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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

vs.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., APPELLANTS

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED APRIL 4, 1944

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1 In United States District Court, District of New Jersey

Civil 2092

THE PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE BOSTON AND MAINE RAILROAD, MERREL P. CALLAWAY, TRUSTEE OF CENTRAL OF GEORGIA RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, THE LONG ISLAND RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, MAINE CENTRAL RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, LEGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TEXAS AND NEW ORLEANS RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION, NEW ORLEANS AND LOWER COAST RAILROAD COMPANY, HOBOKEN MANUFACTURERS RAILROAD COMPANY, AND SEATRAIN LINES, INTERVENING DEFENDANTS

Docket entries

1942

Mar. 26—Petition filed.

27—Summons issued.

Apr. 8—Summons returned served on Charles M. Phillips, United States Attorney by serving Richard J. Hughes, Asst. U. S. Attorney on March 30th, and by mailing copy of complaint and summons to Attorney General and Secretary of Interstate Commerce Commission on March 30th, filed.

16—Petition for leave to file amended petition, filed.

16—Order granting leave to file amended petition and amended petition, filed.

17—Affidavit of service of Order granting leave to file amended petition, filed.

18—Order convening Three Judge Statutory Court, filed.

2 18—Order to show cause for interlocutory injunction, filed.

27—Affidavit of service of orders, filed.

May 15—Petition and Notice of motion for leave to intervene as parties defendants and Answer of Hoboken Mfgs. R. R. Co. & Seatrain Lines, Inc., Interveners-Defendants, to amended petition, filed.

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May 16—Intervention of Interstate Commerce Commission, filed.
16—Answer of Interstate Commerce Commission, as intervener, filed.
18—Hearing on motion for leave to intervene as parties defendants. No opposition. Order to be signed (Fake).
18—Order granting leave to intervene as parties defendants, filed.
18—Stipulation re parties defendants, filed.
18—Answer of United States to Amended petition, filed.
19—Notice fixing place for trial, filed (Newark).
23—Motion for leave to Intervene, filed (New Orleans & Lower Coast Railroad Company).
23—Notice of motion for leave to intervene, filed.
23—Order granting motion for leave to intervene, filed.
23—Answer of New Orleans and Lower Coast Railroad Company, Intervener-Defendant to amended petition, field.
23—Statutory Hearing. Decision Reserved. Briefs to be submitted. (Circuit Judge Biggs, District Judges Fake and Smith.)
July 7—Stipulation and order extending time for filing reply briefs, filed.
Aug. 15—Proposed Findings of Fact and Conclusions of Law, filed.
15—Petitioners' Proposed Findings of Fact & Conclusions of Law, filed.

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Oct. 9—Statutory Hearing for the purpose of making a statement and filing an opinion.
9—Statement by Judge Biggs, filed.
9—Opinion, Findings of Fact and Conclusions of Law (Judge Biggs), filed.
30—Proposed Final Decree, Notice of Settlement and Affidavit of service, filed.
Nov. 20—Statutory Court convened for the purpose of settling the form of decree to be entered in respect to the court's opinion. Decision Reserved.
3 Dec. 8—Opinion on Argument in respect to form of Final Decree and additional Findings of Fact, filed.
8—Final Decree setting aside order of the Interstate Commerce Commission, dated October 13, 1941 and enjoining the enforcement thereof entered.

1944

Jan. 28—Notice of Appeal to U. S. Supreme Court (I. C. C., et al.) filed.

28—Petition for Appeal, filed.

28—Order allowing appeal, filed.

28—Assignment of errors, filed.

28—Citation on Appeal, issued.

28—Defendants' (Appellants') praecipe for transcript of record, filed.

28—Jurisdictional Statement by defendants under Rule 12 of the revised rules of the Supreme Court of the U. S., filed.

28—Statement by Defendants-Appellants directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the U. S., filed.

28—Citation returned, service acknowledged and filed.

31—Notice of Appeal, filed (P. R. R., et al.)

31—Petition for appeal, filed.

31—Order allowing appeal, filed (Fake).

31—Assignments of Error, filed.

31—Citation issued returnable March 8, 1944.

31—Citation returned, served and filed.

31—Petitioners-Appellants' (P. R. R., et al.) Praecipe for transcript of record, and acknowledgment of service, filed.

31—Jurisdictional Statement by Petitioners under Rule 12, filed.

31—Statement by Petitioners-Appellants directing attention to Par. 3 of Rule 12, filed.

31—Bond on Appeal, filed.

31—Order as to exhibits, filed.

31—Order Substituting Trustee for Hoboken Manufacturers Railroad Company and permitting him to adopt appeal papers, etc., filed.

4 Feb. 1—Defendants' Notice to Attorney General of State of New Jersey re allowance of Appeal by United States, et al. and acknowledgment of service, filed.

1—Petitioners' Notice to Attorney General of State of New Jersey re allowance of Appeal by Pennsylvania R. R. Co., and acknowledgment of service, filed.

2—Proof of Service on Appeal, filed.

11—Supplement to Defendants' (Appellants) Praecipe for Transcript of Record, filed.

1944
Mar. 3—Petition for enlargement of time to file record, etc., filed.
3—Copy of order enlarging time for filing record, etc., filed.

5 In the District Court of the United States

[Title omitted.]

Order granting leave to file amended petition

April 16, 1942

This cause coming on to be heard on the application of petitioners to amend their petition heretofore filed in this cause on the 26th day of March 1942, and for other relief, and the Court being fully advised of the amendments sought to be made, and it appearing that the effective date of the order of the Interstate Commerce Commission in Docket Nos. 25728 and 25878 dated October 13, 1941, has been further postponed until June 1, 1942, it is

Ordered, adjudged, and decreed that the application be granted; that the amended petition annexed hereto be allowed, and the Clerk of the Court is hereby ordered to file the same as of the date of this order; and the Marshal is directed forthwith to serve the same and this order on the United States of America by sending copies thereof to the Attorney-General of the United States, Washington, D. C., and to the Interstate Commerce Commission, Washington, D. C., and also on the United States Attorney or Assistant United States Attorney at Trenton, New Jersey; and it is further

6 Ordered, adjudged, and decreed that the defendant United States of America may respond to the amended petition within the time remaining for response to the petition, or within ten days after service of the amended petition, whichever period may be the longer.

Dated, April 16, 1942.

GUY L. FAKE, U. S. D. J.

8 In the District Court of the United States for the District of New Jersey

Civil No. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE BOSTON AND MAINE RAILROAD, MERREL P. CALLAWAY, TRUSTEE OF CENTRAL OF GEORGIA RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, THE LONG ISLAND RAIL ROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, MAINE CENTRAL RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, LEGH R. POWELL, JR., AND HENRY W. ANDERSEN, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TEXAS AND NEW ORLEANS RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, DEFENDANT

Amended petition

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

Come now The Pennsylvania Railroad Company and the other petitioners, leave having been granted to them by this Honorable Court, and allege as follows:

I

The petitioners herein are the following:

9 The Pennsylvania Railroad Company, which is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and a citizen of said Commonwealth, with its principal office at Philadelphia, Pennsylvania.

Atlantic Coast Line Railroad Company, a corporation of the State of Virginia.

The Boston and Maine Railroad, a corporation of the States of Massachusetts, Maine, New Hampshire and New York.

Merrel P. Callaway, Trustee of Property of Central and Georgia Railway Company, a corporation of the State of Georgia.

Great Northern Railway Company, a corporation of the State of Minnesota.

The Long Island Rail Road Company, a corporation of the State of New York.

Louisville and Nashville Railroad Company, a corporation of the State of Kentucky.

Maine Central Railroad Company, a corporation of the State of Maine.

Norfolk and Western Railway Company, a corporation of the State of Virginia.

Northern Pacific Railway Company, a corporation of the State of Wisconsin.

Legh R. Powell, Jr., and Henry W. Anderson, citizens and resident of the State of Virginia, Receivers and Ancillary Receivers of the assets and properties of Seaboard Air Line Railway Company, a corporation of the State of Virginia and other states.

Southern Railway Company, a corporation of the State of Kentucky.

Texas and New Orleans Railroad Company, a corporation of the State of Texas.

Union Pacific Railroad Company, a corporation of the State of Utah.

10 II

Petitioners are common carriers of property by railroad subject to the Interstate Commerce Act, hereinafter referred to as the Act. They bring this their petition in behalf of themselves and in behalf of such other persons or corporations as have an interest herein and may be proper proceedings become parties hereto.

III

This is a suit brought under the provisions of Acts of Congress approved June 18, 1910 (36 Stat. 539), March 3, 1911 (36 Stat. 1148), and October 22, 1913 (38 Stat. 219); Title 28 U. S. Code, Sections 41 (28) and 43 to 48 inclusive, to enjoin, set aside, annul, and suspend the orders of the Interstate Commerce Commission, herein termed the Commission, entered in its Docket No. 25728, Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company et al., and its Docket No. 25878, New Orleans & Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railway Company et al., on October 13, 1941, 248 I. C. C. 109, and March 2, 1942, and so much of the order of the Commission in said proceedings entered on February 5, 1935, 206 I. C. C. 328, as incorporates and makes a part thereof its finding that the Commission has jurisdiction to require rail carriers to interchange cars with water carriers, and the order en-

tered therein on April 1, 1935, relating thereto. The jurisdiction of this court depends upon the aforesaid statutes and its general equity jurisdiction, and the United States of America is made defendant herein by authority of the said statutes. The amount in controversy herein exceeds as to each petitioner the sum of Three Thousand Dollars ($3,000) exclusive of interest and costs.

IV

Hoboken Manufacturers Railroad Company, herein called
11 the Hoboken, is and has been a corporation organized and existing under the laws of the State of New Jersey with its principal office at Hoboken, New Jersey, is a citizen and resident of said State, and is a common carrier of property by railroad subject to the Act, and operates a terminal switching road along the water front in Hoboken, New Jersey, on the west side of New York Harbor. The Hoboken makes physical connection with the dock at which vessels of Seatrain receive and deliver railroad cars at Hoboken, New Jersey.

V

New Orleans & Lower Coast Railroad Company, herein called the Lower Coast, is and has been a corporation organized and existing under the laws of the State of Louisiana with its principal office at New Orleans, Louisiana, is a citizen of said State, and is a common carrier of property by railroad subject to the Act, and operates along the western shore of the Mississippi River opposite New Orleans, Louisiana. The Lower Coast makes physical connection with the dock at which vessels of Seatrain receive and deliver cars at Belle Chasse, Louisiana.

VI

Seatrain Lines, Incorporated, herein called Seatrain, is and has been a corporation organized and existing under the laws of the State of Delaware, with its principal office at New York, New York, and is a citizen of the State of Delaware. Through stock ownership Seatrain controls the Hoboken. Since October 6, 1932, Seatrain has been operating ocean going vessels between Hoboken, New Jersey, and Belle Chasse, Louisiana, via Havana, Cuba, on which freight is transported in railroad cars between Hoboken

and Belle Chasse, Hoboken and Havana, and Belle Chasse and Havana. Its said vessels on such voyages operate in and through Cuban waters and dock at Havana, Cuba, where they discharge and take on cargo. Seatrain is a common carrier by water and has been found to be such by the Interstate Commerce Commission.

12

VII

On October 6, 1932, Seatrain began operating in service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba. Prior thereto petitioner The Pennsylvania Railroad Company and other carriers by railroad had notified the Hoboken and Seatrain, respectively, in writing not to deliver, accept, or use its cars in Seatrain service.

VIII

On November 15, 1932, the American Railway Association promulgated, effective on that date, Car Service Rule 4, which had been adopted by the members thereof and which reads as follows:

"Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation, without permission of the owners, filed with the Car Service Division."

The petitioners, the Hoboken, and the Lower Coast are subscribers to the Car Service and Per Diem Agreement by which they agreed to abide by the rules promulgated by the American Railway Association. Petitioners herein have not given their permission for the delivery of their cars to Seatrain.

IX

On December 30, 1932, the Hoboken filed with the Commission its complaint in Docket No. 25728, alleging that said Car Service Rule 4 was unreasonable, unduly prejudicial, and otherwise unlawful. The said complaint was served by the Commission on the defendant railroads named therein, including petitioners, on January 19, 1933. A copy of the said complaint in Docket No. 25728 is annexed hereto as Exhibit A. The Pennsylvania Railroad Company and The Long Island Rail Road Company on or about February 21, 1933, and other defendants therein filed answers denying generally the allegations of the complaint and

13 denying specifically the existence of any duty on their part to permit the use of their cars in Seatrain service. Issue is joined under Rule IV (b) of the Rules of Practice of the Commission as to any defendant who fails to file an answer.

X

On or about March 9, 1933, the Lower Coast filed with the Commission in Docket No. 25878 a complaint substantially similar to that of the Hoboken, Exhibit A hereto.

XI

Docket Nos. 25728 and 25878 were consolidated by the Commission and the hearings thereon were had on one record. A petition by Seatrain for intervention was submitted on November 2, 1933, allowed on the record and filed in said consolidated proceedings and a copy thereof is annexed hereto as Exhibit B. Said petition alleged, among other things, that Seatrain "is a common carrier by water engaged in the transportation of freight in railroad cars partly by railroad and partly by water between Hoboken, New Jersey and Belle Chasse (New Orleans), Louisiana, and between each of these ports and Havana, Cuba." Seatrain therein adopted and realleged as its own the allegations of the complaints in Nos. 25728 and 25878, and joined and adopted the prayers for relief contained therein. After the said intervention was allowed and before any testimony was taken, the defendants therein moved to dismiss the complaints therein on the ground that the Commission was without authority to grant the relief sought and was without jurisdiction of the matters complained of. Thereafter testimony was taken on November 2, 3, and 4, 1933, and thereafter and on or about March 30, 1934, the examiner issued his report in which he concluded that the Commission should find that it had no jurisdiction of the matter in controversy and that even if the Act could be construed as according jurisdiction, the rules, regulations, and practices assailed were not unreasonable, unduly prejudicial, or otherwise unlawful, and that the complaints should be dismissed.

14 XII

The Commission rejected the said conclusions of the examiner and made its report, dated February 5, 1935, 206 I. C. C. 328, in said Docket Nos. 25728 and 25878, and in Docket No. 25565, which report was applicable severally and individually to each of said dockets and a copy of which is annexed hereto as Exhibit C, in which it made its Finding No. 6 as follows:

"6. That we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such through routes are established pursuant to our order or voluntarily, to require the rail carriers parties thereto to interchange cars with

the water carrier, if that is the reasonable and appropriate method of interchanging traffic moving over such through routes."

but stated in part:

"Whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record. Whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided."

The Commission thereupon entered its order of February 5, 1935, incorporating therein its said report of the same date, 206 I. C. C. 328, Exhibit C hereto, and dismissing the complaints Nos. 25728 and 25878 without prejudice to the filing by complainants therein of petition for further consideration, or new complaints, after Docket No. 25727 (referred to in Paragraph XV hereof) should have been disposed of, if the conclusions reached in that case should warrant such action. A copy of said order of February 5, 1935 is annexed hereto as Exhibit D.

XIII

Thereafter the defendants in said Nos. 25728 and 25878
15 filed their petition with the Commission, dated February 20, 1935, for a reconsideration of said Finding No. 6, set forth in paragraph XII hereof, and the legal conclusions upon which the Commission based its order dated February 5, 1935, in connection with its report 206 I. C. C. 328, Exhibit C hereto. On April 1, 1935, the Commission entered its order denying the said defendants' position. A copy of said order of April 1, 1935 is annexed hereto as Exhibit E.

XIV

The said report of the Commission of February 5, 1935, 206 I. C. C. 328, Exhibit C hereof, expressly referred to, relied upon, and adopted parts of its prior report dated July 11, 1933, in No. 25565, 195 I. C. C. 215, and in particular the following findings therein:

"Upon consideration of the evidence, we are of the opinion and find (1) that Seatrain Lines, Incorporated, is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act, (2) that Seatrain Lines, Incorporated, is a common carrier by water engaged in the transportation of property partly by railroad and partly by water, that Seatrain Lines, Incorporated, and the Hoboken Manufacturers Railroad Company are used under a common control, management, and arrangement for continuous carriage or shipment of prop-

erty in railroad cars, in interstate and foreign commerce, that Seatrain Lines, Incorporated, and the New Orleans & Lower Coast Railroad Company are used under a common arrangement for such continuous carriage, and therefore, that Seatrain Lines, Incorporated, is subject to all the provisions of the act applicable to such a carrier, (3) that Seatrain Lines, Incorporated, is not a 'carrier' within the meaning of section 20a of the act, and (4) that

the Hoboken Manufacturers Railroad Company does not
16 and may not compete for traffic with Seatrain, and therefore neither is subject, because of any community of interest between them, to the provisions of section 5 (19–21) of the act."

The aforesaid proceeding, Docket No. 25565, was an investigation by the Commission in a proceeding entitled "Investigation of Seatrain Lines, Inc.," instituted on its own motion October 4, 1932, prior to the inauguration by Seatrain of its service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, as aforesaid, with a view to determining the lawfulness thereof and in said proceeding Seatrain and the Hoboken were made respondents.

XV

In the No. 25727, referred to in Paragraph XII of this petition, the Commission made its report dated January 28, 1938, Seatrain Lines, Inc. v. Akron C. & Y. Ry. Co., 226 I. C. C. 7, upon which it entered its order of January 28, 1938, directing defendants therein, including the petitioner The Pennsylvania Railroad Company and certain of the other petitioners herein, to establish through routes and joint rates for combined rail and Seatrain service between railroad stations in the eastern and southwestern portions of the United States reached via Hoboken, N. J., and Belle Chasse, La. The said defendants therein, including The Pennsylvania Railroad Company and certain of the other petitioners herein, established the through routes so prescribed and now participate therein as directed by the said order, and the said through routes are now in full force and effect. The joint rail-Seatrain rates so prescribed, as modified by the order of the Commission therein dated December 23, 1940, Seatrain Lines, Inc. v. Akron C. & Y. Ry. Co., 243 I. C. C. 199, were established by The Pennsylvania Railroad Company and certain of the other petitioners, and are in full force and effect. The said rates were and are on the same general basis as had been prescribed for rail-water service in connection with other water carriers serving North Atlantic and Gulf ports and were and are on a lower basis than the all-rail rates.

XVI

17 By motion, dated July 20, 1936, and filed with the Commission jointly by the Hoboken as complainant and Seatrain as inter-

vener in Nos. 25728 and 25878, said Hoboken and Seatrain sought an order therein requiring the defendants therein, including petitioners herein, to permit their cars to be used in Seatrain service. A similar motion, dated July 26, 1938, was filed therein by the Lower Coast. The reply, dated July 29, 1938, of The Pennsylvania Railroad Company and certain other petitioners herein to said motions asserted that the Commission was without authority to enter the order requested, but, without waiving such contention, urged that if the Commission should adhere to its opinion that it had such authority, a further hearing would be necessary in order that appropriate compensation might be fixed for such use of railroad owned cars in Seatrain service.

XVII

By its order dated November 21, 1938, the Commission reopened Nos. 25728 and 25878 "for further hearings to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc." A copy of said order of November 21, 1938, is annexed hereto as Exhibit F. Thereafter such further hearings were had on January 25, February 1 and March 1 and 2, 1939. On January 8, 1940, the Commission made its report on Further Hearing therein, 237 I. C. C. 97, a copy of which is annexed hereto as Exhibit G, wherein it clarified the issues and again reopened the proceedings for further hearing, which was had on September 16 and 17, 1940.

XVIII

Thereafter on October 13, 1941, the Commission made its Second Report on Further Hearing in said Nos. 25728 and 25878 and on the same day entered its final order in which there were incorporated and made a part thereof (1) the Commission's said
18 Second Report, 248 I. C. C. 109, a copy of which is annexed hereto as Exhibit H, in Nos. 25728 and 25878, (2) the Commission's report, Exhibit C hereto, dated February 5, 1935, 206 I. C. C. 328, in Docket No. 25565 and Nos. 25728 and 25878, which was applicable severally and individually to each of them, and (3) the Commission's report, Exhibit G hereto, dated January 8, 1940, 237 I. C. C. 97, in Nos. 25728 and 25878. The said final order of the Commission in Nos. 25728 and 25878, dated October 13, 1941, is annexed hereto as Exhibit I.

XIX

In its said report of October 13, 1941, Exhibit H hereto, the Commission adopted a finding theretofore made by it, that the

cost to the owner of freight-car ownership and maintenance averaged 83.812 cents per car per day for each day in the calendar year, and the defendant railroads introduced further evidence that, and there was no evidence to the contrary, and the Commission in its said report found that, in general railroad service a car does not spend each day of the calendar year in active or productive service, but

"that a car in general railroad use spends an average of only 1 day in 'active and productive service' out of a period ranging, in accordance with the definition of such service, from 3.82 to 19 days. If such service is assumed to include only the time in which the car is moving under load in line haul, not including the time spent in intermediate switching, only 1 out of every 19 days is so spent. If it includes the time which elapses between placement of the car for the consignor and release of the car by the consignee, 1 out of 3.82 days is so spent. If the time the car is in the possession of the shipper and the consignee is excluded, the ratio is 1 out of every 7 days, and if the time spent in switching at origin and destination is also excluded, it is only 1 out of every 11 days."

Accordingly, on the Commission's own findings, the minimum cost to the owner of car ownership and maintenance
19 is $3.20 per car for each day such car is in active and productive service and if proper consideration is given to all of the days in which the car is not in actual movement, the actual cost thereof is far in excess of said sum. The Commission further found that during the time when cars were actually being moved in service by Seatrain there was a reduction of 10 cents per car per day in car ownership and maintenance cost as the said cars did not move on their wheels.

The Commission further found that in addition to the foregoing, there are days when the car is idle or unproductive by reason of the facts that cars routed for movement on Seatrain's vessels necessarily reach the ports in advance of its weekly sailing dates and that it is necessary for such cars to be held at the ports awaiting arrival of the said vessels and acceptance by Seatrain, and that complainants, the Hoboken and the Lower Coast, as terminal switching lines, refuse to assume payment of per diem, i. e., a daily rate of compensation for the use thereof, on cars held at the ports for that reason.

XX

In its said order of October 13, 1941, Exhibit 1 hereto, the Commission ordered and directed as follows:

"It is ordered, That the defendants listed in the appendix to said report on further hearing, according as they participate in

through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainant herein for transportation by Seatrain Lines, Inc., in interstate commerce.

"It is further ordered, That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day; provided, however, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

"And it is ordered, That this order shall continue in effect until the further order of the Commission."

Petitioner The Pennsylvania Railroad Company and the other petitioners herein were listed as defendants in the appendix to said report on further hearing Exhibit H hereto, referred to in the foregoing order of October 13, 1941, Exhibit I hereto. By an order entered by the Commission in Nos. 25728 and 25878 on December 26, 1941, the effective date of the aforesaid order of October 13, 1941, was postponed until April 1, 1942, and by a further order so entered therein on March 27, 1942, the said effective date was further postponed until May 1, 1942, and by a further order so entered therein on or about April 7, 1942, the said effective date of the aforesaid order of October 13, 1941, was further postponed until June 1, 1942.

XXI

By its said order of October 13, 1941, Exhibit I hereto, the Commission has directed the petitioners to make available freight cars, owned by them, for use by Seatrain, a water carrier, on its ocean going vessels from Hoboken, New Jersey, to Belle Chasse, Louisiana, via Havana, Cuba, and in and through a foreign country and in and through foreign waters, and wherein they dock at a foreign port.

XXII

Gulf, Mobile & Ohio Railroad Company and certain of the petitioners herein, including Southern Railway Company, by their petition dated December 10, 1941, and the Atlantic Coast
21 Line Railroad Company and certain other petitioners herein, including The Pennsylvania Railroad Company, by their petition dated December 13, 1941, sought to have the Commission reconsider the aforesaid report and order of October 13, 1941, Exhibits H and I hereto, and petitioner The Pennsylvania Railroad Company by its petition dated December 13, 1941, reserving all objections to said report and order, also sought a clarification of finding 1 of the said report, Exhibit H hereto, in so far as it purported to find a past violation of the Act. Under date of March 2, 1942, the Commission entered its order in Nos. 25728 and 25878 denying each of the aforesaid petitions. A copy of said order of March 2, 1942, is annexed hereto as Exhibit J. Said order of March 2, 1942, though negative in form is affirmative in effect in that it operates to require compliance with the said order of October 13, 1941, Exhibit I hereto. Said order of March 2, 1942, was not made public or served upon the parties until on or about March 14, 1942.

XXIII

The said orders of the Commission of October 13, 1941, and March 2, 1942, Exhibits I and J hereto, respectively, are beyond the statutory power of the Commission in that they require your petitioners to permit the use of their cars by Seatrain, which the Commission has found to be a water carrier, and neither the Interstate Commerce Act nor any other statute authorizes the Commission to require railroads to permit the use of their cars by carriers by water.

XXIV

The said orders of the Commission of October 13, 1941, and March 2, 1942, Exhibits I and J hereto, respectively, are based upon a mistake of law in that in making them the Commission erroneously assumed that your petitioners were under a duty to permit their cars to be used by Seatrain where through routes existed or were prescribed, although your petitioners were under no duty to permit their cars to be used by Seatrain, which the Commission held is not a carrier by railroad within the meaning of that term as used in the Act but is a carrier by water.

22 XXV

The said orders of the Commission of October 13, 1941, and March 2, 1942, Exhibits I and J hereto respectively, are beyond

the Commission's statutory power in that they require your petitioners to permit the use of their cars in certain service by Seatrain, which the Commission held is not a carrier by railroad within the meaning of that term as used in the Act but is a carrier by water, and neither the Interstate Commerce Act nor any other statute authorizes the Commission to require railroads to permit the use of their cars except by other railroads.

XXVI

The said orders of the Commission of October 13, 1941 and March 2, 1942, Exhibits I and J hereto, respectively, are beyond the statutory power of the Commission in that they require your petitioners to permit the use of their cars by Seatrain for transportation in and through a foreign country and in and through foreign waters, and neither the Interstate Commerce Act nor any other statute authorizes the Commission to require railroads to permit such use of their cars.

XXVII

The said orders of the Commission of October 13, 1941 and March 2, 1942, Exhibits I and J hereto, respectively, are based upon a mistake of law in that in making them the Commission erroneously assumed that your petitioners were under a duty to permit their cars to be used by Seatrain, for transportation in and through a foreign country and in and through foreign waters, although your petitioners were under no duty to permit their cars to be so used by Seatrain.

XXVIII

The orders of the Commission of October 13, 1941 and March 2, 1942, Exhibits I and J hereto respectively, are beyond the power which the Commission could constitutionally exercise in that the rate of $1 per car per day for such period only as the cars are in Seatrain's actual possession is so low as to be confiscatory, as is more fully shown in Paragraph XIX hereof, and to deprive the petitioners of their property without due process of law,
23 in violation of the Fifth Amendment to the Constitution of the United States.

XXIX

In said proceedings, Nos. 25728 and 25878, evidence was introduced that, although petitioner The Pennsylvania Railroad Company had not given its permission under said Car Service Rule 4 to the delivery of its cars to Seatrain, the Hoboken had in fact been delivering said petitioner's cars to Seatrain since October 6,

1932, and that by July 1940, such cars had been in the possession of and used by the Hoboken and Seatrain for 167,058 car days, but the Commission's examiner received the same for the sole purpose of showing that there was no segregation made by the Hoboken, and for no other purpose. Evidence was also introduced showing that no compensation had been paid to said petitioner for the use of said cars during said period by either the Hoboken or Seatrain, and said examiner erroneously struck such evidence from the record. Exceptions were duly taken to said rulings of the examiner, and the Commission erroneously and by mistake of law failed and refused to overrule its examiner, to consider the evidence, and to make appropriate findings with respect thereto, to all of which the said petitioner duly excepted.

XXX

The said orders of the Commission of October 13, 1941 and March 2, 1942, Exhibits I and J hereto respectively, run against and by their terms impose obligations upon the petitioners herein, but do not run against or impose any obligation upon Seatrain with respect to its use of, or for the return of, cars of the petitioners herein, and the said orders fail to direct Seatrain to pay even the $1 per day which the Commission found to be reasonable for the use of the petitioners' cars by Seatrain or to pay any other amount, although the petition of the Atlantic Coast Line Railroad Company and certain other petitioners herein, dated December 13, 1941, sought a reconsideration thereof in this respect, and the said orders are arbitrary, capricious, and without warrant in law.

24

XXXI

The orders of October 13, 1941 and March 2, 1942, Exhibits I and J hereto respectively, were based upon mistakes of law and erroneous conclusions of the Commission (1) that, notwithstanding its findings with respect to the actual cost of car ownership and maintenance for each day in which the car was in active and productive use as set forth in Paragraph XIX hereof, Seatrain should not pay a higher per diem rate than the $1. rate, paid by the railroads for interchange of cars among themselves generally, which was payable by each railroad from the date when the car was tendered to such railroad until it passed out of its possession, and (2) that such per diem rate of $1. was to be payable by Seatrain only for the limited period during which the cars were in its actual possession, so that Seatrain thereby escaped the burden borne by railroads generally for the days between the time when the cars were tendered for interchange and the time when they

were actually accepted. In making such orders the Commission acted arbitrarily and unreasonably.

XXXII

The order of October 13, 1941, Exhibit I hereto, was based upon a mistake at law in that there was incorporated therein the finding that the defendants listed in the appendix referred to therein had failed to provide reasonable facilities for operating through routes with Seatrain and had failed to make reasonable rules and regulations with respect to their operation, in violation of Section 1 (4) of the Act, by refusing to agree to the interchange of freight cars owned by them with complainants therein for transportation by Seatrain. In making such finding and entering said order the Commission erroneously failed to determine what rules and regulations would have been reasonable, or what rules, regulations and agreements defendants should have made, or should make, and the order in these respects is so indefinite and uncertain as to be contrary to law. By its order of March 2, 1942, Exhibit J hereto, the Commission refused to clarify its order of October 13, 1941 in these respects, and denied the petition so to do as heretofore alleged in paragraph XXI.

25

XXXIII

Petitioners, although they firmly believe, and are so advised by counsel, that the said orders are unlawful and void, may not, nevertheless, safely continue their present practices on and after April 1, 1942, and fail to obey said orders, and if petitioners should do so and the order should thereafter be held valid in any respect, petitioners and each of them would be subject to the heavy penalty of Five Thousand Dollars ($5,000) for each day each violation thereof may continue, as provided in Section 16 (8) of the Interstate Commerce Act, and the petitioners would suffer irreparable injury and damage for which there is no remedy at law.

Wherefore, petitioners, being without adequate remedy at law, respectfully pray:

FIRST. That upon the filing of this petition, the Judge of this Court shall call to his assistance, in the hearing and determination of this cause, two other Judges, of whom at least one shall be a Circuit Judge;

SECOND. That process may issue against the defendant United States of America;

THIRD. That after not less than three days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held, and a temporary stay or suspension of the orders of the Interstate Com-

merce Commission in its Docket Nos. 25728 and 25878 dated October 13, 1941 and March 2, 1942, and so much of the order dated February 5, 1935 as incorporates and makes a part thereof the finding that the Commission has authority to require rail carriers to interchange cars with water carriers, and the order of April 1, 1935, be issued, pending hearing and determination of petitioners' application for interlocutory and permanent injunctions, for a duration of sixty days;

FOURTH. That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, as provided by law, a hearing shall be held,
26 and an interlocutory injunction be issued, staying and suspending the said orders of the Interstate Commerce Commission;

FIFTH. That on final hearing of this cause a decree be entered herein, enjoining, setting aside, annulling, and suspending the said orders of the Interstate Commerce Commission and permanently enjoining the enforcement, execution, and operation thereof.

SIXTH. That this Court grant to the petitioners such other and further relief as by it may be deemed proper in the premises.

Respectfully submitted.

JOHN A. HARTPENCE,
Attorney for Petitioners,
168 W. State St., Trenton, N. J.

JOHN VANCE HEWITT,
BERNARD SOBOL,
J. R. BELL,
W. C. BURGER,
CHARLES CLARK,
W. A. COLE,
JOSEPH F. ESHELMAN,
FRANK W. GWATHMEY,
G. H. MUCKLEY,
CONRAD OLSON,
J. P. PLUNKETT,
EDWARD W. WHEELER,
JOHN A. HARTPENCE,
of Counsel,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
of Counsel.

APRIL 15, 1942.

27 *[Duly sworn to by George Le Boutillier; jurat omitted in printing.]*

28 *Exhibit A to amended petition*

Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY, COMPLAINANT.

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL., DEFENDANTS.

COMPLAINT

The complainant, above named, respectfully shows:

I

Complainant is a corporation organized and existing under the laws of the State of New Jersey and is a common carrier by railroad subject to the provisions of the Interstate Commerce Act. It operates a terminal switching railroad along the waterfront of Hoboken, New Jersey, in New York Harbor. It has direct rail connection with the Erie Railroad Company, through which it interchanges freight with various other railroads reaching New York Harbor, and is engaged as a terminal switching line in the transportation of freight between points on its line and points on the lines of its connections in other states. It is engaged, among other things, in the transportation of freight received from
29 its connections for delivery to steamship lines which dock at piers served by it.

II

The defendants named in Appendix A, attached hereto and made a part hereof, are common carriers by railroad engaged in the transportation of property wholly by railroad or partly by railroad and partly by water in interstate commerce subject to the provisions of the Interstate Commerce Act.

III

Complainant is informed and believes that all or most of the defendants herein are members of the American Railway Association, an association of common carrier railroads in the United States, which acts as the agent of the individual member roads for the handling of car service matters and the promulgation and enforcement of rules and regulations with respect to car service, including the rules and regulations relating to the use and inter-

change of cars and the compensation to be paid for the use thereof.

Complainant is a subscriber to the Car Service and Per Diem agreement, but is without vote with respect to the provisions of the Car Service rule promulgated by the American Railway Association.

IV

Among the steamship lines docking at the piers served by complainant is Seatrain Lines, Inc. This company is a common carrier by water operating three ships which are specially designed for the transportation by water of freight in railroad cars without the loading, unloading or breaking of bulk of the cars at the ports. Two of these ships, which have a capacity of 100 freight cars each, are operated between Hoboken, N. J., and Havana, Cuba, and between Hoboken, N. J., and Belle Chasse, Louisiana, a point within the switching limits of New Orleans, via Havana, Cuba. Complainant has expended large sums in the rearrangement of its terminal and the construction of special facilities for the interchange of railroad cars between its rails and the vessels of Seatrain Lines, Inc.

V

Seatrain Lines, Inc. is a party to joint rates on file with the Interstate Commerce Commission, covering traffic transported by it, as a common carrier by water, in through transportation partly by rail and partly by water subject to the provisions of the Interstate Commerce Act.

VI

The American Railway Association on behalf of and by vote of the common carrier railroads, members thereof, has, as complainant is informed, adopted and promulgated new Car Service Rule 4 and in connection therewith has promulgated certain rules, regulations and instructions, all of which were announced to become effective November 15, 1932. A copy of said new Car Service Rule 4 and of said rules, regulations and instructions is attached hereto as Appendix B and made a part hereof.

Said New Car Service Rule 4 provides in part as follows:

"Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owners filed with the Car Service Division."

VII

Complainant has in the past delivered, and desires to continue to deliver, freight transported by it which shippers

direct to be forwarded by the vessels of Seatrain Lines, Inc., to said vessels in the cars in which it is loaded when received by complainant from its connections. This necessarily involves the delivery of the cars to the vessels of Seatrain Lines, Inc.

VIII

Complainant is ready and willing at all times to pay to the owning roads car hire in accordance with the Code of Per Diem Rules of the American Railway Association upon all cars subject to such rules delivered by it to Seatrain Lines, Inc. from the time such cars are received by complainant until the cars are delivered to another railroad member of the American Railway Association, and on cars heretofore delivered to Seatrain Lines complainant has promptly made settlement in accordance with said rules. Complainant has also secured a contract with Seatrain Lines, Inc. by which Seatrain Lines, Inc. has agreed to handle cars only in accordance with the Car Service Rules of the American Railway Association, other than Car Service Rule 4, and to reimburse complainant for per diem paid by complainant on any cars delivered to said Seatrain Lines, Inc. during the period said cars are in the possession of Seatrain Lines, Inc.

IX

Cars have been and will be delivered by complainant to Seatrain Lines only for transportation purposes and not for uses
32 contrary to the purposes for which said cars, as complainant is informed and believes, were acquired.

X

Complainant has delivered and in the future undertakes to deliver to Seatrain Lines cars (other than cars leased or owned by it) only when such cars contain freight arriving at Hoboken by the lines of one of the rail carriers with which the complainant connects or when, in accordance with the rules of the American Railway Association, complainant is required to return such cars to Seatrain Lines, Inc.

XI

In accordance with the provisions of said new Car Service Rule 4 and related rules and regulations, but without admitting the legality thereof, complainant has, through the American Railway Association, requested permission of the defendants herein to deliver to Seatrain Lines, Inc. cars owned by such defendants.

In response to this request, complainant has been advised by the American Railway Association that certain of the defendants have given their consent without restriction to the delivery of their cars by complainant to Seatrain Lines, Inc. Complainant has also been advised that certain of the other defendants, while refusing their consent to complainant to deliver cars to Seatrain Lines, Inc., have given their consent to the New Orleans and Lower Coast Railroad to deliver their cars to Seatrain Lines, Inc. for transportation only between New Orleans and Havana, Cuba. With repects to the remaining defendants, complainant has as yet received no response to its request for permission to deliver their cars to Seatrain Lines, Inc.

33

XII

Complainant is informed and believes that said new Car Service Rule 4 was adopted by defendants as part of a concerted plan to prevent the delivery by complainant to Seatrain Lines, Inc., of cars owned by said defendants.

XIII

In respect of freight in cars received by complainant for transportation via vessels of Seatrain Lines, Inc., or via other vessels, it is the common carrier duty of complainant to place such freight within reach of the vessel's tackle. The failure or refusal of the defendants herein or any of them, under new Car Service Rule 4, to permit cars owned by them containing such freight to be delivered to the vessels of Seatrain Lines, Inc., or other vessels docking at the piers served by complainant, will make it necessary for the complainant or the shipper to incur the expense of transferring the lading contained in cars owned by said defendants to other cars. Moreover, the maintenance on its rails of sufficient cars which it may be permitted to deliver to Seatrain Lines, Inc., to accomplish such transfer, and the detention of cars during such transfer would unduly congest the facilities of complainant and impair its ability to serve shippers and receivers dependent upon it.

XIV

The refusal of the defendants to permit complainant to deliver cars owned by them to Seatrain Lines, Inc., for transportation in its vessels will deprive shippers of the non-break-bulk rail-water service made posible by the development of the vessels of Seatrain Lines, Inc., and by the improved and specially constructed facilities installed by complainant.

34

XV

Complainant is informed and believes that there is at the present time no car shortage, that the delivery by it of cars to Seatrain Lines, Inc., will not interfere with the ability of the owners of said cars properly to perform their transportation duties, but that the adoption of Car Service Rule 4 and the separate and concerted practices of defendants thereunder, and their refusal of permision to deliver cars to Seatrain Lines have been adopted for competitive purposes, to prevent the forwarding of freight by Seatrain Lines, Inc., and to injure that carrier, whom defendants regard as a potential or actual competitor.

XVI

Said new Car Service Rule 4, as complainant is informed and believes, is unjust and unreasonable in that it is designed to and does place upon complainant the burden of securing the consent of the owning road for the delivery of any car to Seatrain Lines, Inc., and is designed to and does place complainant in the position of having violated the Car Service Rules if it delivers any car to Seatrain Lines without having secured the consent of the owning road although complainant has no control over the placing of cars for loading by its connections and must receive freight in any cars in which they may deliver such freight to it.

XVII

Said new Car Service Rule 4, as complainant is informed and believes, is unjust and unreasonable in that it is designed to and does interfere with the reasonable and proper use of railroad cars in the transportation of property by interfering with
35 the delivery of said cars, without the consent of the owner thereof, to Seatrain Lines.

XVIII

Said new Car Service Rule 4 and the rules, regulations and practices of defendants thereunder are and will be, as complainant is informed and believes, unlawfully and unduly prejudicial to complainant in that they are designed to prevent complainant from delivering cars to Seatrain Lines, a common carrier of freight in interstate and foreign commerce, without the consent of the owners of said cars, whereas other railroads are permitted freely to deliver cars containing freight for transportation by their connections to said connections without securing the consent of those owners of said cars prior to said delivery.

XIX

Complainant is informed and believes that the Florida East Coast Car Ferry Company, which connects with the Florida East Coast Railway Company, operates vessels carrying freight cars between Key West, Florida, and Havana, Cuba, and as such is engaged in handling and transporting freight in cars which are owned by many of the defendants. Certain freight contained in the freight cars which the Florida East Coast Railway Company delivers to the Florida East Coast Car Ferry Company is traffic originating in interior points along the North Atlantic Seaboard destined to Havana, Cuba, and interior points in Cuba, and is traffic for which complainant does or may compete for movement over its line via Hoboken and the Seatrain Lines, Inc. Complainant is is informed and believes that the Florida East Coast
36 Railway Company does now and will continue, with full consent of the defendants, to deliver to the vessels of Florida East Coast Car Ferry Company, without breaking or transferring bulk of the freight contained therein, cars owned by the defendants. Complainant alleges that the failure of the defendants to permit the complainant to deliver cars owned by them to Seatrain Lines, Inc., or other similar water carriers while said defendants contemporaneously permit and consent to the delivery of their cars by the Florida East Coast Railway Company to the Florida East Coast Car Ferry Company and by other railroads to other steamships or water carriers is and will continue to be unlawfully and unduly prejudicial to complainant and preferential to the Florida East Coast Railway Company and said other railroads.

XX

Complainant is informed and believes that if it fails to comply with new Car Service Rule 4 and if it delivers cars to vessels of Seatrain Lines without the permission of the owners thereof, an embargo may be placed by its connections against the delivery of cars to it. This would cause great hardship to it, would cause congestion on its rails, and would unlawfully interfere with the through movement of freight. Moreover, in view of the apparent purpose of Car Service Rule 4, such action would be in violation of the regulations of the American Railway Association with respect to embargoes, which expressly provide that:

"An embargo shall not be used to control the routing of traffic to or via any particular gateway or line nor for the purpose of giving the embargoing road a longer haul."

37 and that

"An embargo shall not be used as a permanent measure to control traffic movements when possible to regulate by tariff."

XXI

For the reasons set forth in the foregoing paragraphs, new Car Service Rule 4 and the refusal of the defendants to grant permission to the complainant to deliver freight cars owned by them to Seatrain Lines, Inc., and the regulations and practices of defendants with respect to the interchange of cars with Seatrain Lines, Inc., are and will be in violation of paragraphs 4 and 11 of Section 1 and paragraphs 1 and 3 of Section 3 of the Interstate Commerce Act.

XXII

New Car Service Rule 4 and the action of the railroads, members of the American Railway Association, in adopting said rule and in refusing permission to complainant to deliver their cars to the vessels of Seatrain Lines are and will be in violation of Section 7 of the Interstate Commerce Act, in that, as complainant is informed and believes, they do and will constitute an unlawful combination, contract or agreement to prevent, by compelling carriage in different cars, the carriage of freight subject to the Interstate Commerce Act from being continuous from place of shipment to place of destination and by compelling the break of bulk to prevent the carriage of such freight to be transported via Seatrain Lines from being treated as one continuous carriage from the place of shipment to place of destination.

37 XXIII

Complainant has been and will continue to be damaged by the refusal of the defendants to permit complainant to deliver cars owned by them to Seatrain Lines, Inc. to the extent that complainant has been or may be compelled to incur expense for the acquisition and handling of other cars and for the transfer of freight thereto, to the extent that such refusal of defendants has and may hereafter prevent the forwarding of freight via complainant's line which would otherwise be forwarded via its line for delivery to Seatrain Lines, Inc., and to the extent that such refusal has or may hereafter cause the diversion of freight from complainant's line to the lines of other common carriers.

Wherefore, complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding such defendants and each of them to cease and desist from the aforesaid violations of the Interstate Commerce Act and to establish and put in force reasonable rules, regulations and practices in conformity with the provisions of the Interstate Commerce Act in regard to car serv-

ice by carriers by railroad subject to said Act and with respect to the interchange of cars between their lines, the line of complainant, and the vessels of Seatrain Lines, Inc.

Complainant further prays that the Commission shall by order determine that it has been damaged by the aforesaid violations of the Interstate Commerce Act and the amount of such damage and may require the defendants and each of them to the extent that they are responsible therefor to pay to complainant by way of reparation for such unlawful acts such sum as in view of the evidence to be adduced herein the Commission shall deter-
39 mine that complainant is entitled to as an award of damages under the provisions of said Act for violation thereof.

Complainant further prays that the Commission make such further order or orders as it may consider proper in the premises.

Respectfully submitted.

HOBOKEN MANUFACTURERS RAILROAD COMPANY,
By GEORGE S. AMORY,
Its Vice-President,
39 Broadway, New York, N. Y.

PARKER MCCOLLESTER,
LORD, DAY & LORD,
Attorneys for Complainant,
25 Broadway, New York, N. Y.

40 [*Duly sworn to by George S. Amory; jurat omitted in printing.*]

41 APPENDIX A

Abilene & Southern Railway Company.
The Akron, Canton & Youngstown Railway Company.
The Alabama Great Southern Railroad Company.
Alabama, Tennessee & Northern Railroad Corporation.
The Algoma Central and Hudson Bay Railway Company.
Aliquippa and Southern Railroad Company.
The Ann Arbor Railroad Company.
(Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers)
Aroostook Valley Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
Atlanta and West Point Rail Road Company.
Atlanta, Birmingham and Coast Railroad Company.
Atlantic City Railroad Company.
Atlantic Coast Line Railroad Company.
The Baltimore and Ohio Railroad Company.
Bangor and Aroostook Railroad Company.
The Beaumont, Sour Lake & Western Railway Company.

Bessemer and Lake Erie Railroad Company.
Birmingham Southern Railway Company.
Boston and Albany Railroad.
(The New York Central Railroad Company, Lessee.)
Boston and Maine Railroad.
Buffalo & Susquehanna Railroad Corporation.
Buffalo, Rochester and Pittsburgh Railway Company.
Burlington-Rock Island Railroad Company.
Canadian National Railway Company.
Canadian National Railways.
Canadian Pacific Railway Company.
Carolina, Clinchfield and Ohio Railway.
Carolina, Clinchfield and Ohio Railway of South Carolina.
Clinchfield Northern Railway of Kentucky.
Lessees:
Atlantic Coast Line Railroad Company.
Louisville and Nashville Railroad Company.
42 Central of Georgia Railway Company.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago and North Western Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
The Chicago, Rock Island and Gulf Railway Company.
The Chicago, Rock Island and Pacific Railway Company.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company
Chicago, Springfield & St. Louis Railway Company
(Elmer Nafziger, Receiver).
The Cincinnati, New Orleans and Texas Pacific Railway Company.
Cincinnati, Saginaw and Mackinaw Rail Road Company
(Grand Trunk Western Railroad Company, Lessee.).
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.
(The New York Central Railroad Company, Lessee.)
The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Denver and Rio Grande Western Railroad Company.
The Denver and Salt Lake Railway Company.
Detroit, Toledo and Ironton Railroad Company.
Erie Railroad Company.
Florida East Coast Railway Company
(W. R. Kenan, Jr., and S. M. Loft n, Receivers.).
Fort Smith and Western Railway Company
(L. B. Barry, Jr., Receiver.).

Fort Smith, Subiaco & Rock Island Railroad Company.
Fort Worth & Rio Grande Railway Company.
Georgia Rail Road & Banking Company.
Operated as the Georgia Railroad by lessees:
Atlantic Coast Line Railroad Company.
Louisville and Nashville Railroad Company.
43 Great Northern Railway Company.
Hoboken Manufacturers' Railroad Company.
Illinois Central Railroad Company.
International-Great Northern Railroad Company.
The Kansas City Southern Railway Company.
Kansas, Oklahoma & Gulf Railway Company.
The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
The Long Island Rail Road Company.
Louisiana & Arkansas Railway Company.
The Louisiana & Pine Bluff Railway Company.
Louisiana, Arkansas & Texas Railway Company.
Louisville and Nashville Railroad Company.
Main Central Railroad Company.
The Michigan Central Railroad Company.
(The New York Central Railroad Company, Lessee.)
Mineral Range Railroad Company.
The Minneapolis & St. Louis Railroad Company.
(W. H. Bremner, Receiver.)
Minneapolis, St. Paul & Saulte Ste. Marie Railway Company.
Missouri and North Arkansas Railway Company
(W. Stephenson, Receiver.)
Missouri-Kansas-Texas Railroad Company.
Missouri-Kansas-Texas Railroad Company of Texas.
Missouri Pacific Railroad Company.
Missouri Pacific Railroad Corporation in Nebraska.
Mobile and Ohio Rail Road Company (Ernest E. Norris, Receiver.)
The Monongahela Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
New Orleans and Lower Coast Railroad Company.
New Orleans Great Northern Railroad Company.
The New York and Long Branch Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
44 The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company.
New York, Susquehanna and Western Railroad Company.

Norfolk and Western Railway Company.
Norfolk Southern Railroad Company.
Northern Pacific Railway Company.
Northwestern Pacific Railroad Company.
Oregon Trunk Railway.
The Pennsylvania Railroad Company.
Pere Marquette Railway Company.
Piedmont and Northern Railway Company.
The Pittsburg & Shawmut Railroad Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
The Pittsburg, Shawmut & Northern Railroad Company (John D. Dickson, Receiver.)
Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rock Island Southern Railway Co.
Rutland Railroad Company.
Sacramento Northern Railway.
St. Louis, San Francisco and Texas Railway Company.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.
St. Louis Southwestern Railway Company of Texas.
Seaboard Air Line Railway Company.
(L. R. Powell, Jr. and E. W. Smith, Receivers.)
Southern Pacific Company.
Southern Pacific Railroad Company of Mexico.
Southern Railway Company.
Southern Railway Company (St. Louis-Louisville Divisions.)
Spokane International Railway Company.
Spokane, Portland and Seattle Railway Company.
Susquehanna and New York Railroad Company.
45 Temiskaming and Northern Ontario Railway.
Tennessee Central Railway Company.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
The Toronto, Hamilton and Buffalo Railway Company.
Union Pacific Railroad Company.
The Virginian Railway Company.
Wabash Railway Company.
Western Maryland Railway Company.
The Western Pacific Railroad Company.
The Western Railway of Alabama.
West Shore Railroad.
(The New York Central Railroad Company, Lessee.)
West Virginia Northern Railroad Company.

The Wheeling and Lake Erie Railway Company.
Wichita Falls & Southern Railroad Company.

46 APPENDIX B

The Committee on Car Service, Transportation Division, after giving careful consideration to the subject, has recommended the adoption of a new Car Service Rule 4 together with necessary concurrent changes in Per Diem Rule 3 and present Car Service Rules 4, 5, 6, and 7 and the Notes to Car Service Rules 1 to 5, inclusive. This recommendation has been approved by the General Committee, Transportation Division, for submission to the membership for letter ballot vote as follows:

Proposed Revision of Car Service Rules and Per Diem Rules.

Present Form	Proposed Form
None	**New Car Service Rule 4** Cars of railroad ownership must not be delivered to a *steamship, ferry,* or barge line for water transportation without permission of the owners filed with the Car Service Division.
Car Service Rule 4	Car Service Rule 5 (No other change)
Car Service Rule 5	Car Service Rule 6 (No other change)
Car Service Rule 6	Car Service Rule 7 (No other change)
Car Service Rule 7	Car Service Rule 17 (No other change)

47

Present Form	Proposed Form
Notes to Car Service Rules 1 to 5 inclusive	Notes to Car Service Rules 1 to 6 inclusive
Notes.—(A) Car Service Rules 1 to 5, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.	Notes.—(A) Car Service Rules 1 to 6, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.

(No other changes)

Per Diem Rule 3	Per Diem Rule 3
Freight cars must be handled as prescribed by Rules 1 to 5, inclusive, of the Code of Car Service Rules of the American Railway Association.	Freight cars must be handled as prescribed by Rules 1 to 6, inclusive, of the Code of Car Service Rules of the American Railway Association.

In the application of New Car Service Rule 4, it will be necessary for a railroad wishing to deliver cars to a steamship, ferry, or barge line for water transportation to make prompt application for such permission to the Car Service Division. Such application should include the following information:

(a) Cars (ownerships) which it is desired to deliver;
(b) Name of water transportation carrier;
(c) Points between which water carrier will transport cars.

Application for such permission should be made promptly, so that delay or confusion may be avoided when the rule becomes effective.

48 The Car Service Division will handle with the owner railroad.

In the case of water carriers operating between more than two points, a car owner may grant permission for cars to be used between certain points and refuse permission between certain other points. For example, services are now operative on the Atlantic Seaboard between New York and New Orleans, New York and Havana and New Orleans and Havana. A car owner may permit its cars to be used between New York and Havana and refuse such permission between New York and New Orleans, etc.

Permission shall not be required for movements which are entirely within harbor or switching district limits.

In the event the proposed new Car Service Rule 4 is adopted, the Car Service Division propose to issue a special car order addressed to all roads reaching the termini of water transportation lines, so that the transportation of railroad owned equipment via such water carriers may not cause rail lines serving such ports to make excessive empty mileage in the disposition of equipment.

The proposed revised rules are submitted for a vote by letter ballot in the usual manner, to become effective as of November 15, 1932, if approved by a majority of the membership, that majority to represent two-thirds of the freight cars owned or controlled by the members of the Association.

A form of letter ballot is enclosed herewith. This ballot must be used if the vote is to be recorded, and should be in the hands

of the Secretary, 30 Vesey Street, New York City, on or before noon, Eastern Standard Time, November 14, 1932.

Respectfully,

H. J. FORSTER, *Secretary.*

American Railway Association

Letter Ballot

Reply to Circular No. _____ to be returned to H. J. Forster, Secretary, 30 Vesey Street, New York City, on or before noon, Eastern Standard Time, November 14, 1932.

R

On the proposal to approve new Car Service Rule 4; revise Per Diem Rule 3; renumber present Car Service Rule 4 to read Rule 5; renumber present Car Service Rule 5 to read Rule 6; renumber present Car Service Rule 6 to read Rule 7; renumber present Car Service Rule 7 to read Rule 17; change Notes to Car Service Rules 1 to 5, inclusive, to read Notes to Car Service Rules 1 to 6 inclusive, as indicated in Circular No. _____, the vote of this company is:

Affirmative

Negative

(If you are in favor, please cross off word "Negative" and vice versa.)

Name of Officer _____

Title _____

Date _____

CPY8552

Exhibit "B" to amended petition

Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY, COMPLAINANT

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL., DEFENDANTS

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY, COMPLAINANT

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL., DEFENDANTS

PETITION FOR LEAVE TO INTERVENE

Now comes your petitioner, Seatrain Lines, Inc., and respectfully represents that it has an interest in the matters in controversy in the above entitled proceedings and desires to intervene in and become a party to said proceedings and for grounds of the proposed intervention says:

51 1. Petitioner is a corporation organized under the laws of the State of Delaware with its principal office at No. 39 Broadway, New York, N. Y., and is a common carrier by water engaged in the transportation of freight in railroad cars partly by railroad and partly by water between Hoboken, New Jersey, and Belle Chasse (New Orleans), Louisiana, and between each of these ports and Havana, Cuba.

2. At Hoboken, New Jersey, petitioner has facilities and arrangements for the interchange of cars both loaded and empty, between its ships and complainant, Hoboken Manufacturers Railroad Company; and at Belle Chasse (New Orleans), Louisiana, it has facilities and arrangements for the interchange of cars, both loaded and empty, between its ships and complainant, New Orleans & Lower Coast Railroad Company.

3. Petitioner has an interest in the pending proceedings in that, among other things, the enforcement of Car Service Rule 4 and the refusal of defendants thereunder to consent to the delivery of their cars by complainants to petitioner's ships will prevent the continuous and through movement of freight in cars via complainant's ships without unloading from or loading freight into cars at the ports, will interfere with petitioner's operations, will deprive it of revenue from the through transportation of freight via its lines and will deprive the shipping public of the special advantages of the transportation service afforded by petitioner.

4. Petitioner, therefore, seeks leave to intervene on behalf of the complainants, adopts and realleges as its own the allegations of the complaints and joins in and adopts the prayers for relief contained in said complaints; but by its intervention petitioner

52 does not seek to broaden the issues raised by the complaints and agrees that nothing herein contained shall be construed to have that purpose or effect.

Wherefore, your petitioner prays for leave to intervene and be treated as a party to said proceedings with the right to have notice

of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument if oral argument is granted.

Dated: New York, N. Y., November 1, 1933.

Respectfully submitted.

SEATRAIN LINES, INC.,
By GRAHAM M. BRUSH,
its President,
39 Broadway, New York, N. Y.

PARKER MCCOLLESTER
FRANK J. CLARK
LORD, DAY & LORD
Attorneys for Petitioner,
25 Broadway, New York, N. Y.

[*Duly sworn to by Graham M. Brush; jurat omitted in printing.*]

54 *Exhibit "C" to amended petition*

No. 25565[1]

INVESTIGATION OF SEATRAIN LINES, INCORPORATED

Submitted November 30, 1934. Decided February 5, 1935

1. Interest of Missouri Pacific Railroad Company and Texas & Pacific Railway Company in Seatrain Lines, Incorporated, found to be such an interest as is contemplated by section 5 (19) of act.
2. Establishment of coastwise service between Hoboken, N. J., and New Orleans (Belle Chasse), La., by Seatrain without Commission's authority found to have been in violation of section 5 (19-21) of act.
3. Operation of vessels and transportation of property by Seatrain found not to have been otherwise in violation of act since October 1, 1933.
4. Competition for traffic between Missouri Pacific and Texas & Pacific on one hand and Seatrain on the other hand found to exist.
5. Service of Seatrain between Hoboken and New Orleans (Belle Chasse) found to be in public interest and of advantage to convenience and commerce of the people, and its continuance not to exclude, prevent nor restrict competition on that water route.
6. Where through routes exist between rail and water carriers, found that Commission has jurisdiction to require rail carriers parties thereto to interchange cars with the water carrier if that is the reasonable and appropriate method of interchanging traffic moving over such through routes.
7. Alleged violation of section 7 of act not established. Prior report, 196 I. C. C. 215.

Appearances in no. 25565 shown in original report.

Edward J. White, H. H. Larimore, F. D. Gresham, M. E. Clinton, R. S. Shapard, and Herbert Fitzpatrick for applicants in no. 25546.

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[1] This report also embraces No. 25546, Application of Missouri Pacific Railroad Company and Texas & Pacific Railway Company under Section 5 (19-21) of Interstate Commerce Act in the Matter of Installation of Common Carrier Service by Water Other Than Through Panama Canal; No. 25728, Hoboken Manufacturers Railroad Company v. Atlantic & Southern Railway Company et al.; and No. 25878, New Orleans & Lower Coast Railroad Company v. Akron, Canton & Youngstown Railway Company et al.

Parker McCollester, Frank J. Clark, William C. Burger, M. G. Roberts, Charles Clark, Henry Thurtell, G. H. Muckley, Roland J. Lehman, Alfred S. Knowlton, W. P. Lewis, J. C. Whiteford, A. J. Branen, Joseph F. Eshelman, Bronson Jewell, Francis R. Cross, D. B. Green, H. W. Schaffer, Harvey Allen, C. S. Burg, B. H. Stanage, B. F. Blatts, J. G. Kerr, J. R. Bell, S. G. Reed, Carl Giessow, J. B. Campbell, C. E. Hochstedler, J. P. McGill, H. J. Wagner, Charles R. Seal, William Simmons, Frank S. Davis, W. A. Lockyear, H. W. Wills, S. H. Williams, W. T. Hughes,
55 J. H. Tallichet, Edward L. Hefron, W. H. Day, Norris W. Ford, R. C. Fulbright, A. G. T. Moore, and A. L. Reed for various interveners in no. 25546.

H. H. Larimore, C. M. Spence, Parker McCollester, and Frank J. Clark for complainants in nos. 25728 and 25878.

Parker McCollester and Frank J. Clark for Seatrain, intervener in nos. 25728 and 25878.

William C. Burger, W. N. McGehee, G. H. Muckley, Henry Thurtell, Alfred P. Thom, Alfred S. Knowlton, J. R. Bell, and Roland J. Lehman for defendants in nos. 25728 and 25878.

Report of the Commission on Further Hearing

By the Commission:

On October 4, 1932, on our own motion, we instituted an investigation into the lawfulness of the operation of facilities and transportation of property in interstate commerce by Seatrain Lines, Incorporated, hereinafter referred to as Seatrain, the acquisition of control by Seatrain of the Hoboken Manufacturers Railway Company, hereinafter referred to as the Hoboken, and of the issuance of securities by Seatrain, with a view to determining whether such operation and transportation, acquisition, and issuance of securities were in conformity with the various provisions of the Interstate Commerce Act. Prior thereto the Missouri Pacific Railroad Company and the Texas & Pacific Railway Company had filed an application, no. 25546, under section 5 (19–21) of the act with respect to their interest in Seatrain.

Hearings were had and, pending the completion of a field investigation with respect to alleged unlawful practices and policies of Seatrain and as to matters relating to questions of competition and public interest involved in no. 25546, we passed upon the jurisdictional questions involved in the title case. In the original report, 195 I. C. C. 215, we found that Seatrain is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act; that it is a common carrier by water engaged in the transportation of property partly by railroad and partly by water; that it and the Hoboken are used under a

common control, management, and arrangement for continuous carriage or shipment of property in railroad cars in interstate and foreign commerce; that it and the New Orleans & Lower Coast Railroad Company, hereinafter referred to as the Lower Coast, are used under a common arrangement for such continuous carriage; that therefore Seatrain is subject to all of the provisions of the act applicable to such a carrier: that Seatrain is not a "carrier" within the meaning of section 20a of the act; and that the Hoboken
56 does not and may not compete for traffic with Seatrain and accordingly neither is subject, because of any community of interest between them, to the provisions of section 5 (19–21) of the act.

The field investigation referred to has been completed, a further hearing had on the undisposed of issues, briefs filed and the proceedings submitted on exceptions to the examiners' proposed report and replies to such exceptions. At the further hearing the application in no. 25546 was amended to show L. W. Baldwin and Guy A. Thompson, trustees of the Missouri Pacific, as parties applicant, they having been appointed trustees of the properties of that carrier in a proceeding instituted under section 77 of the Bankruptcy Act in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, subsequent to the original report herein.

As stated in the original report, Seatrain, since October 6, 1932, has been operating vessels between Hoboken, N. J., and New Orleans (Belle Chasse), La., via Havana, Cuba, on which freight is transported in railroad cars. These vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided and such special facilities have been provided only at Hoboken, Belle Chasse, and Havana. The loading facilities at Hoboken are owned by the Hoboken and, together with the piers and necessary supporting tracks, are leased by Seatrain. The Hoboken, indirectly controlled by Seatrain through stock ownership, is a terminal switching line about a mile and a half in length operating along the water front of New York Harbor. It connects with the Erie Railroad and, through the Erie, interchanges cars with all of the trunk lines serving New York Harbor. The loading facilities at New Orleans, owned by Seatrain, are on property of the Lower Coast, a subsidiary of the Missouri Pacific extending in a southerly direction from Algiers, La., on the west bank of the Mississippi River opposite New Orleans, to Buras, La., about 60 miles. At Algiers it connects with the Southern Pacific and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans and through them interchanges cars with all railroads reaching New Orleans. Belle Chasse, which is Seatrain's

New Orleans terminal, is about 8.5 miles south of Algiers and is within the switching limits of New Orleans.

Shortly after inauguration of service by Seatrain between Hoboken and New Orleans, and prior to the original report herein, the American Railway Association promulgated the following car-service rule:

> RULE 4.—Cars of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division.

57 The complaints in nos. 25728 and 25878, filed respectively by the Hoboken on December 30, 1932, and by the Lower Coast on March 9, 1933, assail this rule and the rules, regulations, and practices of defendants relating to the delivery or the refusal to permit delivery of their cars to the vessels of Seatrain. Seatrain intervened in both complaints. The complaints were heard together, exceptions filed by complainants and Seatrain to the report proposed by the examiners, to which defendants replied, and oral argument had.

The sole issue remaining undisposed of in no. 25565 is whether the operation of vessels and transportation of property by Seatrain are and have been in conformity with the provisions of the act. As the determination of this issue is in some degree dependent upon the conclusions reached in no. 25546 we will first consider the latter proceeding.

Interest of applicants in Seatrain.—At the time of the original report the outstanding stock of Seatrain consisted of 24,500 shares of class A and 16,000 shares of class B stock, the latter having one-third of the voting rights. All of the class B stock and 10,110 shares of the class A stock were owned by Over-Seas Railways, Incorporated, hereinafter referred to as Overseas. The latter had outstanding 7,475 shares of preferred stock and 11,212.5 shares of common stock, the preferred stock having exclusive voting rights if dividends thereon were passed for two consecutive years. The Missouri Pacific owned 1,674 shares and the Texas & Pacific 1,673 shares of the class A stock of Seatrain and respectively owned 863 and 862.5 shares of each class of stock of Overseas. These stock interests of applicants were acquired prior to the inauguration of service by Seatrain.

On October 14, 1933, subsequent to the original report, Overseas was merged into and consolidated with Seatrain. Each holder of preferred stock in Overseas also held a like number of shares of its common stock. The remainder of its common stock, 3,737.5 shares, was held by Railway Transports, Incorporated, which owns the Seatrain patents and which is controlled by the president and another officer of Seatrain. Pursuant to the agreement of merger and consolidation, one and two thirds shares of class A stock of

Seatrain was exchanged for each unit consisting of one share of preferred and one share of common stock of Overseas, and the number of shares of class B stock of Seatrain was reduced to 500 and same exchanged for the 3,737.5 shares of common stock of Overseas owned by Railway Transports. As a result of the merger the outstanding stock of Seatrain consists of 26,848⅓ shares of class A, of which the Missouri Pacific owns 3,112⅓ and the Texas & Pacific owns 3,110.5 shares, and 500 shares of class B, all owned by
58 Railway Transports and still entitled to one-third of the voting rights. Applicants have a combined voting power in Seatrain equal to 15.45 percent of the whole, whereas prior to the merger, because of the fact that dividends had not been paid on the preferred stock of Overseas, their direct and indirect voting power in Seatrain was approximately 23.1 percent of the whole.

Applicants are represented on Seatrain's board of directors, the Missouri Pacific by its executive vice president and the Texas & Pacific by its president, who is also a member of the board of directors of that company. Another director of Seatrain is also a director of the Texas & Pacific. Applicants and Seatrain do not have executive, operating, traffic or other officials in common. Seatrain has its own complete organization.

Applicants and Seatrain contend that the interest of the former in the latter is not such an interest as is contemplated by section 5 (19) of the act, the pertinent provisions of which are as follows:

> * * * It shall be unlawful for any railroad company * * * subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad * * * does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad * * * does or may compete for traffic * * *.

Applicants do not either individually or jointly control Seatrain or own lease, or operate its vessels. Neither of them is operated under a common management or control with Seatrain. The question is whether they have "any interest whatsoever" in Seatrain within the meaning of section 5(19). In addition to their minority stock holdings, their interest in Seatrain is evidenced in numerous other ways. Seatrain's vessels are designed primarily for the handling of railroad cars in non-break-bulk transportation and the cooperation of railroads is essential to their successful operation. Both applicants acquired stock in Overseas in 1927, more than a year prior to the inauguration of service by that company. Both made large cash loads to Overseas in 1929 when its service between New Orleans and Havana was

started. Their cooperation made the venture of Overseas possible. Both acquired stock in Seatrain in December 1931, nearly a year prior to the commencement of service by that company. The Lower Coast, a wholly owned subsidiary of the Missouri Pacific, is an essential link in Seatrain service. For its supply of railroad cars, Seatrain depends in part upon contracts with the two rail carriers last mentioned. The only through routes that Seatrain has been able to establish between Hoboken and
59 points in the Southwest are via the lines of applicants and some of their short-line connections. Both applicants have a direct and active interest in the operation of Seatrain in that thereby they are afforded through routes by water between points in the Southwest and points on the Atlantic Seaboard, in competition with similar routes afforded by subsidiaries of the Southern Pacific Company.

Applicants and Seatrain would construe the phrase "any interest whatsoever" as meaning such an interest as enables a railroad to control or exercise a direct influence over the activities and policies of the water carrier. With this we cannot agree. There is nothing in the language of the statute that would warrant such a restricted construction. The interest which a rail carrier is forbidden to have in a water carrier with which it does or may compete is any interest and the prohibition is absolute except for the proviso in section 5 (21) which empowers us in certain cases to extend the effective date of the prohibition.

Competition between applicants and Seatrain.—Whether there is or may be competition between applicants and Seatrain is a question of fact for us to determine as provided by section 5 (20).

Applicant Missouri Pacific controls through stock ownership various railroads and also owns all of the preferred stock and 50 per cent of the common stock of applicant Texas & Pacific, but the latter is independently operated. The various railroads embraced in the Missouri Pacific system serve directly an extensive territory, including the greater parts of Missouri, Kansas, Arkansas, Louisiana, and Texas and parts of Colorado, New Mexico, Nebraska, Oklahoma, Illinois, and Tennessee. The lines of the Texas & Pacific are mainly in Louisiana and Texas. The Missouri Pacific system serves the principal Mississippi River crossings from St. Louis to New Orleans and the ports of New Orleans and Beaumont, Houston, Galveston, and Corpus Christi, Tex., and the Texas & Pacific serves the port of New Orleans. The Missouri Pacific system lines and the Texas & Pacific are parties to through routes and joint rates with Seatrain between Hoboken and points in the Southwest. They are also parties to through routes and joint rates between points in the Southwest and points in eastern seaboard territory via Kansas City and the Mississippi River crossings in

connection with rail lines extending eastward and northeastward from those crossings, and via the Gulf ports in connection with steamship lines between those ports and the north Atlantic ports. They are also parties to transcontinental routes and joint rates. Both applicants actively solicit and participate in the movement of traffic over all of these routes.

A large volume of diversified traffic moves between the Southwest and eastern-seaboard territory. Generally speaking, the distribution of this traffic between the all-rail and the break-bulk rail-water routes is determined largely by the measure of the respective rates. Where the rates are substantially the same the traffic will ordinarily move all rail because of the faster service and other advantages, whereas if the rail-water rates are substantially less than the all-rail rates the traffic will move over the rail-water routes, unless shorter time in transit or some other factor requires all-rail service. Factors which determine whether a shipment will move over the all-rail or rail-water routes are, in addition to the time in transit, service in transit, the nature of the traffic, the manner of shipment, the requirements and cost of packing, and the necessity of avoiding handling at the ports. Considerable tonnage will move all-rail at substantially higher rates because of one or more of these factors. Examples are commodities which require a service that will permit diversion or reconsignment in transit and commodities in tank cars or under refrigeration or which because of weight, bulk, or other peculiarities it is not practicable to transfer from cars to vessels.

As it has been the policy of Seatrain to maintrain rates no higher than those charged by the break-bulk water lines, its service affords the same advantage of lower rates as the latter lines. It has advantages over the latter lines because of its more expeditious service and its ability, because of its non-break bulk service, to handle traffic that the break-bulk lines cannot. It can handle all traffic that the all-rail routes can and, because of its lower rates, some that the all-rail routes cannot, and its only disadvantages over the latter are the absence of diversion and reconsignment privileges in transit and the somewhat longer time in transit, usually from one to seven days between representative points.

During the first six months of 1931 a total of 2,626 carloads moved between 47 representative points on the Missouri Pacific system lines in Louisiana and Texas and points in eastern-seaboard territory. Of these, 978 moved all rail and 1,648 over the break-bulk water-rail routes. In numerous instances the same kind of commodity moved over both the all-rail and the break-bulk rail-water routes, and in some instances to and from the same points. It is manifest from this and other evidence of record that the

the all-rail routes actively compete with the break-bulk water routes and that Seatrain, with its many advantages and no disadvantages over the break-bulk water routes, can more effectively compete with the all-rail routes. This is illustrated by the fact that on its first five voyages Seatrain carried 169 cars of freight, including 7 cars of bakery goods from New York to Texas and Louisiana and 1 car of methanol from Tennessee to New Jersey, which 8 cars, its witness admits, would have moved over all-rail routes if its service had not been in existence. Most of
61 the other 161 cars contained commodities which move between the Southwest and eastern-seaboard territory over all-rail routes or routes by water. Applicants admit that of the 978 cars shown to have moved all rail to and from representative points on the Missouri Pacific during the first six months of 1931, 10 percent would have been subject to competition with Seatrain if the latter service had been in existence at that time.

The competitive situation between applicants and Seatrain is in all respects similar to that between the rail and water lines of the Southern Pacific Company, presented in Southern Pac. Co. Ownership of Atlantic S. S. Lines, 43 I. C. C. 168, in which we found that the rail lines were in active competition with the water lines for traffic between the Gulf ports and the Atlantic seaboard.

Notwithstanding applicants' interest in Seatrain and the existence of competition between applicants and Seatrain, we may extend the time within which the service by water may continue if we are of the opinion that (1) such service is being operated in the public interest and is of advantage to the convenience and commerce of the people, and (2) that such extension will neither exclude, prevent nor reduce the competition on the route by water under consideration.

Public interest.—The Seatrain method of transportation was developed for the purpose of eliminating the expenses, disadvantages and delays incident to the transfer of lading between railroad freight cars and the holds of vessels. By means of the loading machinery described in the original report, loaded freight cars are lifted from the tracks of the connecting railroad at one port, deposited on the Seatrain vessel, which carries them to the port of destination, lifted from the vessel to the tracks of the connecting railroad, and moved to final destinations without having the contents disturbed in any way. The service performed by Seatrain is generally conceded to be superior to that afforded by steamships of the usual type.

By using Seatrain service, shippers obtain what is practically equivalent to all-rail service, except for the somewhat longer time in transit, at rates less than the all-rail rates. They are also saved packing and handling expenses necessarily incurred if the move-

ment is over the break-bulk water routes. In addition, certain classes of bulk freight which cannot be handled in vessels of the usual type, and which cannot bear the all-rail charges, can be handled by Seatrain, and thus markets opened up for them which theretofore could not be reached.

Representatives of the Manufacturers Association of Connecticut, the New England Traffic League, the Chambers of Commerce of Boston, Mass., and Fort Worth and Dallas, Tex., the Fort Worth Freight Bureau, and the Southern Pine Association testified that Seatrain service is of advantage to the convenience
62 and commerce of their members. Similar representations were made on behalf of several individual shippers.

It seems clear from the evidence of record that the operation of Seatrain is in the public interest and is of advantage to the convenience and commerce of the people.

Restraint of competition.—The competition that is not to be excluded, prevented, nor reduced as a result of a continuing interest in the route by water of the applicant rail carriers is competition on the route by water under consideration. Seatrain has provided a service that has created additional competition on the route by water, and in doing so has received the active cooperation and assistance of applicants. The more cooperation and support Seatrain receives from applicants the more effective the competition it can offer. It is in applicants' interest to afford such cooperation and assistance and thereby continue to have a friendly water connection and be enabled to better meet the competition of the rail-water routes of the Southern Pacific, the rail lines of which serve much of the same southwestern territory as do those of applicants.

The objections of the intervening railroads arise almost entirely from their apprehension that applicants will favor the Seatrain route rather than the all-rail routes, thereby causing an increase in the movement by water and depriving them of their hauls to the Mississippi gateways. This apprehension, which seems to be well founded, also is convincing that applicants' interest in Seatrain will increase rather than decrease the competition on the route by water under consideration.

Operation of Seatrain.—As heretofore indicated, we conclude that applicants' interest in Seatrain is such an interest as is contemplated by section 5 (19) of the act. As such interest existed prior to and at the time of Seatrain's engaging in coastwise traffic between Hoboken and New Orleans, such service could not lawfully be inaugurated until we, after full hearing on an appropriate application, determined whether the rail lines of applicants do or may compete with Seatrain's route by water, as provided by section 5 (20); and, if there was such competition or possibility of

competition, that Seatrain service by water was in the interest of the public and of advantage to the convenience and commerce of the people and would neither exclude, prevent nor reduce competition on the route by water under consideration, as provided by section 5 (21) of the act. While we also conclude that the existing coastwise service of Seatrain is in the public interest and will neither exclude, prevent nor reduce competition on the route by water, we desire to here emphasize that, so long as applicants maintain an interest in Seatrain, service by the latter over
63 other routes by water may not be lawfully established until authorized by us, as provided by section 5 (19–21) of the act.

Since October 1, 1933, subsequent to the issue of our original report, Seatrain has filed with us its tariffs showing all of its interstate rates and all of its rules, regulations, allowances, and practices applicable to interstate shipments, and, so far as appears of record, has strictly adhered to these tariffs.

We have no jurisdiction over the rates and practices of Seatrain in its strictly foreign commerce between United States ports and Cuba. There is nothing of record to indicate that its rates and practices respecting foreign commerce are used as cloaks or devices for according to shippers engaged in both foreign and interstate commerce concessions from the tariff rates applicable to interstate commerce.

Car-service rule 4 and practices thereunder.—As stated in the introduction, car-service rule 4, which is there quoted, was promulgated by the American Railway Association shortly after inauguration of coastwise service by Seatrain on October 6, 1932. Since the close of the hearings, this and other railroad associations and organizations have been consolidated into the Association of American Railroads, and the rule is now car-service rule 4 of the latter association. Complainants Hoboken and Lower Coast are subscribers to the car-service rules.

As of March 17, 1933, the Missouri Pacific system lines, the Texas & Pacific and 24 other railroads had consented to the delivery of their cars to Seatrain without restriction; several others had consented to the delivery of their cars to Seatrain for movement between Hoboken and New Orleans or Havana, or between New Orleans and Havana only, but not for coastwise movement between Hoboken and New Orleans. Most of the railroads had refused to permit delivery of their cars to Seatrain. No railroad had refused to permit delivery of their cars to any of the other 11 water lines listed in a circular of the Association as coming within the intendment of the rule. The rule does not apply to cars delivered to water lines for movement entirely within harbor or switching-district limits.

While the rule does not specifically mention Seatrain, it is clear that its sole object is to prevent the diversion of traffic from the all-rail routes to Seatrain. The Association's circular submitting the proposed rule to its membership shows that such submission was occasioned by the inauguration of Seatrain's coastwise service. For almost four years prior to the inauguration of this service cars were delivered to Seatrain or its predecessor Overseas for movement from New Orleans to Havana without objection by defendants. During that period 18,159 loaded cars moved
64 over that route, upon which per diem at the per diem rates of the American Railway Association was paid to the owning roads by the Lower Coast for the time they were in its possession or that of Seatrain, Overseas, or Cuban railroads. During that period there was no car-service rule conditioning delivery of cars to Seatrain or Overseas on the consent of the owners of the cars.

Rule 4 is not strictly observed by complainants. While they have observed it on traffic loaded on their own rails, they have continued to deliver to Seatrain loaded cars received from their connections whether the owners of the cars had consented to or refused such delivery. In many instances the cars of the nonconsenting railroads delivered by complainants to Seatrain were loaded on the lines of the owning roads or other nonconsenting railroads and moved on local bills of lading to the ports. In some instances these bills of lading contained notations which would indicate that there would be a further movement via Seatrain; in other instances they did not. In some instances cars of nonconsenting railroads were loaded on the Missouri Pacific or Texas & Pacific, consenting railroads, and delivered to Seatrain, although in some instances the rail movement to Seatrain's terminal was in a direction other than that of the owning road and apparently in violation of rule 2 of the car-service rules. During the month of August 1933, 322 of the 640 loaded cars which arrived at Hoboken and New Orleans on Seatrain vessels were cars which moved in violation of rule 4.

After the adoption of rule 4 the car-service division of the American Railway Association advised complainants that if loaded cars were consigned in their care or to parties on their lines and such cars did not have permission to move via Seatrain, diversion, reconsignment, or reshipment in such cars would be deemed a violation of rule 4, and that in such cases complainants should obtain cars which did have permission to move via Seatrain and arrange for the transfer of the lading to them.

The record does not warrant the conclusion, as contended by complainants, that defendants have followed a practice of furnishing their own cars for shipments to move via Seatrain and

returning to Seatrain empty the cars of consenting roads. Complainants point out that from February 1 to September 30, 1933, Seatrain handled 359 loaded Missouri Pacific cars and that up to November 3, 1933, the date of the hearing, 225 had been returned empty and only two returned loaded, although during this time numerous loaded cars of nonconsenting eastern roads had been received by the Hoboken. With one exception, they do not show, however, that the Missouri Pacific cars which were returned empty were available for loading at or near points at which ship-
65 ments were offered for movement via Seatrain or consigned in care of or to parties on the Hoboken. It is shown that, of 23 loaded cars received during September 1933 by the Pennsylvania from the Hoboken after movement via Seatrain, 8 were cars of the Missouri Pacific system lines or of the Texas & Pacific. One of these moved to New York City, one to Clarendon, Pa., and six to nearby New Jersey points. During the same month the Pennsylvania delivered 39 loaded cars to the Hoboken which later moved via Seatrain. All were Pennsylvania cars and only one originated in New Jersey, the remainder originating at points in Pennsylvania and West Virginia.

Defendants point out that shipments from points on their lines to Hoboken or Belle Chasse are local shipments and move only on local bills of lading and that they have the right to use their own equipment for such local movements over their own rails. Subsequent to the filing of these complaints a number of the trunk-line defendants filed suit in the United States District Court for the Southern District of New York seeking an injunction to prevent the Hoboken and Seatrain from "appropriating" their equipment, which suit is now pending.

Jurisdiction over interchange of cars with Seatrain.—Rule 4 and defendants' rules, regulations, and practices relating to the delivery or the refusal to permit delivery of their cars to Seatrain are alleged by complainants Hoboken and Lower Coast to violate section 1 (4) and (11), section 3 (1) and (3) and section 7 of the act. At the hearing defendants moved to dismiss the complaint on the ground that we are without jurisdiction of the matters complained of. It is their position that the act nowhere gives us authority to require them to supply Seatrain with their equipment or to turn such equipment over to complainants for Seatrain's use. They contend that they cannot be required, under the provisions of section 1 (4), to interchange cars with Seatrain unless such cars are required for transportation over through routes to which they are parties or which may be required by us; that carriers were not required at common law to participate in through routes with connecting carriers or to permit their equipment to go beyond their rails, citing Atchison, T. & S. F. Ry Co.

v. Denver & N. O. R. Co., 110 U. S. 667, Southern Pac. Co. v. Interstate Commerce Commission, 200 U. S. 536, and other cases; that they do not participate in through routes with Seatrain and we are without jurisdiction to require them to do so, as Seatrain's only routes are via Havana, Cuba; that the provisions of section 1 (11) apply only to common carriers by railroad and relate only to the obligations owed by common-carrier railroads to each other; that it cannot be inferred that the provisions of section 3 (3) requiring equal facilities for the interchange of traffic include
66 interchange of equipment between rail and water carriers in the absence of express language to that effect, citing Capehart & Smith v. Louisville & N. R. Co., 4 I. C. C. 265; and that the word "facilities" in section 3 does not embrace car equipment, citing Scofield v. Lake Shore & M. S. Ry. Co., 2 I. C. C. 90.

Section 1 (4) provides that it is the duty of every common carrier subject to the act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, to establish through routes and charges and reasonable rates, fares, and charges applicable thereto, to provide reasonable facilities for operating through routes, to make reasonable rules and regulations with respect to the operation of through routes, and to provide for reasonable compensation for those entitled thereto. The duty to provide and furnish transportation and to establish through routes and reasonable rates applicable thereto was first imposed by the Hepburn Act of June 29, 1906. The duty to provide reasonable facilities for operating through routes, to make reasonable rules and regulations with respect to the operation thereof, and to provide for reasonable compensation to those entitled thereto was added by the act of June 18, 1910, as was also the duty to make reasonable rules and regulations with respect to the "exchange, interchange and return of cars" used in such through routes. The latter was omitted by the act of February 28, 1920.

The car-service provisions of the act were added by the act of May 29, 1917, popularly known as the Esch Car Service Act. This act, as amended by the act of February 28, 1920, is now embraced in section 1 (10–17). These car-service provisions, by their terms, apply only to "carriers by railroad subject to the act."

Prior to the enactment of the Car Service Act we had held that the duty to establish through routes, which, by the terms of the act, applied to all common carriers subject thereto, included through routes with water lines as well as with other rail lines, and in several cases had required the establishment of such through routes. Flour City S. S. Co. v. Lehigh Valley R. Co., 24 I. C. C. 179; Pacific Nav. Co. v. Southern Pac. Co., 31 I. C. C. 472; Chattanooga Packet Co. v. Illinois Central R. Co., 33 I. C. C. 384. The first of these cases

was decided prior to the enactment on August 24, 1912, of section 6 (13) of the act, which specifically authorizes us to establish through routes and maximum joint rates over rail and water lines; the others subsequent thereto. We had also held that the duty to maintain through routes carried with it necessarily the power on our part to enforce rules which would permit the free interchange of cars between carriers, the theory of this provision of the
67 act being that carriers should freely interchange freight between their respective lines to the end that interstate commerce might move without interruption or delay. Missouri & Illinois Coal Co. v. Illinois Central R. Co., 22 I. C. C. 39, cited with approval in Chicago, R. I. & P. Ry. Co. v. United States, 284 U. S. 80. While the interchange of cars at that time, as now, was ordinarily between railroads, there was also some interchange of cars between railroads and various transportation and car-ferry companies which like Seatrain had been held to be water carriers within the meaning of section 5 (19–21) of the act. Pennsylvania Co. Operation of Transportation Co., 34 I. C. C. 47; Grand Trunk Ry. Co. of Canada Operation of Car Ferry Co., 34 I. C. C. 49; Buffalo, R. & P. Ry Co. Operation of Car Ferry Co., 34 I. C. C. 52, and Grand Trunk W. Ry. Co. Operation of Car Ferry Co., 34 I. C. C. 54. In each of these cases we held that it was possible for petitioner to compete within the meaning of the act with the boatline in which it was interested.

In Capehart & Smith v. Louisville & N. R. Co., 4 I. C. C. 265, we held that section 3 (3) of the act could not be invoked by a common carrier not subject to the provisions of the act, and similar findings were made in American Hawaiian S. S. Co. v. Erie R. Co., 152 I. C. C. 703.[1] In the Pacific Nav. Co. case and Chattanooga Packet Co. case, as well as in Colonial Nav. Co. v. New York, N. H. & H. R. Co., 50 I. C. C. 625, we found that failure to establish through routes with water carriers not subject to the act was unduly prejudicial under section 3. Seatrain, however, is subject to our jurisdiction, as found in the original report.

As our power to enforce rules relating to the interchange of cars necessarily flows from the carriers' duty to establish through routes, and as the duty to establish through routes relates to water-rail routes as well as to all-rail routes, it seems apparent that our power to enforce rules relating to the interchange of cars between rail and water carriers, where such interchange might reasonably and appropriately be made, was, prior to the enactment of the Car Service Act, coextensive with our power to enforce rules relating to the interchange of cars between rail carriers. We do not believe that the latter act, as it stood originally or as amended in 1920, has lessened in any particular the jurisdiction we previously had with respect to interchange of cars but on the contrary has materially

increased it. The original act was passed pursuant to recommendations in our 1916 annual report and was designed primarily to accord us power to meet emergencies due to shortage of equipment, congestion of traffic, or other causes. The amendment thereto of February 28, 1920, further increased our power to prevent
68 interruptions in traffic. While the latter eliminated from section 1 (4) the provision requiring carriers subject to the act to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars, neither the original Car Service Act nor the act of February 28, 1920, changed the duty imposed by section 1 (4) upon all common carriers to establish through routes, reasonable facilities for operating same, and reasonable rules and regulations with respect to the operation thereof, and, as heretofore stated, our power to enforce rules relating to interchange of cars necessarily flows from the duty to establish through routes. While the act of February 28, 1920, also amended the car-service act so as to provide that the provisions thereof should apply only to railroads, such amendment did not lessen the duties of the railroads with respect to car service which had been imposed upon them prior to such amendment. There is nothing in the language of this particular amendment or in the act of February 28, 1920, as a whole from which it may be reasonably inferred that our power to enforce rules relating to the interchange of cars was intended to be or was lessened in any degree. In Chicago, R. I. & P. Ry. Co. v. United States, 274 U. S. 29, the Supreme Court said, in holding that we are empowered to require a rail carrier to embrace in a through rail-water route less than the entire length of its railroad lying between the termini of the through route proposed, irrespective of whether the water carrier is a common carrier within the meaning of section 1 of the act:

This addition to the Interstate Commerce Act [section 6 (13)] materially extends the jurisdiction of the commission in respect of land-and-water transportation and the carriers engaged in it, whenever property may be or is transported in interstate commerce by rail and water by a common carrier or carriers; and the obvious intention of Congress would be substantially limited in effect if the quoted provisions were held to be subject to the restriction that both rail and water must be used under a common control, etc. The phrase "except where one of the carriers is a water line," was introduced in an amendment made to the Interstate Commerce Act by the Transportation Act, 1920, and it is not unreasonable to include within the scope of its reference, the then existing paragraph (13) of sec. 6. And this view is strengthened by the consideration that the Transportation Act, 1920, as a part of the new policy which it introduced in respect of the regulation of interstate transportation, Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co., 257 U. S. 563, 585; New England Divisions Case, supra, p. 189, directed the commission to establish through routes, joint classifications, etc., both in respect of railroad-and-water carriers, "whenever deemed by it to be necessary or desirable in the public interest," etc. 41 Stat. 485. And the same act declares it to be "the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail-and-water transportation." Sec. 500, 41 Stat. 499.

69 These and other provisions emphasize the intention of Congress to broaden the control of the Interstate Commerce Commission over rail-and-water transportation and, generally, to extend the regulatory power of that body over all such transportation in the public interest. It would be quite inconsistent with that broad purpose to adopt the narrow construction of the statutory provisions under review which is advanced by appellants. On the whole, and especially in the light of the definite congressional policy which the legislation reflects, Richardson v. Harmon, 222 U. S. 96, 104; Holden v. Stratton, 198 U. S. 202, 213–214; Minnesota v. Hitchcock, 185 U. S. 373, 395, we find no difficulty in rejecting the construction thus advanced and adopting that which we have indicated, without, at the same time, doing violence to the fair meaning of the language actually employed.

It is our view that we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such routes are established pursuant to our order or voluntarily, to require the interchange of cars between the rail and water carriers, and to require that equality of treatment provided by section 3 (3) between connecting carriers, whether rail or water, in the facilities for the interchange of traffic, including through routes and the interchange of cars. We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist.

This record shows that Seatrain participates in through routes and joint rates with the Missouri Pacific system lines and the Texas & Pacific and their short-line connections, which carriers permit their cars to be delivered to Seatrain. Whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record. Whether such through routes exist and, if not, whether they should be established are issues in no. 25727, not yet decided.

Alleged violation of section 7.—Section 7 prohibits any arrangement whereby carriers may prevent the carriage of freight from being continuous from the place of shipment to the place of destination. Violation of this section is not established, as alleged by complainants. The evidence does not show that defendants entered into any agreement to withhold delivery of their cars to Seatrain. As heretofore pointed out, numerous carriers have consented to the delivery of their cars and, under the provisions of rule 4, any carrier can at any time consent to the delivery of its cars if it so desires. Even if there were such an agreement, it is our view that it would not be in violation of this section. There is no duty to interchange cars with Seatrain resting on those defendants who are not parties to through routes with it, and this record does not establish that such through routes exist. Shipments over the lines of such defendants consigned in care of or to parties on the
70 Hoboken or Lower Coast are treated as local shipments, and there is nothing to indicate any agreement that that would even tend to prevent such local shipments from being continuous.

Findings.—We find:

1. That the interest of applicants Missouri Pacific and Texas & Pacific in Seatrain is such an interest as is contemplated by section 5 (19) of the act.

2. That as such interest existed prior to and at the time of Seatrain's engaging in coastwise traffic between Hoboken and New Orleans (Belle Chasse), the inauguration of such service, which had not been authorized by us, was in violation of the provisions of section 5 (19–21) of the act.

3. That other than as indicated above, Seatrain, since October 1, 1933, does not appear to have violated any of the provisions of the act.

4. That applicants Missouri Pacific and Texas & Pacific may and do compete for traffic with Seatrain.

5. That the service of Seatrain between Hoboken and New Orleans (Belle Chasse) is being operated in the public interest and is of advantage to the convenience and commerce of the people and that extension of the time within which such service may continue will neither exclude, prevent, nor reduce competition on the route by water under consideration.

6. That we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such through routes are established pursuant to our order or voluntarily, to require the rail carriers parties thereto to interchange cars with the water carrier, if that is the reasonable and appropriate method of interchanging traffic moving over such through routes.

7. That the alleged violation of section 7 of the act has not been established.

8. No. 25565 will be discontinued. An appropriate order will be entered in no. 25546. Nos. 25728 and 25878 will be dismissed without prejudice to the filing by complainants of petition for further consideration, or new complaints, after no. 25727 has been disposed of, if the conclusions reached in that case warrant such action.

PORTER, *Commissioner*, concurring:

While concurring generally in the holdings of this report, I am not prepared at this time to accept the finding that the car-service rule 4 of the American Railway Association, together with other facts, does not constitute a combination, contract, or agreement in violation of section 7 of the Interstate Commerce Act.

Commissioner LEE concurs in the result.

71 MAHAFFIE, *Commissioner*, dissenting:

In my dissent to the prior report, 195 I. C. C. 215, 234, I stated that in my opinion the operation of the vessel here in question is that of a railroad within the terms of section 1 (3) of the act:

The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, * * *.

Nothing in this proceeding leads me to change the view then expressed.

In my judgment, the majority err in the construction placed upon section 5 (19–21) of the act:

(19) From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce, to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

(20) Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may, on its own motion, or the application of any shipper, institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

(21) If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*,
72 Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered as granted thereafter.

The majority correctly find competition between the interested railroads and the Seatrain to exist. Seatrain was not in existence on July 1, 1914. Under those circumstances I find no warrant in the statute for the order issued by the majority undertaking to permit those railroads "to continue their stock interest in, and to con-

tinue the operation by Seatrain Lines, Incorporated, of vessels between the ports of New York, N. Y., and New Orleans, La."

I am authorized to say that Commissioner McMANAMY joins in this expression.

73 *Exhibit D to amended petition*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of February, A. D. 1935

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY ET AL.

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

These cases being at issue upon complaints on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed.

By the Commission.

[SEAL] GEORGE B. McGINTY,
Secretary.

74 *Exhibit E to amended petition*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of April, A. D. 1935

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY ET AL.

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

Upon consideration of defendants' petition for modification of the findings and the legal conclusions upon which based, as stated in the report of February 5, 1935, in the above-entitled proceedings, and of complainants' reply thereto:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

[SEAL] GEORGE B. MCGINTY,
Secretary.

75 *Exhibit F to amended petition*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of November, A. D. 1938.

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

Upon consideration of motions filed in the above-entitled proceedings by complainant and intervener Seatrain Lines, Inc., and of replies thereto filed by defendants:

It is ordered, That said proceedings be, and they are hereby, reopened for further hearing to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc.

By the Commission.

[SEAL] W. P. BARTEL,
Secretary.

76 *Exhibit G to amended petition*

Interstate Commerce Commission

No. 25728 [1]

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

Submitted November 2, 1939. Decided January 8, 1940

1. Upon order reopening for further hearing to determine upon what terms and conditions (including compensation) defendants participating in through routes with Seatrain Lines, Inc., should be required to interchange their cars with Seatrain, found that period of time and manner in which Seatrain should pay for the use of cars, the amount of compensation it should pay, and any other condition which the evidence adduced shows would be appropriate are questions in issue. Prior reports, 195 I. C. C. 215 and 206 I. C. C. 328.
2. Proceedings reopened for further hearing.

Graham M. Brush, Frank J. Clark, and Parker McCollester for complainant in No. 25728 and intervener corporation.

H. H. Larimore and Toll R. Ware for complainant in No. 25878.

J. Carter Fort for intervener association.

William Burger, Charles Clark, Francis R. Cross, Joseph H. Eshelman, F. W. Gwathmey, T. P. Healy, George W. Holmes, H. H. Larimore, Roland J. Lehman, G. H. Muckley, W. T. Pierson, E. A. Smith, Robert Thompson, and Toll R. Ware for defendants.

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

Exceptions to the report proposed by the examiners were filed jointly (1) by complainant in the title proceeding and intervener Seatrain Lines, Inc., hereinafter called Seatrain, and (2) by certain defendants [2] and intervener Association of American Railroads. Each group replied to the exceptions of the other, and oral argument has been held.

Since October 6, 1932, Seatrain has been operating vessels between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, on which freight is transported in railroad cars between Hoboken and Belle Chasse, Hoboken, and Havana, and Belle Chasse and

[1] This report also embraces No. 25878, New Orleans and Lower Coast Railroad Company v. Akron, Canton & Youngstown Railway Company et al.

[2] The eastern lines, Southern Pacific lines, and most of the important southern lines.

Havana. Previously, since January 1929, it and its predecessor, Over-Seas Railways, Inc., had been engaged in similar transportation between Belle Chasse and Havana.

77 Seatrain's terminal at Hoboken is served by complainant in the title proceeding, hereinafter called the Hoboken, a terminal switching line about 1½ miles in length, extending along the water front at New York Harbor, and directly controlled by Seatrain through stock ownership. Its terminal at Belle Chasse is served by complainant in No. 25878, hereinafter called the Lower Coast, a subsidiary of the Missouri Pacific Railroad Company, extending from Algiers, La., on the west bank of the Mississippi River opposite New Orleans, La., south about 60 miles. Belle Chasse is about 10 miles south of Algiers.

Shortly after the inauguration of Seatrain's service between Hoboken and Belle Chasse and between Hoboken and Havana, the American Railway Association, predecessor of the Association of American Railroads, hereinafter referred to as the association, promulgated the following car-service rule:

Rule 4.—Cars of railway ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owner filed with the Car Service Division.

As most of the railroads refused to permit delivery of their cars to Seatrain, these complaints were filed assailing the car-service rule referred to and the rules, regulations, and practices of the railroads relating to the delivery, or the refusal to permit delivery of their cars to Seatrain as unlawful under section 1 (4) and (11), section 3 (1) and (3), and section 7 of the Interstate Commerce Act. Seatrain intervened in support of the complaints. Defendants moved to dismiss on the ground that we are without jurisdiction of the matters complained of, but in the report on further hearing in *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, after discussing fully the jurisdictional question, we said, at page 343:

It is our view that we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such routes are established pursuant to our order or voluntarily, to require the interchange of cars between the rail and water carriers, and to require that equality of treatment provided by section 3 (3) between connecting carriers, whether rail or water, in the facilities for the interchange of traffic, including through routes and the interchange of cars. We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist.

This record shows that Seatrain participates in through routes and joint rates with the Missouri Pacific system lines and the Texas & Pacific and their short-line connections, which carriers permit their cars to be delivered to Seatrain. Whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record. Whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided.

78 No. 25727, referred to in the above quotation, was subsequently decided, and in our report therein, Seatrain Lines, Inc., v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, we found that through routes either existed or should be established and maintained between a certain described portion of official territory and certain described portions of southwestern and southern territories. With respect to the interchange of cars with Seatrain, we said, at page 29:

> We have here found that in certain instances through routes between Seatrain and defendants now exist, and that, in those and other instances, the establishment and maintenance of through routes and joint rates are necessary in the public interest. The record here shows that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be by the interchange of the loaded cars. If defendants parties to the through routes and joint rates herein prescribed refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention either by a request for reopening Nos. 25728 and 25878, the complaints of the Hoboken Manufacturers' and Lower Coast referred to above, or by a new complaint.

There is no question raised by the parties that the through routes required in the above decision have not been established and maintained. Rule 4, however, continues in effect, and the defendants who, under said rule, filed notice with the association or its predecessor of their refusal to permit delivery of their cars to Seatrain have not withdrawn such refusals. Accordingly, complainants filed motions seeking reopening of these proceedings for the entry of an order requiring defendants to cease and desist from their refusal to permit interchange of their cars with Seatrain for the accomplishment of through transportation over through routes, and upon consideration thereof the proceedings were reopened for further hearing "to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc."

At the further hearing, over the objections of complainants, intervener Seatrain, and the Missouri Pacific and Texas & Pacific lines, defendants in the title proceeding, the association was permitted to intervene. On brief, complainant in the title proceeding and intervener Seatrain renew a motion made at the further hearing at the examiners' ruling permitting that intervention be reconsidered and that we hold that the association was not and is not entitled to be a party to the proceeding, exclude the evidence offered by it, and reject its brief. The motion rests upon two grounds, (1) that the allowance of the intervention was directly contrary to our Rules of Practice, and (2) that the association is not empowered to intervene in opposition to some of its own members.

79 Rule II (1) of our Rules of Practice provides that anyone entitled under the act to complain to us may petition for leave to intervene in any pending proceeding prior to or at the time it is called for hearing. It further provides that the petitioner shall set forth the grounds of the proposed intervention and the interest of the petitioner in the proceeding. The first ground of the motion rests upon the contention that the association has not set forth any "grounds" of its intervention nor shown any "interest * * * in the proceeding." Counsel for the association stated of record that he appeared under instructions from its board of directors, and asked leave to intervene on behalf of the association because of the duties and concern which it has with car-service and per diem rules. As is well known and shown by the record in these proceedings, the association, by agreement of all of the important railroads in the country, promulgates rules for car service and per diem and acts as agent for the railroads in car-service matters. Furthermore, as previously stated, the association's rule 4 is assailed in these proceedings as in violation of numerous provisions of the act. It seems clear that the association's interest in these proceedings is sufficient properly to permit its intervention.

The second ground of the motion rests upon the contention that it has not been shown that the association has the power to intervene. Intervener was not required by the Examiners to furnish such evidence, though requested to do so by movants. The association, under section 13 (1) of the act, is a party which may properly complain to us, and, accordingly, a party which may properly intervene in proceedings before us. Whether, under the by-laws of the association, the board of directors had power to authorize intervention in these proceedings is not a question that we should decide. For the purposes of intervention, we shall assume that the board acted within its authority.

The evidence introduced by the association was adopted as their own by numerous defendants, including the eastern lines, Southern Pacific lines, and most of the important southern lines; and brief, exceptions, and reply to exceptions were filed jointly by such defendants and the association. Hereinafter they will be collectively referred to as defendants.

The motion to deny the intervention of the association, exclude the evidence offered by it, and reject its brief is overruled.

The issue here presented is upon what terms and conditions, including compensation, defendants should be required to interchange their cars with Seatrain. This issue is limited to cars containing a portion, but not all, of the traffic transported by Seatrain, and to the interchange of the cars of some, but not all, of the defendants, as will presently appear.

80 Seatrain transports a considerable volume of foreign traffic between Hoboken and Havana and Belle Chasse and Havana. As to such commerce there are no through routes between defendants and Seatrain, and, as found in Investigation of Seatrain Lines, Inc., supra, we have no jurisdiction over the rates and practices of Seatrain in its strictly foreign commerce. Seatrain also handles considerable port-to-port traffic between Hoboken and New Orleans over routes to which complainants are parties but defendants are not. In this connection we said, in the case last referred to:

> We find nothing in the act imposing any duty upon or giving us any jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist.

The territories between which through routes now exist in connection with Seatrain are those between which through routes were required to be maintained in Seatrain Lines, Inc., *v.* Akron, C. & Y. Ry. Co., supra, namely, southwestern territory and a small portion of southern territory, on the one hand, and that portion of official territory within about 550 miles of the north Atlantic ports, on the other hand. Some of the defendants who refuse to permit delivery of their cars to Seatrain for movement in coastwise service, of which the Great Northern Railway Company and Northern Pacific Railway Company are examples, cannot, because of their location, be parties to these through routes.

Before discussing the issue, limited as described above, it should be stated that defendants here again contend, as they have throughout the proceedings, that we are without jurisdiction to require defendant railroads to interchange their cars with Seatrain. The question of our jurisdiction was fully discussed in Investigation of Seatrain Lines, Inc., supra, where we found that we had such jurisdiction when through routes between Seatrain and defendant railroads exist. The basis of our jurisdiction is there fully set forth, and nothing has been since advanced by defendants that would warrant a change in our views there expressed, to which we adhere.

The parties agree that the complaint raises the issue of the amount of compensation which defendants should receive for the use of their cars. There is, however, considerable difference of opinion between them as to whether the order requiring defendants to interchange their cars with Seatrain should be subject to other conditions. Defendants contend that such an order should be conditioned upon terms which will require Seatrain to assume the same responsibilities with respect to switching reclaims and cars held on connecting roads because of its inability to receive them as if it were a road-haul rail carrier. Complainants and

81 Seatrain contend that only the amount of compensation to be received by the owners of the cars is here in issue, and not how the car expense should be divided between Seatrain, its switching connections, and the road-haul rail carriers who may or may not be the owners of the cars, and, further, that, if it were in issue, detention of cars cannot be fairly charged to Seatrain unless similar detention is charged to the break-bulk water carriers. At the hearing they objected to the introduction of evidence on these points, and on brief, in exceptions to the examiners' proposed report, and at the oral agument they requested a further hearing in the event that we conclude that such questions are in issue.

It is our view that the period of time during which, and the manner in which, Seatrain should pay for the use of cars, the amount of compensation it should pay, and any other condition which the evidence adduced shows would be an appropriate condition to attach to an order requiring defendants to interchange their cars with Seatrain are questions here in issue. The proceedings will be reopened for further hearing.

COMMISSIONER MAHAFFIE dissents.

CASKIE, Commissioner, dissenting:

I do not concur in the majority findings that we have jurisdiction to compel the rail carriers to "interchange their cars with Seatrain." The reasons for my views are sufficiently set forth in my dissent in Seatrain Lines, Inc., *v.* Akron, C. & Y. Ry. Co., 266 I. C. C. 7.

I am authorized to state that COMMISSIONER ALLDREDGE joins in this expression.

82 *Exhibit H to amended petition*

Interstate Commerce Commission

No. 25728 [1]

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

Submitted June 12, 1941. Decided October 13, 1941

Upon further hearing (prior reports 206 I. C. C. 328 and 237 I. C. C. 97), terms and conditions, including compensation and period of time, upon which

[1] This report also embraces No. 25878, New Orleans & Lower Coast Railroad Company v. Akron, Canton & Youngstown Railway Company et al.

defendants which participate in through routes with Seatrain Lines, Inc., should be required to interchange their cars with Seatrain, determined.

Graham M. Brush, Frank J. Clark, W. J. Mathey, and Parker McCollester for complainant in No. 25728 and intervener corporation.

H. H. Larimore, J. S. Smith, and Toll R. Ware for complainant in No. 25878.

J. Carter Fort for intervener association.

J. R. Bell, R. D. Brooks, William C. Burger, Charles Clark, Francis R. Cross, Joseph F. Eshelman, F. W. Gwathmey, T. P. Healy, George W. Holmes, H. H. Larimore, Roland J. Lehman, Joseph Marks, G. H. Muckley, W. T. Pierson, E. A. Smith, Robert Thompson, and Toll R. Ware for defendants.

Second Report of the Commission on Further Hearing

Eastman, *Chairman:*

Exceptions to the report proposed by the examiners were filed jointly by (1) complainant in the title proceeding and intervener Seatrain Lines, Inc., hereinafter called Seatrain, and (2) certain defendants [2] and intervener Association of American Railroads, which we shall refer to as the association. Each group replied to the exceptions of the other, and oral argument has been held. Our conclusions differ in part from those recommended by the examiners.

The issue presented in these complaints is whether defendants should be required to turn over their cars to complainants for Seatrain's use, and, if so, upon what terms and conditions, including compensation. The questions of law and fact involved in this issue are set forth in considerable detail in the prior reports, 206
83 I. C. C. 328 and 237 I. C. C. 97, and the discussion there need not be repeated. In the latter report (pp. 101–102) we said:

The parties agree that the complaint raises the issue of the amount of compensation which defendants should receive for the use of their cars. There is, however, considerable difference of opinion between them as to whether the order requiring defendants to interchange their cars with Seatrain should be subject to other conditions. Defendants contend that such an order should be conditioned upon terms which will require Seatrain to assume the same responsibilities with respect to switching reclaims and cars held on connecting roads because of its inability to receive them as if it were a road-haul rail carrier. Complainants and Seatrain contend that only the amount of compensation to be received by the owners of the cars is here in issue, and not how the car expense should be divided between Seatrain, its switching connections, and the road-haul rail carriers who may or may not be the owners of the cars, and, further, that, if it were in issue, detention of cars cannot be fairly charged to Seatrain unless similar detention is charged to the break-

[2] Certain eastern lines, Southern Pacific lines, and most of the important southern lines.

bulk water carriers. At the hearing they objected to the introduction of evidence on these points, and on brief, in exceptions to examiners' proposed report, and at the oral argument they requested a further hearing in the event that we conclude that such questions are in issue.

It is our view that the period of time during which, and the manner in which, Seatrain should pay for the use of cars, the amount of compensation it should pay, and any other condition which the evidence adduced shows would be an appropriate condition to attach to an order requiring defendants to interchange their cars with Seatrain are questions here in issue. The proceedings will be reopened for further hearing.

Before discussing the questions above referred to, it should be pointed out that defendants and the association reiterate their contention that we are without power to require defendants to permit use of their cars by Seatrain. This question was fully discussed at pages 339–343 of our first report, and we expressed the view that—

we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such routes are established pursuant to our order or voluntarily, to require the interchange of cars between the rail and water carriers.

Defendants now urge that their argument has received additional support through the repeal of the former section 6 (13) (b) by the Transportation Act of 1940. Insofar as the enactment of the latter measure is concerned, we regard it as confirming our jurisdiction in the present premises, as Congress reenacted section 1 (4) with no material change in wording, presumably with full knowledge of the interpretation of that section followed in our first report in these proceedings.

By the record as augmented by the further hearing, the following questions are presented: (1) The compensation which the defendants required to interchange their cars with Seatrain
84 should receive for the use of such cars, and (2) to what other terms and conditions the interchange should be subject.

The association publishes rules governing the settlement for the use of railroad-owned freight cars between all common-carrier railroads, known as the code of per diem rules. Rule 1 thereof provides that the rate for the use of freight cars, to be known as the per diem rate, shall be $1 per car per day. This has been the per diem rate for many years. In Rules for Car Hire Settlement, 160 I. C. C. 369, 378, we said:

The per diem rate is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 percent interest on the investment. From the evidence of record, it is estimated that the cost of car ownership and maintenance averaged 83.812 cents per car day and $305.91 per car unit in the calendar year 1925, and approximately $1 per car day in that year for the periods cars were actually in service. Cars were idle a portion of the year, due in part to unserviceable condition, and in part to the fact that the supply of cars exceeded the demand.

The reasonableness of the per diem rate is not here questioned insofar as it applies between the railroads. Seatrain is willing to pay that rate, although it believes that the cost of maintenance is less when the cars are in its possession, because they are not in motion and therefore are not subject to the stress incidental to train movements, and are, in some degree, protected from the elements.

The association and defendants which join it on brief, hereinafter collectively referred to as defendants, contend that the transportation of railroad cars by Seatrain tends to accelerate the wear and tear to which such cars are subject. Repairs account for a large proportion of the cost of car ownership. Defendants concede that about 61.5 percent of the average running-repair expenses of 16 cents per car per day, or about 9.8 cents, are avoided when cars are not moving. They claim, however, that this saving is more than offset by increased maintenance costs due to the corrosive effect of the ocean atmosphere on steel cars. In support of this claim, defendants refer to the results of comparative tests which have been made to show the relation between rust of steel, such as that used in freight cars, and atmospheric conditions. These tests indicate that corrosion is considerably more rapid in the "full salt atmosphere" of Key West, Fla., than in the "semi-salt atmosphere" of Sandy Hook, N. J., or in the "sulphurous atmosphere" of Pittsburgh, Pa., and that the relatively pure atmosphere of State College, Pa., has the least corrosive effect to all. It is also shown that steel gondola cars used almost exclusively by the Long Island Rail Road Company deteriorate more rapidly than similar cars in general service of the Pennsylvania Railroad Company.

85 This evidence of susceptibility to rust is not, in our judgment, entitled to any important weight, in view of the fact that Seatrain has transported hundreds of shipments of iron and steel articles, including machinery, in open-top cars as well as in boxcars without special packing for protection against rust, and has had only occasional complaints from shippers on that account. Furthermore, it is seldom that any individual car makes more than one round trip of 12 days on a Seatrain vessel in a single year. The slight amount of rust which might be caused by such a trip would probably be little if any more serious than that which would be shown after exposure to a day or so of rainy or humid weather on a sidetrack.

Defendants contend that the per diem to be paid by Seatrain should cover not only the time a car is actually in its possession but an allowance for the time in which the car is idle or unproductive. They point out that much of the time railroad cars are necessarily not in use for the movement of freight, as when they are stored in anticipation of peaks of traffic, when they are

awaiting or undergoing repairs, when they are hauled empty, when they are being conditioned and placed for loading, and when they are in the possession of consignors for loading and of consignees for unloading. They urge that Seatrain, which has no cars of its own, should bear its full share of the cost of car ownership during the idle and unproductive time. They show that a car in general railroad use spends an average of only 1 day in "active and productive service" out of a period ranging, in accordance with the definition of such service, from 3.82 to 19 days. If such service is assumed to include only the time in which the car is moving under load in line haul, not including the time spent in intermediate switching, only 1 out of every 19 days is so spent. If it includes the time which elapses between placement of the car for the consignor and release of the car by the consignee, 1 out of 3.82 days is so spent. If the time the car is in the possession of the shipper and the consignee is excluded, the ratio is 1 out of every 7 days, and if the time spent in switching at origin and destination is also excluded, it is only 1 out of every 11 days.

As heretofore stated, we found in Rules for Car Hire Settlement, supra, that in 1925 the full cost of ownership and maintenance of cars was, on the average, approximately $1 each per day for the periods in which the cars were actually in service, not including the time they were idle because of lack of demand or unserviceable condition. The record indicates that the present cost does not exceed that amount. Defendants' contention seems to be that this idle time is a burden on the car owner for which he receives no compensation, either from use of the car or
86 from per diem payments by other lines. Inasmuch as the cars are made available for general railroad use, provision might well, upon this theory, be made in the car-hire rules for the sharing of this burden, but this is unnecessary, according to defendants, because very generally the railroads own cars and this general ownership accomplishes in itself a distribution of the burden. As aforesaid, Seatrain owns no cars.

A similar burden results from the fact that many cars must return empty after moving under load. While foreign lines pay per diem to the car owner for such empty movements over their rails, such receipts are offset by corresponding payments to the foreign lines. Defendants allege that Seatrain manages to avoid the movement of empty cars, thus escaping its share of this burden. They further allege that Seatrain escapes the burden resulting from the time consumed in the placement of cars for loading or in their removal after unloading, in the processes of loading and unloading, and in intermediate switching.

In these circumstances, defendants argue that Seatrain should pay per diem not only for the time that cars are in its possession,

but also "for any additional days when the car is idle or unproductive as an incident to its use by Seatrain on the day when it was in the possession of Seatrain." From their studies they express confidence in the "conclusion that approximately nine or ten idle days are so attributable" to the average use of a car by Seatrain, and hence that it should pay per diem at the rate of $10 per day.

So far as car ownership is concerned, Seatrain has offered of record to acquire cars for interchange with the railroads if and when such acquisition is desirable from the standpoint of the car supply of the country. The witness from Car Service Division who testified on behalf of the association was unwilling, upon inquiry, to state that such acquisition would be desirable under the then existing circumstances. It appears, also, that Seatrain rents a substantial number of privately owned cars.

So far as the movement of empty cars is concerned, Seatrain holds itself ready to move in the home direction cars which it has moved in the opposite direction under load. It argues that it should not be penalized because it happens to have a well-balanced traffic and consequently can furnish loads for many such cars, or because the delivering railroads prefer to return others by rail. Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense.

87 Of equal importance is the fact that as between railroads there is no such balancing of burdens as defendants would imply. Not all railroads own cars. Granting that the more important are car owners, there is no reason to believe that the ownership is always proportionate to car use. There are also railroads which, by reason of location, are essentially bridge carriers with much less than the normal amount of car origination, termination, and intermediate switching. There are railroads which, by reason of well-balanced traffic, have much less than the normal proportion of empty-car movement. The car-hire rules do not differentiate between railroads because of such differences in conditions. It is also the fact that these rules have always been applied uniformly where cars are interchanged voluntarily with water lines such as the various so-called car ferries. For almost 4 years prior to the inauguration of its coastwise service, the railroads freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service at the regular per diem rate. Moreover, a large number of railroads operating in official and southwestern territories, some of which are defendants in these

proceedings, have voluntarily consented to the delivery of their cars to Seatrain at that rate. Also, 19 defendants which have not consented to the use of their cars by Seatrain in its coastwise traffic permit such use in its Cuban traffic at the prevailing per diem rate.

In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the $1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars is decreased approximately 10 cents per day while they are in its possession.

As before stated, Seatrain is willing to pay a per diem of $1 per car for the time during which the cars are in its actual possession, but is not willing to pay this per diem while the cars are being held at the ports awaiting arrival of its vessels. At the time of the hearings, the schedule of its sailings between Hoboken, N. J., and Belle Chasse, La., was weekly in each direction. In these circumstances, necessarily some cars routed for movement in its vessels reach the ports in advance of sailing dates. Complainants, as terminal switching lines, likewise refuse to assume payment of per diem on cars held at the ports for that reason. Seatrain and complainants renew their argument that, since this situation presents an issue which involves only those defendants which connect directly with the complainants, it could not appropriately be considered in passing upon the amount of per diem to which the car-owning defendants are entitled. We adhere, however, to our view that the period of time during which, and the manner in which, Seatrain should pay for the use of cars should be determined in these proceedings insofar
88 as these questions are in dispute. Since the situations with respect to Hoboken and Belle Chasse are different, we shall discuss them separately.

Complainant in No. 25878, hereinafter called the Lower Coast, which makes the interchange at Belle Chasse, has a tariff providing that it will receive cars from connecting railroads for movement over Seatrain only upon written delivery orders from Seatrain and then only subsequent to 12:01 a. m. of the day prior to the scheduled sailing date from that point. In this way the Lower Coast obligates itself to pay only 1 day's per diem, for which it is reimbursed through the payment to it by its line-haul rail connections of a switching reclaim averaging 54 cents per car under the prevailing per diem rule governing the payment of reclaims to an intermediate switching road, defined as "a road handling a car, including a trap or ferry car, from one railroad, steamship, ferry or barge line, to another railroad, steamship, ferry or barge line."

Defendants which connect with Seatrain through the Lower Coast (with negligible exceptions) urge that they should not be required to assume per diem payments on cars held at New Orleans to await Seatrain sailings. The average detention of 2,180 cars held by these defendants for this reason in the last 6 months of 1938 was 3.3 days per car. They urge that the payment of per diem under such circumstances should be governed by car-hire rule 15, which provides that "a road failing to receive promptly from a connection cars on which it has laid no embargo, shall be responsible to the connection for the per diem on cars so held for delivery."

Seatrain contends that its inability to receive cars promptly must be regarded as inherent in the nature of all water lines, which ordinarily have a limited number of sailings and are therefore unable to provide as frequent service as a railroad. It stresses the fact that at New Orleans and other ports, the railroads commonly assume the per diem expense on cars containing freight to be interchanged with the break-bulk steamer lines and urges that failure of defendants to assume per diem expense on cars held for delivery to Seatrain would be unduly prejudicial to it. Seatrain also points out that demurrage rules commonly provide for a greater amount of free time on export, import, and other water-borne freight than on domestic traffic in recognition of disabilities of water lines because of less frequent service. The expenses which railroads incur incident to the detention of equipment at the ports in holding water-borne freight, in Seatrain's view, "are expenses for which the railroads are compensated by their freight rates and which come within the railroads' undertaking."

89 At New Orleans, carload freight which is interchanged with a break-bulk steamer line must, of course, be unloaded from or loaded in railroad cars, and when the traffic moves on joint water-rail rates, in line-haul railroads perform this work, the cars remaining in their actual or constructive possession. Presumably that fact is taken into account in determining their divisions. It is not clear from the record whether the railroads at New Orleans unload carload freight from cars and hold it in storage until the steamer is ready to receive it or hold the cars and defer the unloading until that time. There is evidence that the detention of railroad cars used for traffic interchanged with the break-bulk lines at New Orleans may be somewhat less than that of the cars interchanged with Seatrain. In January, March, and May, 1939, the detention at New Orleans of 1,201 cars containing freight delivered by defendant line-haul carriers at that port to break-bulk steamer lines averaged 0.19 day on the rails of those carriers plus 2.39 days on the terminal switching lines, making a total of 2.58 days. This compares with

the average shown above of 3.3 days per car in the case of interchange with Seatrain. However, the periods used in arriving at the averages were not the same, and the lower average for traffic interchanged with the break-bulk lines may have been caused by the fact that the freight was to some extent unloaded and held in storage, thus releasing the cars. As Seatrain points out, the facilities for and the expense of such storage constitute a burden upon the railroads analogous to the expense incident to detention of the cars.

In No. 25728, which involves the interchange at Hoboken, there is at present no similar controversy with the defendant line-haul railroads which connect with Seatrain through complainant, hereinafter called the Hoboken. Those defendants are the New York Central Railroad Company, the Erie Railroad Company and its trustees, the Delaware, Lackawanna & Western Railroad Company, the Central Railroad Company of New Jersey and its trustees, and the Lehigh Valley Railroad Company. They have entered into an agreement with complainant, under which, in effect, they undertake to assume the per diem charges and other expense of detention of cars held at Hoboken awaiting delivery to Seatrain.

Prior to January 1, 1937, the Pennsylvania Railroad Company connected directly with the Hoboken, but it has not been a direct connection since that date. Consequently the Pennsylvania is not interested in the questions of the Hoboken's reclaims for the future. It has, however, had a controversy of long standing with the Hoboken involving the payment of per diem and reclaims on Seatrain traffic prior to January 1, 1937. That controversy is the subject of a suit which the Pennsylvania has
90 brought against Seatrain and the Hoboken in the United States District Court for the Southern District of New York.

This matter can be viewed in two different ways.

On the one hand, payment of rental for use of freight cars by railroads other than those owning the cars has been an established transportation practice for more than 70 years. Under the system of per diem charges now in force, every line-haul rail carrier using the cars of another pays the owner according to the time covered by its use of the car. The fact or the amount of the payment is not conditioned on the profitability of that use. A break-bulk water carrier does not have occasion to use railroad cars and accordingly is not required to pay per diem rental. Seatrain's operation is anomalous in that it requires the use of railroad freight cars. The purpose of these complaints, broadly stated, is to permit it to use railroad cars owned by others upon terms comparable with those available to railroad carriers generally. We

have found that it is entitled to the privilege of such use, and, on the theory stated above, it should also be willing to assume the obligations incident thereto.

Under the tariff rule of the Lower Coast above referred to, the connecting line-haul defendants must hold cars containing freight to be transported by Seatrain until the latter is prepared to take them into its physical possession. If these are foreign-line cars, the delivering defendant lines are obliged to pay compensation to the actual owners of the cars for the period of this detention. To the extent that system cars of the delivering line are involved, the owning line is obliged by the circumstances of the case to forego the opportunity to use the cars in its own service or get per diem for their use by other carriers. See Chrysler Corp v. New York Central R. Co., 234 I. C. C. 755, 762. The detention being one attributable to Seatrain's mode of operation, on this view of the matter defendants should not be compelled to assume the cost of this detention.

On the other hand, it is clear that, on traffic interchanged with the break-bulk lines, defendants bear a burden through car detention which is analogous to the burden which they would bear on traffic interchanged with Seatrain if the latter should pay per diem only when the cars are in its actual possession. It is also clear that this car detention in the case of traffic interchanged with water lines, caused by their infrequent service as compared with rail service, is a disability which has always been recognized and which is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic. From this point of view, such detention is a matter for consideration in connection with these rates and divisions, rather than in determining the per diem rates which Seatrain should pay.

91 As we see it, the net result will or should be much the same in either event. If defendants are relieved by per diem payments of Seatrain from a burden of car detention which they bear on traffic interchanged with the break-bulk lines, they will, theoretically, be entitled to relatively lower divisions of through rail-water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination. Considerable difficulty, however, would be encountered in making any such adjustment. From a practical point of view, therefore, the simple and desirable way of handling the matter is to leave the burden of car detention with defendants when traffic is interchanged with Seatrain just as when it is interchanged with the break-bulk lines. Under this method of handling, Seatrain would pay per diem only when the cars are in its actual possession or are being held for its use awaiting loading at the ports. This view

is reinforced by the fact that Seatrain's line-haul connections at Hoboken have agreed to this method. Accordingly, we shall make no findings which would have the effect of forcing Seatrain to assume the payment of reclaim to complainants on cars being held at the ports for delivery to its vessels.

In our last report we stated that there were no through routes between points on defendant's line and Havana in connection with Seatrain and that for that reason we could not require defendants to permit their cars to be used by Seatrain in its Cuban traffic. Complainant in No. 25728 and Seatrain now urge that we erred—

in not concluding that the Commission does have jurisdiction to require the nonconsenting railroads to permit the delivery of their cars to Seatrain for the purpose of handling freight to Cuba, this jurisdiction resting on two grounds: First, the jurisdiction to prevent discrimination against Seatrain and in favor of the Florida East Coast Car Ferry, to which the delivery of the cars of all railroads is permitted without restriction or condition; and, second, the Commission's jurisdiction to prescribe just and reasonable rules as to car service to be observed within the United States, the delivery of cars to Seatrain taking place within the United States.

In each complaint it is alleged that—

the failure of the defendants to permit the complainant to deliver cars owned by them to Seatrain Lines, Inc., or other similar water carriers while said defendants contemporaneously permit and consent to the delivery of their cars by the Florida East Coast Railway Company to the Florida East Coast Car Ferry Company and by other railroads to other steamships or water carriers is and will continue to be unlawfully and unduly prejudicial to complainant and preferential to the Florida East Coast Railway Company and said other railroads.

In St. Louis, B. & M. Ry. Co. v. Brownsville Nav. District, 304 U. S. 295, 300, the Supreme Court said:

The [Interstate Commerce] Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law,
92 regulation, or tariff to furnish cars for transportation in Mexico. But that freedom from obligation does not imply, that in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States.

The allegations here are that in furnishing equipment for transportation beyond the United States over the Florida East Coast companies, defendants cause undue prejudice and preference as between common carriers by railroad in the United States. We have construed section 3 (1) as not comprehending situations of prejudice or preference between common carriers, Kansas City S. Ry. Co. v. Kansas City Term. Ry. Co., 211 I. C. C. 291, 297. It is not clear whether these allegations also were intended to raise an issue under section 3 (4), but, assuming that they were, we do not regard that paragraph as applicable to situations of this kind. We therefore adhere to the view that we have no power to make a

finding which directly or indirectly would require defendants to turn over their cars to complainants for use by Seatrain in its Cuban traffic.

FINDINGS

1. We find that the defendants in these proceedings listed in the appendix, according as they participate in through routes with complainants and Seatrain, have failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operations, in violation of section 1 (4) of the Interstate Commerce Act, by refusing to agree to the interchange of freight cars owned by them with complainants for delivery to Seatrain for use in interstate commerce between points in the United States.

2. We find further that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain.

Defendants urge that Seatrain should be required to make report of its detention of cars directly to the owning lines and to make settlement of per diem charges directly with them instead of through complainants. Seatrain is willing to do this, but points out that apparently this method of settlement would require it to become a party to the car-service agreement in which the subscribing railroads have agreed to abide by the per diem rules. Since there is no difference of opinion as to the desirability of making direct settlement, no finding on this point appears
93 to be necessary, and the method of accomplishing the result will be left to the intervener, Association of American Railroads.

An appropriate order will be entered.

LEE, *Commissioner*, dissenting in part:

I concur in the report except insofar as it compels the defendants in No. 25878 which connect with complainant at New Orleans to bear the per diem payments on cars held for delivery to Seatrain. It is my view that Seatrain should be subject to per diem rule 15 to the same extent as a rail carrier.

PATTERSON, *Commissioner*, dissenting:

In my opinion, Seatrain, contrary to the finding of the majority of the Commission in Investigation of Seatrain Lines, Inc., 195

I. C. C. 215, is a car ferry operated in connection with railroads, and, accordingly, a railroad within the meaning of section 1 of the Interstate Commerce Act.

Whether Seatrain is a railroad or, as the majority found, a water carrier, it cannot successfully operate except by transporting freight in railroad cars. It owns no cars, and we are here requiring defendants, against their will, to interchange their cars with it. We should not require defendants to make such interchange on less favorable terms and conditions than those on which they interchange cars with each other. Seatrain, as the majority has found, should pay the same daily rate of rental as the railroads pay each other. A railroad that is unable to accept a car from its rail connections pays the car rental which accrues because of its inability to accept such car. Seatrain should do likewise. In other words so far as responsibility for car rental is concerned, Seatrain should be treated exactly the same as a line-haul rail carrier, receiving all of the privileges and assuming all of the responsibilities that the railroads receive or assume in their relations with each other.

I am authorized to state that COMMISSIONERS MAHAFFIE, ROGERS, and ALLDREDGE join in this expression, except that COMMISSIONERS ROGERS and ALLDREDGE regard Seatrain as a water carrier.

APPENDIX

Defendants in these proceedings

The Algoma Central and Hudson Bay Railway Company; The Ann Arbor Railroad Company (Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers); Atlanta and West Point Rail Road Company; The Western Railway of Alabama; Georgia Rail Road & Banking Company (Operated as the Georgia Railroad by Lessees Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company); The Baltimore and Ohio Railroad Company; Bessemer and Lake Erie Railroad Company; Boston
94 and Maine Railroad; Canadian National Railway Company; Canadian National Railways; Canadian Pacific Railway Company; Central of Georgia Railway Company; Central Vermont Railway, Inc.; The Chesapeake and Ohio Railway Company; Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees); Detroit, Toledo and Ironton Railroad Company; Florida East Coast Railway Company (W. R. Kenan, Jr., and S. M. Loftin, Receivers); Great Northern Railway Company; The Long Island Rail Road Company; Maine Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; The Pittsburgh & West Virginia Railway Company; Richmond, Fredericksburg and Potomac Railroad Company; Seaboard Air Line Railway Company (L. R. Powell, Jr., E. W. Smith, and Henry W. Anderson, Trustee); Spokane International Railway Company; Spokane, Portland and Seattle Railway Company; Temiskaming and Northern Ontario Railway; The Virginian Railway Company; Wabash Railway Company (Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers); The Alabama Great Southern Railroad Company; Alabama, Tennessee & Northern Railroad Corporation; Atlantic Coast Line Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Indianapolis and Louisville Railway Company; The

Cincinnati, New Orleans and Texas Pacific Railway Company; Louisville & Nashville Railroad Company; The Nashville Chattanooga & St. Louis Railway; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; Southern Railway Company; Southern Pacific Company; Southern Pacific Railroad Company of Mexico; Texas and New Orleans Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis and Omaha Railway Company; Illinois Central Railroad Company; Northern Pacific Railway Company; Union Pacific Railroad Company.

95 *Exhibit I to amended petition*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of October, A. D. 1941

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report together with the prior reports, 206 I. C. C. 328 and 237 I. C. C. 297, are hereby referred to and made a part hereof:

It is ordered, That the defendants listed in the appendix to said report on further hearing, according as they participate in through routes with complainants and Seatrain Lines, Inc., in inter-

96 state commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.

It is further ordered, That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day; provided, however, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

And it is further ordered, That this order shall continue in effect until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

97 *Exhibit J to amended petition*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of March, A. D. 1942.

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

Upon further consideration of the record in the above entitled proceeding, and upon consideration of petition of defendant, Gulf, Mobile & Ohio Railroad Company et al for reconsideration and modification of order; petition of defendant Atlantic Coast Line Railroad Company et al for modification of findings and order; petition of defendant The Pennsylvania Railroad Company for clarification of finding 1; and petition of New Orleans Public

Belt Railroad for leave to intervene and for reconsideration and modification of findings and order:

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission.

[SEAL] W. P. BARTEL,
Secretary.

98 In District Court of the United States

[Title omitted.]

Order convening three judge statutory court

April 18, 1942

This cause coming on for hearing on application for an interlocutory injunction and a permanent injunction and in accordance with the provisions of an Act of Congress of October 22, 1913 (38 Stat. 220), it is

Ordered, that the following judges be called to my assistance to hear and determine said application for an interlocutory injunction and for a permanent injunction: United States Circuit Judge John Biggs, Jr., and United States District Judge William F. Smith, and that the time and place fixed shall Court Room No. 2 U. S. District Court, P. O. Building, Newark, N. J., at 11:00 a. m. eastern wartime, on May 23, 1942.

Dated April 18, 1942.

GUY L. FAKE,
United States District Judge.

99 In District Court of the United States

[Title omitted.]

ORDER TO SHOW CAUSE

April 18, 1942

Whereas the above entitled action is pending for an interlocutory injunction and for a final decree to set aside and annul the order of the Interstate Commerce Commission made on October 13, 1941, in Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company et al. Docket No. 25728, and in New Orleans and Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railway Company, et al., Docket No. 25878, to become effective on February 2, 1942, which effective

date by subsequent orders of the said Commission was postponed until June 1, 1942, and to set aside and annul the order of the Interstate Commerce Commission made therein on March 2, 1942, and so much of the order of the Interstate Commerce Commission made therein on February 5, 1935, as incorporates and makes a part thereof the finding that the Commission had authority to require rail carriers to interchange cars with water carriers; and

Whereas a verified amended petition praying for an interlocutory injunction and for a final decree enjoining, setting aside, annulling and suspending the aforesaid orders of the Interstate Commerce Commission and permanently enjoining the enforcement of said orders has been duly filed with the Clerk of this court; and

100 Whereas, it is made to appear from said verified amended petition that the petitioners may be entitled to the interlocutory injunction and final decree therein prayed for, it is

Ordered that the respondent herein, the United States of America, appear before the undersigned and two other judges at least one of whom being a United States Circuit Judge, said judges having been called by the undersigned to his assistance to hear and determine said petition in accordance with the provisions of an Act of Congress of October 22, 1913 (38 Stat. 220) at the United States Court House in Newark, N. J. P. O. Building on May 23rd, 1942, at 11:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard and then and there show cause before said court and judges so convoked or so called together why the aforesaid application for an interlocutory injunction should not issue, and it is further

Ordered that a copy of this order and the amended verified petition be served forthwith upon the Attorney General of the United States and on the Interstate Commerce Commission by registered mail or by personal delivery and upon the United States Attorney or Assistant United States Attorney at Trenton, New Jersey, not less than five days before the day herein set for said hearing.

Dated April 18th, 1942.

GUY L. FAKE,
United States District Judge.

101 In District Court of the United States

[Title omitted.]

Application for leave to intervene

Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., submit herewith their application for leave to inter-

vene as additional parties defendants in the above proceeding, and in support of their application respectfully show:

I. Hoboken Manufacturers Railroad Company is a corporation organized and existing under the laws of the State of New Jersey, with its principal office at Hoboken, New Jersey, and its engaged in business as a common carrier of freight by railroad and partly by railroad and partly by water in interstate commerce subject to the Interstate Commerce Act (34 Stat. L. 584) and Acts amendatory thereof and supplementary thereto.

II. Seatrain Lines, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 39 Broadway, New York, N. Y., and is engaged in business as a common carrier of freight by water and partly by railroad and partly by water in interstate commerce subject to the Interstate Commerce Act (34 Stat. L. 584, and Acts amendatory thereof and supplementary thereto.

102 III. The suit having the caption above stated, in which applicants desire to intervene, is a suit brought to suspend or set aside in whole or in part certain orders of the Interstate Commerce Commission referred to and described in the petition of the petitioners in said suit.

IV. Section 212 of the Judicial Code provides in part "that the Interstate Commerce Commisison and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party."

V. Applicants have an interest in this suit and will be affected by the decision or decree herein in that the orders of the Interstate Commerce Commisison herein sought to be set aside and annulled were made in proceedings, to wit: Docket No. 25728 Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company, et al., in which Hoboken Manufacturers Railroad Company was the complaining party and in which Seatrain Lines, Inc., intervened as a party in interest in support of the complaint therein, and Docket No. 25878 New Orleans & Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railway Company, et al., in which both applicants herein intervened as parties in interest in support of the complaint therein.

VI. Applicants therefore desire to intervene as of right and to join in said suit in opposition to the prayer of the petition, in support of the validity of the orders of the Interstate Commerce Commission whose suspension or annulment is sought, and in order

to assert the defenses set forth in their answer to the petition, a copy of which is attached hereto.

103 Wherefore, applicants pray that an order may be entered allowing them to intervene in said suit as additional party defendants in the same and to answer the petition, and for such other and further relief in the premises as may be just, and applicants will ever pray, etc.

Dated, New York, N. Y., May 13, 1942.

DUANE E. MINARD,
1180 Raymond Boulevard,
Newark, New Jersey.
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25 Broadway, New York, N. Y.
Attorneys for Applicants for Leave to Intervene.

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LORD, DAY & LORD,
25 Broadway, New York, N. Y.,
Of Counsel.

104 In District Court of the United States

[Title omitted.]

Answer of Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., Interveners-Defendants, to the amended petition.

Now come Hoboken Manufacturers Railroad Company, hereinafter called the Hoboken, and Seatrain Lines, Inc., hereinafter called Seatrain, and having been allowed to intervene as defendants in the above-entitled proceeding, each for itself respectively answers the allegations of the amended petition, as follows:

I. It admits the allegations of paragraph I.

II. It admits that petitioners are common carriers of property by railroad subject to the Interstate Commerce Act, and alleges further that petitioners as common carriers are engaged in connection with Seatrain in the transportation of property in interstate commerce between points in the United States partly by railroad and partly by water under common arrangement for continuous carriage or shipment, but it is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph II.

105 III. It admits the allegations of paragraph III, except that it denies that the jurisdiction of the court to hear this suit depends upon its general equity jurisdiction.

IV. It admits the allegation of paragraph IV and alleges further that the Hoboken was also engaged in connection with petitioners and Seatrain in the transportation of property in interstate commerce between points in the United States partly by railroad and partly by water under common arrangement for continuous carriage or shipment.

V. It admits the allegations of paragraph V and alleges further that the Lower Coast was engaged in connection with Seatrain, petitioners, and other trunk-line railroads in the transportation of property in interstate commerce between points in the United States partly by railroad and partly by water under a common arrangement for continuous carriage or shipment.

VI. It admits the allegations of paragraph VI except that it denies that the vessels of Seatrain operating between Hoboken, N. J., and Belle Chasse, La., always operate or always have operated via Havana, Cuba, or in and through Cuban waters, or that they have always docked at Havana, Cuba, and there discharged or taken on cargo, and it alleges further that it is engaged with petitioners and Hoboken in the transportation of property in interstate commerce between points in the United States partly by railroad and partly by water under common arrangement for continuous carriage or shipment.

VII. Answering paragraph VII, it admits that on October 6, 1932, Seatrain began operating in service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, as well as in service between Hoboken, N. J., and Belle Chasse, La., not stopping at Havana; it admits that a few days prior to October 6, 1932, defendant Hoboken and defendant Seatrain each received a letter written on the letterhead of the Trunk Line Association, so-called,
and purporting to be jointly on behalf of petitioner, The
106 Pennsylvania Railroad Company, and others, stating that
the railroads, on whose behalf the letter was written, did not consent to the delivery of their cars to Seatrain, and except as so expressly admitted, it denies the allegations of paragraph VII.

Further answering paragraph VII, it alleges, as the Commission found on uncontradicted evidence in Investigation of Seatrain Lines, Inc., 206 I. C. C. 328 (Exhibit C attached to the Amended Petition):

"For almost four years prior to the inauguration of this service (the inauguration of Seatrain's service to and from Hoboken in October, 1932) cars were delivered to Seatrain or its predecessor Overseas for movement from New Orleans to Havana without objection by defendants (including petitioners). During that period 18,159 loaded cars moved over that route, upon which per diem at the per diem rates of the American Railway Association

was paid to the owning roads by the Lower Coast for the time they were in its possession or that of Seatrain, Overseas, or Cuban railroads. During that period there was no car-service rule conditioning delivery of cars to Seatrain or Overseas on the consent of the owners of the cars."

The uncontradicted evidence before the Commission further shows that in the Spring of 1932 or some time prior thereto, Seatrain entered into negotiations and discussions with petitioner, The Pennsylvania Railroad Company, and other railroads regarding the possibility of and arrangements for a proposed service to and from New York Harbor; that said petitioner and other railroads, well knowing that the essential characteristic of Seatrain's service was the through movement of freight in railroad cars and that the delivery of their cars to the vessels of Seatrain and their use for through and continuous carriage by railroad and Seatrain would be required in connection with such service, represented that they desired Seatrain to inaugurate such service and would co-
operate in every way with Seatrain in the operation of such
107 service; that, in reliance upon these representations, Seatrain contracted for and cause to be constructed two new vessels with which to operate the service from and to New York Harbor, and caused a terminal, including a crane for the transfer of cars, to be constructed on the property of the defendant Hoboken and the defendant Hoboken caused its tracks to be rearranged and its facilities to be altered for the purpose of handling freight to be interchanged with the vessels of Seatrain in railroad cars; that on or about September 20, 1932, Mr. W. C. Kendall, Chairman of the Car Service Division of the American Railway Association, the exclusive agent of the railroad members of the Association, including petitioners, in all matters relating to the use and interchange of their freight cars, represented to Seatrain and Hoboken that the interchange of cars owned by petitioners and others with the vessels of Seatrain would be permitted provided Hoboken should assume responsibility for the payment of car rental or so-called per diem to the owners of cars at the established rate of $1.00 per day during the time cars were in Seatrain's possession and that Seatrain should enter into a contract with Hoboken agreeing to pay Hoboken such car rental in order to enable Hoboken to pay the owners of the cars and agreeing to handle the cars in accordance with the lawful rules of the American Railway Association; and that as requested by said Kendall and in reliance upon the said representations Hoboken and Seatrain thereupon did all of these things, and have continuously done so to the present time.

VIII. Answering paragraph VIII, it admits the promulgation by the American Railway Association of so-called Car Service

Rule 4 and admits the language of said rule as quoted in the amended petition; it admits that petitioners, Hoboken and Lower Coast, are subscribers to the Car Service and Per Diem Agreement, and have thereby agreed to abide by the rules promulgated by the American Railway Association, but only insofar as said rules are lawful; it denies the allegation of the last sentence of paragraph VIII, except that it admits that petitioners, The
108 Pennsylvania Railroad Company; Boston and Maine Railroad Company; Merrel P. Callaway, Trustee of Central of Georgia Railway Company; Great Northern Railway Company; The Long Island Railroad Company; Main Central Railroad Company; and Norfolk and Western Railway Company, have not filed with the American Railway Association or its successor, the Association of American Railroads, their consents under Car Service Rule 4 for the delivery of their cars to Seatrain; but it alleges that the other petitioners—namely, Atlantic Coast Line Railroad Company; Louisville and Nashville Railroad Company; Northern Pacific Railway Company; Legh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company; Southern Railway Company; Southern Pacific Company; Texas and New Orleans Railroad Company; and Union Pacific Railroad Company—Although they have not filed with the American Railway Association or its successor, the Association of American Railroads, under Car Service Rule 4, their consents for the delivery of their cars to Seatrain in the performance of through transportation over through routes between points in the United States, have consented and now do consent and have filed with the American Railway Association or the Association of American Railroads their consents to the delivery of their cars to Seatrain for transportation to and from Cuba involving interchange with railroads in Cuba; and it alleges further that petitioner, The Pennsylvania Railroad Company and other petitioners, although frequently requested by the Hoboken and Seatrain if they do not choose to have their own cars used for through transportation via and delivery to Seatrain to furnish to shippers for loading shipments for through movement via Seatrain cars of other railroads which have consented to such use, have nevertheless furnished to shippers for loading freight under through bills of lading consigned over through routes via Seatrain cars of their own ownership and have tendered the freight to the Hoboken for interchange with Seatrain in the performance and completion of the through trans-
109 portation contracted for by said petitioners loaded in their own cars thus furnished by them; and, except as so expressly admitted, denies the allegation of paragraph VIII.

Further answering paragraph VIII, it alleges that in Investigation of Seatrain Lines, Inc., 206 I. C. C. 328, the Commission, on uncontradicted evidence, found:

"* * * * No railroad had refused to permit delivery of their cars to any of the other 11 water lines listed in a circular of the Association as coming within the intendment of the rule (Car Service Rule 4). The rule does not apply to cars delivered to water lines for movement entirely within harbor or switching-district limits.

"While the rule does not specifically mention Seatrain, it is clear that its sole object is to prevent the diversion of traffic from the all-rail routes to Seatrain. The Association's circular submitting the proposed rule to its membership shows that such submission was occassioned by the inauguration of Seatrain's coastwise service."

IX. It admits the allegations of paragraph IX except that, for the substance and contents of the answers filed by petitioners to the complaint of the Hoboken in Docket No. 25,278, it refers to said answers and asks leave to produce them or copies thereof if material to the issues here.

It alleges further that none of the petitioners by their answers alleged that the established per diem rate of $1.00 per day for their cars while in Seatrain's possession would be inadequate compensation for the use of such cars as facilities for the performance of through transportation and none of them asserted the inadequacy of compensation, which since 1929, they had accepted on their cars delivered to Seatrain and its predecessor, as the ground for their refusal or as justification for Car Service Rule 4.

X. It admits the allegations of paragraph X.

XI. It admits generally the allegations of paragraph XI, except that for an accurate statement of the proposed
110 report of the Examiner of the Commission dated March 30, 1934, it refers to said report.

It alleges further that at the hearings in November 1933, referred to in paragraph XI, the Hoboken and Seatrain offered and there was received a large amount of evidence, which was uncontradicted, that the use of cars by Seatrain involved substantially less expense to the car owners than their use by railroads, that the going per diem rate of $1.00 per day provided proportionately greater net compensation to car owners for their cars when in Seatrain's possession than for their cars when incurring the shocks and hazards of railroad yard and line-haul operations and that the Seatrain service greatly reduced empty car mileage by providing a revenue earning use for cars which would otherwise remain idle or have to be hauled empty, and

thereafter counsel for the railroads which were defendants before the Commission, including petitioners, on brief and oral argument before the Commission, stated that said railroads were not seriously concerned with the amount of the per diem or compensation for their cars.

XII. It admits generally the allegations of paragraph XII, except that it refers to the report and orders of the Commission mentioned in paragraph XII for a complete and accurate statement of the contents thereof.

XIII. It admits the allegations of paragraph XIII.

XIV. It admits generally the allegations of paragraph XIV, except that it refers to the reports of the Commission therein cited for a full and accurate statement of the contents thereof and of the findings of the Commission.

In particular it alleges that the Commission found further, as shown in its report (Exhibit C attached to the Amended Petition) as follows:

"Public interest.—The Seatrain method of transportation was developed for the purpose of eliminating the expenses, disadvantages, and delays incident to the transfer of lading
111 between railroad freight cars and the holds of vessels. By means of the loading machinery described in the original report, loaded freight cars are lifted from the tracks of the connecting railroad at one port, deposited on the Seatrain vessel, which carries them to the port of destination, lifted from the vessel to the tracks of the connecting railroad, and moved to final destinations without having the contents disturbed in any way. The service performed by Seatrain is generally conceded to be superior to that afforded by steamships of the usual type.

"By using Seatrain service, shippers obtain what is practically equivalent to all-rail service, except for the somewhat longer time in transit, at rates less than the all-rail rates. They are also saved packing and handling expenses necessarily incurred if the movement is over the break-bulk water routes. In addition, certain classes of bulk freight which cannot be handled in vessels of the usual type, and which cannot bear the all-rail charges, can be handled by Seatrain, and thus markets opened up for them which theretofore could not be reached.

"Representatives of the Manufacturers Association of Connecticut, the New England Traffic League, the Chambers of Commerce of Boston, Mass., and Fort Worth and Dallas, Tex., the Fort Worth Freight Bureau, and the Southern Pine Association testified that Seatrain service is of advantage to the convenience and commerce of their members. Similar representations were made on behalf of several individual shippers.

"It seems clear from the evidence of record that the operation of Seatrain is in the public interest and is of advantage to the convenience and commerce of the people."

XV. It admits the allegations of paragraph XV, except that it refers to the report of the Commission, dated January 28, 1938, in Docket No. 25727, Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, for a complete and accurate state-
112 ment of the decision, findings, conclusion, and order of the Commission in said proceeding. It alleges that in said proceeding the railroads, defendants therein, including petitioners, challenged the jurisdiction of the Commission to require them to establish and maintain through routes with Seatrain on the ground that Seatrain's vessels operating between New York Harbor (Hoboken) and New Orleans (Belle Chasse) ordinarily called at Havana, Cuba, and passed through Cuban waters; that on this point the Commission found and determined as follows (Report, pp. 14–16):

"In Chicago, R. I. & P. Ry. Co. v. United States, 74 U. S. 29, the Supreme Court sustained our order requiring the establishment of through routes and joint ocean-rail rates on cotton from points in Oklahoma to New England destinations in connection with the Mallory and Morgan steamship lines. With respect to section 6 (13) the court said at page 35:

> This addition to the Interstate Commerce Act materially extends the jurisdiction of the Commission in respect of rail and water transportation and the carriers engaged in it, whenever property may be or is transported in interstate commerce by rail and water by common carrier or carriers. * * * This and other provisions emphasize the intention of Congress to broaden the control of the Interstate Commerce Commission over rail and water transportation and, generally, to extend the regulatory power of that body over all such transportation in the public interest.

"It does no violence to the fair meaning of the language employed in section 6 (13) to hold that it means that we have jurisdiction over a rail-and-water movement from one point in the United States to another point in the United States that is not entirely within the limits of a single State, irrespective of whether that part of the transportation by water is entirely through territorial waters of the United States, or partly on the high seas, or partly through territorial waters of a foreign country. If it had been the intention of Congress to limit our jurisdiction to that part of the water transportation that takes place within the waters of the United States, it is but fair to assume that it would have specifically so provided, as it did in section 1 (1) with respect
113 to rail transportation. That this construction of section 6 (13) is warranted is strengthened by the consideration that, during approximately 25 years this provision of the law has been in effect, we have on numerous occasions prescribed through

routes and joint rates without inquiring as to whether the routes traversed by the water lines were wholly within the territorial waters of the United States. Apparently our jurisdiction to do so has never been previously questioned. The more recent cases in which such through routes and joint rates have been prescribed are Lake and Rail Class and Commodity Rates, 205 I. C. C. 101 and 214 I. C. C. 93, and Consolidated Southwestern Cases, 123 I. C. C. 203, 211 I. C. C. 601, and 222 I. C. C. 229. In the former, joint lake-rail rates were prescribed between portions of western trunk-line and official territories in connection with the water-lines operating on the Great Lakes, and, in the latter, joint ocean-rail rates were prescribed as previously described. This record shows that the water lines operating on the Great Lakes pass through Canadian waters, and that the water lines operating between north Atlantic and Gulf ports pass outside the territorial waters of the United States. In Lake and Rail Class and Commodity Rates, 205 I. C. C. 101, it is stated at pages 110 and 111 that some of the lake lines call at the port of Windsor, Ontario, Canada.

"Section 6 (13) and section 5 (19) were a part of the so-called Panama Canal Act entered August 24, 1912. Section 5 (19) refers to 'any common carrier by water operating through the Panama Canal or elsewhere.' We have construed section 5 (19) as having application to water carriers operating to or via foreign ports. Southern Pac. Co. Operation Pacific Mail S. S. Co., 32 I. C. C. 690; Peninsular and O. S. S. Co., 37 I. C. C. 432; New Orleans and Havana Car Ferry Service, 188 I. C. C. 371. It seems obvious that the phrase 'through the Panama Canal or otherwise' in section 6 (13) has the same meaning as the phrase 'through the Panama Canal or elsewhere' in section 5 (19)."

114 that the Commission found further:

"Public interest in through routes between Seatrain and Railroads

Even if it were held that through routes do not now exist in connection with Seatrain, the record shows that the establishment of such routes and of joint rates over same would be in the public interest and should be prescribed. In the report on further hearing in *Investigation of Seatrain Lines, Inc., supra*, we pointed out that the service performed by Seatrain is generally conceded to be superior to that afforded by steamship of the ordinary type; that, by using Seatrain service, shippers obtain what is practically equivalent to all-rail service, except for the longer time in transit, and are also saved packing and handling

expenses necessarily incurred if the movement is over the break-bulk water routes; that certain classes of bulk freight which cannot be handled in vessels of the usual type and which cannot bear the all-rail charges can be handled by Seatrain and thus markets opened up which theretofore could not be reached, and that numerous organizations and individual shippers had testified that the service was of advantage to them. We there found that the operation of Seatrain was in the public interest. Numerous additional representations to the same effect have been made on this record." (Report, p. 20).

"The facts recited warrant the conclusion that through routes now exist over the lines of defendants (including petitioners, The Pennsylvania Railroad Company, the Boston and Maine Railroad, the Long Island Rail Road Company, Maine Central Railroad Company, Norfolk and Western Railway Company) and Seatrain between points in trunk line and New England territories on the one hand and points in southwestern territory on the other hand." (Report, p. 20)

and that the Commission also found and decided:

"We have here found that in certain instances through routes between Seatrain and defendants now exist, and that, in
115 those and other instances, the establishment and maintenance of through routes and joint rates are necessary in the public interest. The record here shows that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be by the interchange of the loaded cars. If defendants parties to the through routes and joint rates herein prescribed refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention either by a request for reopening Nos. 25728 and 25878, the complaints of the Hoboken Manufacturers' and Lower Coast referred to above, or by a new complaint."

that based upon its finding and conclusion that through routes and reasonable facilities for operating through routes for through transportation via Seatrain and the lines of petitioners and other railroads were required by the public convenience and necessity, the Commission, by order dated January 28, 1938, ordered the defendants in said proceeding, including petitioners, to establish and/or maintain such through routes with Seatrain; that petitioners did not challenge said order but said order was complied with by petitioners, and such through routes were established and/or have been maintained in connection with Seatrain; and that it is in connection with the operation of such routes and under and as a part of the Commission's jurisdiction to re-

quire the establishment thereof and also to require and prescribe reasonable facilities for the operation of such routes and determine all of the terms and conditions under which such routes shall be operated and maintained that the Commission thereafter made the order sought in this suit to be enjoined.

XVI. It admits the allegations of paragraph XVI and alleges that the motion dated July 20, 1938, filed with the Commission by Hoboken and Seatrain was filed pursuant to the last sentence in the last quotation from the Commission's report, set forth in the previous paragraph.

It alleges further that it was not until their reply of July 29, 1938 to said motion that petitioner The Pennsylvania Rail-
116 road Company and certain other petitioners for the first time raised the question of the inadequacy of the established per diem rate as compensation for the use of their cars in the performance of through transportation in connection with Seatrain or suggested that the payment of a different compensation from the going per diem rate which they had been accepting without protest since 1929 should be a condition of their being required to permit the delivery of their cars to Seatrain in the performance of such through transportation.

XVII. It admits the allegations of paragraph XVII and alleges further that at the further hearings in January, February and March, 1939, and September, 1940, referred to in Paragraph XVII, substantial additional evidence to the same effect as that described in paragraph XI hereof was produced and received, including testimony of car service officials of various railroads to the effect that based upon their experience it was more profitable for them to have their cars interchanged with Seatrain at the going per diem rate of $1.00 per day than have them used by other railroads. It alleges further that uncontradicted evidence was offered and received by the Commission at the hearing on March 2, 1939, that in the months of December, 1938, and January 1939, which were taken as typical for the purposes of a statistical study, a substantial number of through shipments under through bills of lading over the through routes established by petitioner The Pennsylvania Railroad Company in connection with Seatrain were delivered by the Pennsylvania Railroad to the Hoboken for delivery in turn to Seatrain loaded in cars owned by the Pennsylvania Railroad, which the Pennsylvania had furnished to shippers for the loading of such shipments notwithstanding its alleged refusal to permit its cars to be delivered to Seatrain. It alleges also that the uncontradicted evidence before the Commission further showed that the Hoboken and

Seatrain had requested the Pennsylvania Railroad and other petitioners if they did not desire to have their cars used for through transportation in connection with Seatrain at the going
117 per diem rate of $1.00 per day, to furnish for the movement of such freight cars of the many railroads throughout the United States who had permitted without condition the delivery of their cars to Seatrain, and that although many such cars had been delivered by the Hoboken to the Pennsylvania they were not used for such shipments.

XVIII. It admits the allegations of paragraph XVIII.

XIX. It admits that the Commission made the report of October 13, 1941 (Exhibit H attached to the Petition) and for a correct and complete statement of the Commission's finding refers to said report; but it denies that paragraph XIX correctly states the Commission's findings or the substance thereof; denies that the sentences quoted in paragraph XIX represented a finding of the Commission and alleges that said sentences constituted simply a part of the Commission's statement of the contentions of the petitioners and other defendants before the Commission; denies that there was no evidence before the Commission contradicting the evidence offered by the defendant railroads as to the time spent by railroad cars in other than active or productive service; denies that on the Commission's findings the minimum cost to the owners for car ownership and maintenance is $3.20 per car for each day such cars are in active and productive service; alleges that the evidence before the Commission requires a finding that the full cost to car owners for their cars when in the possession of Seatrain is substantially less than $1.00 per car per day; denies that the Commission found as alleged in the last sub-paragraph of paragraph XIX; alleges that the time that freight is in cars held at ports is not idle or unproductive time; alleges that the evidence before the Commission shows that the average detention of freight at the ports and the expenses incident thereto are no greater in connection with freight interchanged with Seatrain than in connection with freight interchanged with other water carriers; alleges that whether car hire for cars held at the ports is paid to the owner by the
118 terminal switching railroad, by Seatrain, or by the trunk line railroad does not affect the amount of compensation received by the car owner for the use of his car; and except as otherwise admitted herein denies the allegations of paragraph XIX.

XX. It admits the allegations of paragraph XX.

XXI. It admits that by its order of October 13, 1941, the Commission has required the petitioners to allow their cars to be deliv-

ered to the vessels of Seatrain in the performance of through transportation over through routes which the Commission has ordered established and maintained and which have been established and are maintained by petitioners in conjunction with Hoboken and Seatrain and other carriers for through transportation between points in the eastern portion of the United States and points in the southern and southwestern portions of the United States, based upon a finding that such interchange constitutes "the reasonable and appropriate method of interchanging traffic moving over such routes," and except as so expressly admitted, it denies the allegations of paragraph XXI.

XXII. It admits the allegations of paragraph XXII.

XXIII. It denies the allegations of paragraph XXIII.

XXIV. It denies the allegations of paragraph XXIV.

XXV. It denies the allegations of paragraph XXV.

XXVI. It denies the allegations of paragraph XXVI.

XXVII. It denies the allegations of paragraph XXVII.

XXVIII. It denies the allegations of paragraph XXVIII and it alleges further that the uncontradicted evidence before the Commission showed and the Commission found that petitioners and each of them continuously since 1929 have been paid and
119 have accepted payment without protest and as full compensation for the use of their cars, where such cars have been delivered to Seatrain either for movement between points in the United States or for movement to and from Cuba, so-called per diem or car rental at the rate of $1.00 per day for the time such cars were in Seatrain's possession or in the possession of railroads in Cuba, and alleges further that this condition has continued since the close of the hearings before the Commission to the present time.

XXIX. It admits that at the hearing before the Examiner of the Commission on September 17, 1940, counsel for petitioner, The Pennsylvania Railroad Company, endeavered to offer in evidence certain testimony and statistical exhibits which the Commission's Examiner excluded on objection of counsel for Hoboken and Seatrain on the ground that the evidence offered was not relevant or material to any issue which was involved in the proceeding, or which was within the jurisdiction of the Commission, and that such testimony and exhibits related to an issue in a suit pending in the United States District Court for the Southern District of New York; it admits that the Commission did not overrule the Examiner's ruling excluding the testimony and exhibits, and except as so expressly admitted, it denies the allegations of paragraph XXIX.

XXX. It admits that the Commission's orders of October 13, 1941, and March 2, 1942, do not run against Seatrain in the sense that they require initial affirmative action by Seatrain, but it alleges that this is because the order of October 13, 1941, is a cease and desist order requiring the defendants therein, including petitioners, to cease and desist from their unlawful refusals to permit their cars to be delivered to Seatrain in the performance of through transportation over through routes, and it alleges further that the order is incorrectly described as not imposing any obligation upon Seatrain and as failing to direct Seatrain to pay $1.00 per
120 day since the effect of the order is to require the defendants to permit the delivery of their cars to Seatrain only upon the condition that defendants are paid reasonable compensation, found to be $1.00 per day, for the time their cars are in Seatrain's possession; and it alleges further that without a change in the Car Service and Per Diem Rules and Agreement maintained by petitioners and other railroads, the Commission could not require Seatrain to pay per diem to them since, by the terms of said rules and agreement, petitioners have agreed that Seatrain may not become a party thereto, and that they themselves will not accept payment from Seatrain, but will accept payment only from a railroad which they permit to become a party to said agreement; it admits further that certain of petitioners filed with the Commission a petition for reconsideration dated December 13, 1941; and except as so expressly admitted, it denies the allegations of paragraph XXX.

XXXI. It denies the allegations of paragraph XXXI.

XXXII. It denies the allegations of paragraph XXXII.

XXXIII. It denies the allegations of paragraph XXXIII.

XXXIV. Answering the allegations of paragraph XXXIII, and the Third and Fourth prayers, praying for a temporary stay or suspension of the Commission's orders referred to and for an interlocutory injunction on the ground of alleged irreparable injury, it represents that, as the result of direction or requisition, three of Seatrain's vessels have been delivered and made available to the Government for war purposes and its two remaining vessels are at the present time being operated exclusively between New Orleans and Havana, that no vessels are now operating in interstate commerce between Hoboken, N. J., and New Orleans (Belle Chasse), La., and that while this condition continues, petitioners, even if their suit were well founded, will not suffer irreparable or any injury from the Commission's order.

121 Wherefore, the intervening defendants, each for itself, respectively prays that the petition may be dismissed with

costs and that they may have such other relief as in the premises may be proper.

Respectfully submitted.

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PARKER McCOLLESTER,
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Attorneys for Interveners-Defendants.
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25 Broadway, New York, N. Y.
Of Counsel.

MAY 12, 1942.

122 In District Court of the United States

[Title omitted.]

Intervention of Interstate Commerce Commission

In accordance with the provisions of Section 212 of the Judicial Code, we hereby enter the appearance of the Interstate Commerce Commission as a party defendant in the above-entitled case, and of ourselves as its counsel.

DANIEL W. KNOWLTON,
Chief Counsel.
E. M. REIDY,
Assistant Chief Counsel.

123 In District Court of the United States

[Title omitted.]

Answer of Interstate Commerce Commission

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, for answer to the amended petition in this case, answers and says:

I

Answering paragraphs I and II of the amended petition, the Commission admits the allegations thereof.

II

Answering paragraph III of the amended petition, the Commission admits the allegations thereof, except that it denies that this Court has any jurisdiction of this suit under its general equity powers.

124

III

Answering paragraphs IV and V of the amended petition, the Commission admits the allegations thereof.

IV

Answering paragraph VI of the amended petition, the Commission admits these allegations, except that it denies that the vessels of Seatrain have always operated between Hoboken, N. J., and Belle Chasse, La., by way of Havana, Cuba, or in and through Cuban waters, or that they have always docked at Havana, Cuba, and there discharged or taken on cargo.

V

Answering paragraph VII of the amended petition, the Commission admits that on October 6, 1932, Seatrain began operating in service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, as well as in service between Hoboken, N. J., and Belle Chasse, La., not stopping at Havana. The Commission further admits that the Pennsylvania Railroad and other carriers by railroad had notified the Hoboken and Seatrain in writing not to deliver, accept, or use their cars in Seatrain service.

VI

Answering paragraph VIII of the amended petition, the Commission admits the issuance by the American Railway Association of Car Service Rule No. 4, effective November 15, 1932. The Commission further admits that the Hoboken and the New Orleans & Lower Coast Railway Company are subscribers to the car service and per diem agreement referred to in said
125 paragraph, and thereby agree to abide by the rules promulgated by said American Railway Association, but only insofar as said rules were lawful. The Commission further admits that some of the petitioners herein, but not all of them, had given their permission for the delivery of their cars to Seatrain.

VII

Answering paragraph IX of the amended petition, the Commission admits the allegations thereof, except it refers the Court

to Exhibit A of the amended petition for a more full and complete statement of the contents thereof than is contained in said paragraph. The Commission further admits that the defendants therein referred to filed answers to said complaint.

VIII

Answering paragraph X of the amended petition, the Commission admits the allegations thereof.

IX

Answering paragraphs XI to XIV, inclusive, of the amended petition, the Commission admits the allegations thereof.

X

Answering the allegations of paragraph XV of the amended petition, the Commission respectfully refers the Court to its reports and orders dated January 28, 1939, and December 23, 1940, referred to therein, for a more full and complete statement as to the contents of said reports and orders than is contained in said paragraph.

126 XI

Answering paragraphs XVI to XVIII, inclusive, of the amended petition, the Commission admits the allegations thereof.

XII

Answering the allegations of paragraph XIX of the amended petition, the Commission admits the issuance by it on October 13, 1941, of the report therein referred to, made a part of the amended petition as Exhibit A, to which the Commission respectfully refers the Court for a more full and complete statement as to its findings than is contained in this paragraph.

XIII

Answering the allegations of paragraph XX of the amended petition, the Commission admits the same.

XIV

Answering the allegations of paragraph XXI of the amended petition, the Commission admits the issuance by it of the order of October 13, 1941, referred to and made a part of the amended

petition as Exhibit I. By said order the Commission required the petitioners to allow their cars to be delivered to the vessels of the Seatrain in the performance of through transportation over through routes, which the Commission had ordered to be established and maintained, and which have been established and are maintained by petitioners in conjunction with Hoboken and Seatrain and other carriers for through transportation between points
in the eastern portion of the United States to points in the
127 southern and southwestern portions of the United States,
based upon a finding that such interchange constitutes "the reasonable and appropriate method of interchanging traffic moving over such routes." The Commission denies the other allegations of paragraph XXI.

XV

Answering paragraph XXII of the amended petition, the Commission admits the allegations thereof.

XVI

Answering paragraphs XXIII to XXVIII, inclusive, of the amended petition, the Commission denies the allegations contained in these paragraphs.

XVII

Answering the allegations of paragraph XXIX of the amended petition, the Commission admits that at the hearing before its examiner, counsel for petitioner, the Pennsylvania Railroad Company, sought to introduce in evidence certain testimony and statistical exhibits which the Commission's examiner excluded on objection of counsel for Hoboken and Seatrain on the ground that the evidence was not relevant or material to any issue which was involved in the proceeding, or which was within the jurisdiction of the Commission. The Commission admits that exceptions were duly taken to said rulings of the examiner, and the Commission declined to overrule its examiner. The Commission denies the other allegations of this paragraph.

XVIII

Answering the allegations of paragraph XXX of the amended petition, the Commission admits that its orders of October 30,
1941, and March 2, 1942, referred to and made parts of the
128 amended petition as Exhibits I and J, do not run against
the Seatrain in the sense that they require no initial affirmative action by Seatrain, but it alleges that this is so because the order of October 30, 1941, is a cease and desist order requiring the

defendants therein, including petitioners, to cease and desist from their unlawful refusals to permit their cars to be delivered to Seatrain in the performance of through transportation over through routes, and the Commission further alleges that the order is incorrectly described as not imposing any obligation upon Seatrain and as failing to direct Seatrain to pay $1.00 per day, since the effect of the Commission's order is to require the defendants to permit the delivery of their cars to Seatrain only upon the condition that defendants are paid reasonable compensation, found to be $1.00 per day, for the time their cars are in the possession of Seatrain. The Commission further alleges that without a change in the car service and per diem rules and agreement maintained by petitioners and other railroads, the Commission could not require Seatrain to pay per diem to them since, by the terms of said rules and agreement, petitioners have agreed that Seatrain may not become a party thereto, and that they themselves will not accept payment from Seatrain but will accept payment only from a railroad which they permit to become a party to said agreement. The Commission further admits that certain of the petitioners filed with the Commission a petition for reconsideration dated December 13, 1941. The Commission denies the other allegations contained in this paragraph.

129

XIX

Answering paragraphs XXXI and XXXII of the amended petition, the Commission denies the allegations thereof.

XX

Answering the allegations of paragraph XXXIII of the amended petition, the Commission denies that petitioners will suffer irreparable injury and damage, or any injury and damage, should the Commission's orders be sustained.

XXI

Further answering paragraphs IX to XXII, inclusive, of the amended petition, the Commission admits and alleges that it made and entered the consolidated report and order dated February 5, 1935 (206 I. C. C. 328), referred to in paragraph XII of the amended petition and made a part thereof as Exhibit C, in proceedings then pending before it entitled Docket No. 25728 and Docket No. 25878, following complaints filed with it on December 30, 1932, by the Hoboken, as alleged in paragraph IX of the amended petition, and by the Lower Court's complaint filed with the Commission on or about March 9, 1933, as shown by

paragraph X of the amended petition; that full hearings were had and thereafter the Commission made and entered and served upon all parties to said proceeding its said report of February 5, 1935; that on the same date, February 5, 1935, the Commission dismissed the complaints in Nos. 25728 and 25878 without prejudice to the filing by complainants of a petition for further consideration, or new complaints, after another proceeding then pending before the Commission, Docket No. 25727, referred to in paragraph XV of the amended petition, entitled Seatrain
130 Lines, Inc. v. Akron, C. & Y. Ry Co., should have been disposed of, if the conclusions reached in that case warranted such action. The Commission further alleges that in said Dockets Nos. 25728 and 25878, the rail defendants on February 20, 1935, petitioned for reconsideration of certain portions of its report of February 5, 1935, 206 I. C. C. 328, Exhibit C to the amended petition, which petition was denied by the Commission on April 1, 1935. The Commission further alleges that its report of February 5, 1935, 206 I. C. C. 328, Exhibit C to the amended petition, expressly referred to, relied upon, and adopted parts of its prior report dated July 11, 1933, in Docket No. 25565 (195 I. C. C. 215) which was an investigation instituted by the Commission on its own motion on October 4, 1932, in a proceeding entitled "Investigation of Seatrain Lines, Incorporated," prior to the inauguration by Seatrain of its services between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba. The Commission further alleges that on November 31, 1938, it reopened Dockets Nos. 25728 and 25878 for further hearings; that full hearings were had and thereafter the Commission made, entered and served upon all parties to the proceeding its report and order of January 8, 1940 (237 I. C. C. 97), attached to and made a part of the amended petition as Exhibit G, wherein it clarified the issues and again reopened the proceeding for further hearing as described in said report; that following said further hearings, the Commission, on October 13, 1941, made its second report on further hearing in Dockets Nos. 25728 and 25878, and on the same day entered its final order in said proceedings, annexed to the amended petition as Exhibit I; that following the issuance by the Commission of its report and order of October 13, 1941, certain of the petitioners herein
131 filed with the Commission a petition for reconsideration, which was denied by the Commission under date of March 2, 1942.

Further answering paragraphs IX to XXII, inclusive, of the amended petition, the Commission admits and alleges that in said proceedings the parties thereto, including the petitioners herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearing

a large volume of testimony and other evidence bearing upon the matters covered in said reports and orders were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioners herein by their counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by petitioners in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the petitioners herein, its said reports and orders of February 5, 1935, 206 I. C. C. 328, January 8, 1940, 237 I. C. C. 97, and October 13, 1941, 248 I. C. C. 109, annexed to and made parts of the amended petition as Exhibits C, G, and H, respectively; that said reports and orders included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which its orders were based.

The Commission further alleges that the findings and conclusions of said reports were and are, and that each of them
132 was and is fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the amended petition herein.

The Commission further alleges that said reports and orders of February 5, 1935, January 8, 1940, and October 13, 1941, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said orders, including its order of March 2, 1942, the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the amended petition. The Commission denies that its said orders are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said amended petition, or for any other reason or reasons. The Commission denies that its said orders cause, or will cause, petitioners either irreparable damage or any damage if said orders are not enjoined.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the

amended petition, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and orders referred to and made
133 parts of the amended petition as Exhibits C, G, H, and J, respectively, which reports and orders are hereby referred to and made parts hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said amended petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
E. M. REIDY,
Assistant Chief Counsel.

DANIEL W. KNOWLTON,
Chief Counsel of Counsel.

134 [*Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.*]

135 In District Court of the United States.

[Title omitted.]

Intervention Order

May 18, 1942

The petition for leave to intervene, and a copy of the proposed answer, of Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., together with a notice in writing, returnable on this date, of their motion for leave to intervene as additional parties defendant and to answer the amended petition in the above-entitled suit having been duly served upon the attorney for Petitioners on May 13, 1942, and filed with the clerk of this court on May 14, 1942, and

It appearing that said Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., are parties in interest in this suit within the provisions of section 212 of the judicial code, and good cause being shown;

It is, on this 18th day of May 1942, on motion of Duane E. Minard, attorney for applicants,

ORDERED that said Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., be, and they hereby are allowed to
136 intervene, and hereafter regarded as additional parties defendant, and to answer the Petition, in the above-entitled suit, and it is

Further ordered that the answer of Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., filed with the clerk of this court on May 14, 1942, be, and the same is hereby, accepted as their joint answer as intervener-defendants herein.

GUY L. FAKE,
U. S. District Judge.

137 In District Court of the United States

[Title omitted.]

Answer of the United States of America to Amended Petition

The defendant, United States of America:

1. Admits the allegations of paragraphs I and II of the petition.

2. Admits the allegations of paragraph III except that it denies that this Court has any jurisdiction of this suit under its general equity powers.

3. Admits the allegations of paragraphs IV and V.

4. Admits the allegations of paragraph VI, except that it denies that the vessels of Seatrain since October 6, 1932, in their service between Hoboken, New Jersey, and Belle Chasse, Louisiana, have always operated by way of Havana, Cuba, or in or through Cuban waters, or that they have always docked at Havana and there discharged or taken on cargo, but alleges to the contrary that, as the Commission found in Seatrain Lines, Inc., v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, 14, occasionally the call at Havana was omitted.

138 5. Admits the allegations of paragraph VII but alleges in further answer that on October 6, 1932, Seatrain also began operating service between Hoboken and Belle Chasse not stopping at Havana and also that the Commission has found in Hoboken Manufacturers' Railroad Co. v. Abilene & Southern Ry. Co., 248 I. C. C. 109, 114 (Exhibit H to Amended Petition) that for almost four years prior to the inauguration of the coastwise service in 1932 the railroads, including petitioners, freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service at the regular railroad per diem rate.

6. Admits the allegations of paragraph VIII, except that it alleges that eight of the petitioners herein have consented to the delivery of their cars to Seatrain for transportation to and from Cuba involving interchange with railroads in Cuba, though they have not consented to their use in coastwise service. For further answer it alleges that the Commission has found that a large number of other railroads have permitted use of their cars even in coastwise traffic.

7. Admits the allegations of paragraphs IX through XVIII.

8. Admits the issuance by the Commission of its report of October 13, 1941 (Exhibit H to the Amended Petition), as alleged in paragraph XIX; denies that said paragraph correctly states the substance of the Commission's findings; denies that the sentences there quoted constituted a finding by the Commission, but alleges that said sentences were merely a part of the Commission's statement of the contentions of the petitioners; admits the other allegations of that paragraph, insofar as they are in accord with the findings and conclusions of the Commission in said report, but denies such allegations as are inconsistent therewith and particularly denies the allegation that on the Commission's own findings the minimum cost to the owner of car ownership and maintenance is $3.20 per car
139 for each day such car is in active and productive service.

9. Admits the allegations of paragraph XX.

10. Alleges in answer to paragraph XXI that the Commission's order merely required petitioners who participated in through routes with Seatrain in interstate commerce via Belle Chasse, Louisiana, and Hoboken, New Jersey, to make available cars for such interstate movement, but specifically did not require the furnishing of cars for use in Seatrain's foreign commerce to Havana, Cuba. For further answer it alleges that while the cars used in Seatrain's interstate commerce were on vessels which generally docked at Havana, Cuba, the Commission has found in Seatrain Lines v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, 14 that the United States customs seal on such cars was never broken at Havana, that no Cuban official has ever attempted to take jurisdiction over interstate freight in such interstate cars and that no such freight was ever made accessible to Cuban authorities.

11. Admits the allegations of paragraph XXII.

12. Denies the allegations of paragraphs XXIII through XXV.

13. Alleges in answer to paragraphs XXVI and XXVII that the cars with which the Commission's order dealt were not transported in or through a foreign country, but were transported as alleged in paragraph 10 hereof. For further answer it denies that the Commission did not have authority to require petitioners to permit such use of their cars, and alleges further that this contention was not raised before the Commission in the present proceedings.

14. Denies the allegations of paragraph XXVIII.

15. Admits the allegations of paragraph XXIX, except that it alleges that the evidence in question was not relevant or material to any issue which was involved in the proceeding or within the

jurisdiction of the Commission, and therefore denies that it was erroneously stricken from the record.

140 16. For answer to paragraph XXX it incorporates by reference herein, and adopts the answer to the same paragraph contained in paragraph XVIII of the answer of intervening defendant, the Interstate Commerce Commission.

17. Denies the allegations of paragraphs XXXI through XXXIII.

18. For further answer to the whole petition it alleges on information and belief that three of Seatrain's five vessels have been taken over by the Federal Government for war purposes and are no longer employed in a capacity where they would have occasion to use the cars of railroads; that the two remaining Seatrain vessels are still operated in connection with railroad service but exclusively between New Orleans and Havana and not in interstate commerce, and that such two vessels will be taken over on May 16, 1942, by the United States Maritime Commission with the understanding that they will be used only in operations between such points and not in interstate commerce; that Seatrain does not now and will not in the immediately forseeable future operate in interstate commerce between Hoboken and Belle Chasse or have any occasion to use railroad cars in such commerce; that consequently, because of war conditions beyond the control of all parties, the Commission will have no present or immediately forseeable occasion to require the enforcement of its order; that consequently the case is moot and no longer presents a justiciable "case or controversy" within the jurisdiction of this Court.

Wherefore: It is respectfully prayed that plaintiff's complaint be dismissed.

ROBERT L. PIERCE,
Robert L. Pierce,
Special Attorney, Department of Justice,
Washington, D. C.

THURMAN ARNOLD,
Assistant Attorney General.

CHARLES M. PHILLIPS,
Charles M. Phillips,
United States Attorney.

141 I hereby certify that a copy of the foregoing answer was this day mailed to the following persons:

John A. Hartpence, Esq., 168 W. State Street, Trenton, New Jersey.

Edward M. Reidy, Esq., Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.

Parker McCollester, Esq., Lord, Day & Lord, 25 Broadway, New York, New York.

Duane E. Minard, Esq., Hobart, Minard & Cooper, 1180 Raymond Boulevard, Newark, New Jersey.

ROBERT L. PIERCE,
Robert L. Pierce,
Special Attorney, Department of Justice,
Washington, D. C.

MAY 15, 1942.

142 In District Court of the United States

[Title omitted.]

Motion for leave to intervene

Petitioner, New Orleans and Lower Coast Railroad Company, respectfully shows:

I. Petitioner New Orleans and Lower Coast Railroad Company is a corporation organized and existing under the laws of the State of Louisiana, with its principal office at New Orleans, Louisiana, and is engaged in business as a common carrier of freight and passengers by railroad and is subject to the Interstate Commerce Act (34 Stat. L. 584) and Acts amendatory thereof and supplementary thereto.

II. The suit having the caption above stated, and in which petitioner desires to intervene, is a suit brought to suspend or set aside in whole or in part certain orders of the Interstate Commerce Commission referred to and described in the petition of the petitioners in said suit.

III. Section 212 of the Judicial Code provides in part "that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party."

143 IV. Petitioner has an interest in this suit and will be affected by the decision or decree herein in that the orders of the Interstate Commerce Commission herein sought to be set aside were made in proceedings, to wit: Docket No. 25728, Hoboken Manufacturers' Railroad Company v. Abilene & Southern Railway Company, et al., and Docket No. 25878, New Orleans and Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railway Company, et al., in which last-named proceeding New Orleans and Lower Coast Railroad Company was the complaining party before the Interstate Commerce Commission.

V. Your petitioner therefore desires to intervene as of right and to join in said suit in opposition to the prayer of the petition, in support of the validity of the orders of the Interstate Commerce

Commission whose suspension or annulment is sought, and in order to assert the defenses set forth in its answer to the petition, copy of which is attached hereto.

Wherefore, your petitioner prays that an order be entered allowing your petitioner to intervene in said suit as an additional party defendant therein and to answer the petition, and for such other and further relief in the premises as may be just and proper.

Dated Newark, N. J., May 14, 1942.

(Signed) ARTHUR T. VANDERBILT,
Arthur T. Vanderbilt,
Attorney for Petitioner,
Address: 744 Broad Street, Newark, New Jersey.

H. H. LARIMORE,
13th & Olive Streets,
St. Louis, Missouri.
Of Counsel.

145 In District Court of the United States

Order granting motion to intervene

May 14, 1942

This case coming on to be heard on the motion of New Orleans and Lower Coast Railroad Company for leave to intervene herein and the parties hereto having indicated their assent to such intervention,

It is now ordered and decreed as follows until the further order of this Court:

The motion to intervene is hereby granted and said petitioner has leave to intervene in this suit for its own interests with the right to be made additional party defendant to the case and to appear by counsel and to answer the petition.

Dated, May 14, 1942.

GUY L. FAKE.
United States District Judge.

Without admitting the allegations of the Petition to Intervene and denying some of them we consent to the intervention of the New Orleans and Lower Coast Railroad Company and to the entry of the above order.

JOHN A. HARTPENCE,
Attorney for Petitioners.
ROBERT L. PIERCE,
Counsel for Defendant United States of America.

146 In District Court of the United States,

[Title omitted.]

Answer of New Orleans and Lower Coast Railroad Company, Intervener-Defendant to the amended petition

Comes now New Orleans and Lower Coast Railroad Company, having been allowed to intervene as a defendant in the above-entitled proceeding, and respectfully answers the allegations of the amended petition, as follows:

I. It admits the allegations of Paragraph I.

II. It admits that petitioners are common carriers of property by railroad subject to the Interstate Commerce Act, and alleges further that petitioners as common carriers are engaged in connection with Seatrain in the transportation of property in interstate commerce partly by railroad and partly by water under common arrangement for continuous carriage or shipment, but it is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph II.

III. It admits the allegations of paragraph III, except that it denies that the jurisdiction of the court to hear and determine this suit depends upon its general equity jurisdiction.

147 IV. It admits the allegations of paragraph IV and alleges further that the Hoboken Manufacturers' Railroad Company was also engaged in connection with petitioners and Seatrain Lines, Inc., in the transportation of property in interstate commerce partly by railroad and partly by water under common arrangement for continuous carriage or shipment.

V. It admits the allegations of paragraph V and alleges further that the New Orleans and Lower Coast Railroad Company was also engaged in connection with petitioners and Seatrain in the transportation of property in interstate commerce partly by railroad and partly by water under common arrangement for continuous carriage or shipment.

VI. It admits the allegations of paragraph VI except that it denies that the vessels of Seatrain operating between Hoboken N. J. and Belle Chasse, La., always operate or always have operated via Havana, Cuba, or in and through Cuban waters, or that they have always docked at Havana, Cuba, and there discharged or taken on cargo and alleges further that it is engaged with petitioners and Hoboken in the transportation of property in interstate commerce partly by railroad and partly by water under common arrangement for the continuous carriage or shipment.

VII. Answering paragraph VII, it admits that on October 6, 1932, Seatrain Lines, Inc., began operating in service between

Hoboken, N. J., and Belle Chasse, La., via Havana Cuba, as well as in service between Hoboken, N. J., and Belle Chasse, La., not stopping at Havana, Cuba, but it is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph VII.

VIII. Answering paragraph VIII, it admits the
148 promulgation by the American Railway Association of so-called Car Service Rule 4 and admits the language of said rule as quoted in the amended petition; it admits that petitioners, Hoboken Manufacturers' Railroad Company and New Orleans and Lower Coast Railroad Company, are subscribers to the car service and per diem agreement, and have thereby agreed to abide by the rules promulgated by the American Railway Association, but only insofar as said rules are or were lawful; it denies the allegation of the last sentence of paragraph VIII, except that it admits that petitioners, The Pennsylvania Railroad Company; Boston and Maine Railroad Company; Merrell P. Callaway, Trustee of Central of Georgia Railway Company; Great Northern Railway Company; The Long Island Rail Road Company; Maine Central Railroad Company; and Norfolk and Western Railway Company, have not filed with the American Railway Association or its successor, the Association of American Railroads, their consents under Car Service Rule 4 for the delivery of their cars to Seatrain; but it alleges that the other petitioners—namely, Atlantic Coast Line Railroad Company; Louisville and Nashville Railroad Company; Northern Pacific Railway Company; Legh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company; Southern Railway Company; Southern Pacific Company; Texas and New Orleans Railroad Company; and Union Pacific Railroad Company—although they have not filed with the American Railway Association or its successor, the Association of American Railroads, under Car Service Rule 4, their consents for the delivery of their cars to Seatrain in the performance of through transportation over through routes between points in the United States, have consented and now do consent and have filed with the American Railway Association
149 or the Association of American Railroads their consents to the delivery of their cars to Seatrain for transportation to and from Cuba involving interchange with railroads in Cuba.

IX. It admits the allegations of paragraph IX.

X. It admits the allegations of paragraph X.

XI. It admits generally the allegations of paragraph XI, except that for an accurate statement of the proposed report of the Examiner of the Commission dated March 30, 1934, it refers to said report.

XII. It admits generally the allegations of paragraph XII, except that it refers to the report and orders of the Commission mentioned in paragraph XII for a complete and accurate statement of the contents thereof.

XIII. It admits the allegations of paragraph XIII.

XIV. It admits generally the allegations of paragraph XIV, except that it refers to the reports of the Commission therein cited for a full and accurate statement of the contents thereof and of the findings of the Commission.

XV. It admits the allegations of paragraph XV, except that it refers to the report of the Commission, dated January 28, 1938, in Docket No. 23727, Seatrain Lines, Inc. v. Akron C. & Y. Ry. Co., 226 I. C. C. 7, for a complete and accurate statement of the decision, findings, conclusion, and order of the Commission in said proceeding. It alleges that the Commission in such last-named proceeding among other things found:

"The facts recited warrant the conclusion that through routes now exist over the lines of defendants (including petitioners, The Pennsylvania Railroad Company, the Boston and Maine Railroad, the Long Island Rail Road Company, Maine Central Railroad Company, Norfolk and Western Railway Company, and Seatrain) between points in Trunk Line and New England territory on the one hand and points in Southwestern territory on the other."

150 And that the Commission in such proceeding also found and decided:

"We have here found that in certain instances through routes between Seatrain and defendants now exist, and that, in those and other instances, the establishment and maintenance of through routes and joint rates are necessary in the public interest. The record here shows that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be by the interchange of the loaded cars. If defendants parties to the through routes and joint rates herein prescribed refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention either by a request for reopening Nos. 25728 and 25878, the complaints of the Hoboken Manufacturers' and Lower Coast referred to above, or by a new complaint."

That based upon its findings and conclusions that through routes and reasonable facilities for operating through routes for through transportation via Seatrain and the lines of petitioners and other railroads were required by the public convenience and necessity, the Commission, by order dated January 28, 1938, ordered the defendants in said proceeding, including petitioners, to establish

and/or maintain such through routes with Seatrain; that petitioner did not challenge said order but complied therewith and such through routes were established and/or have been maintained in connection with Seatrain Lines, Inc.; and that it is in connection with the operation of such routes and under and as a part of the Commission's jurisdiction to require the establishment thereof and also to require and prescribe reasonable facilities for the operation of such routes and determine all of the terms and conditions under which such routes should be operated and maintained that the Commission thereafter made the order sought in this suit to be enjoined.

XVI. It admits the allegations of paragraph XVI and alleges that the motion dated July 20, 1938, filed with the Commis-
151 sion by New Orleans and Lower Coast Railroad Company was filed pursuant to the last sentence in the quotation from the Commission's report set forth in the previous paragraph.

XVII. It admits the allegations of paragraph XVII.

XVIII. It admits the allegations of paragraph XVIII.

XIX. It admits that the Commission made the report of October 13, 1941, Exhibit H attached to the petition, and for a correct and complete statement of the Commission's findings refers to said report and except as so expressly admitted it denies the allegations of paragraph XIX.

XX. It admits the allegations of paragraph XX.

XXI. It admits that by its order of October 13, 1941, the Commission has required the petitioners to allow their cars to be delivered to the vessels of Seatrain Lines, Inc., in the performance of through transportation over through routes which the Commission has ordered established and maintained and which have been established and are maintained by petitioners in connection with the New Orleans and Lower Coast Railroad Company and Seatrain Lines, Inc., and other carriers for through transportation between points in the eastern portion of the United States and points in the southern and southwestern portions of the United States, based upon a finding that such interchange constitutes "the reasonable and appropriate method of interchanging traffic moving over such routes," and except as so expressly admitted, it denies the allegations of paragraph XXI.

XXII. It admits the allegations of paragraph XXII.

XXIII. It denies the allegations of paragraph XXIII.

XXIV. It denies the allegations of paragraph XXIV.

XXV. It denies the allegations of paragraph XXV.

XXVI. It denies the allegations of paragraph XXVI.

XXVII. It denies the allegations of paragraph XXVII.

152 XXVIII. It denies the allegations of paragraph XXVIII.

XXIX. It admits that at the hearing before the Examiner of the Commission on September 17, 1940, counsel for petitioner, the Pennsylvania Railroad Company, endeavored to offer in evidence certain testimony and statistical exhibits which the Commission's Examiner excluded on objection of counsel for Hoboken and Seatrain on the ground that the evidence offered was not relevant or material to any issue which was involved in the proceeding, or which was within the jurisdiction of the Commission, and that such testimony and exhibits related to an issue in a suit pending in the United States District Court for the Southern District of New York; it admits that the Commission did not overrule the Examiner's ruling regarding excluding the testimony and exhibits, and except as so expressly admitted, it denies the allegations of paragraph XXIX.

XXX. It admits that the Commission's orders of October 13, 1941 and March 2, 1942, do not run against Seatrain in the sense that they require no initial affirmative action by Seatrain, but it alleges that this is because the order of October 13, 1941, is a cease and desist order requiring the defendants therein including petitioners to cease and desist from their unlawful refusals to permit their cars to be delivered to Seatrain in the performance of through transportation over through routes, and it alleges further that the order is incorrectly described as not imposing any obligation upon Seatrain and as failing to direct Seatrain to pay $1.00 per day since the effect of the order is to require the defendants to permit the delivery of their cars to Seatrain only upon the condition that defendants are paid reasonable compensation,
153 found to be $1.00 per day, for the time their cars are in Seatrain's possession; and it alleges further that without a change in the car service and per diem rules and agreement maintained by petitioners and other railroads, the Commission could not require Seatrain to pay per diem to them since, by the terms of said rules and agreement, petitioners have agreed that Seatrain may not become a party thereto, and that they themselves will not accept payment from Seatrain but will accept payment only from a railroad which they permit to become a party to said agreement; it admits further that certain of petitioners filed with the Commission a petition for reconsideration dated December 13, 1941; and except as so expressly admitted, it denies the allegations of paragraph XXX.

XXXI. It denies the allegations of paragraph XXXI.

XXXII. It denies the allegations of paragraph XXXII.

XXXIII. It denies the allegations of paragraph XXXIII.

XXXIV. Answering the allegations of paragraph XXXIII and the Third and Fourth prayers, praying for a temporary stay or suspension of the Commission's orders referred to and for an

interlocutory injunction on the ground of alleged irreparable injury, it represents that all of the vessels of Seatrain have been either requisitioned by or been delivered and made available to, the United States Maritime Commission, upon its direction, for war purposes, and are not now operating in Interstate Commerce between Hoboken, N. J., and New Orleans (Belle Chasse, La.), and that while this condition continues petitioners, even if their suit were well founded, will not suffer irreparable or any injury from the Commission's order.

Wherefore, the intervening defendant prays that the petition may be dismissed with costs and that it may have such other relief as in the premises may be proper.

Respectfully submitted.

154 ARTHUR T. VANDERBILT,
Arthur T. Vanderbilt,
Attorney for Intervener-Defendant,
744 Broad Street, Newark, New Jersey.

H. H. LARIMORE,
13th & Olive Streets, St. Louis, Missouri,
Of Counsel.

155 [Petitioner's proposed findings of fact and conclusions of law. Omitted in printing.]

178 In the District Court of the United States for the District of New Jersey

Civil No. 2092

THE PENNSYLVANIA RAILROAD COMPANY ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, DEFENDANT,

and

THE INTERSTATE COMMERCE COMMISSION ET AL., INTERVENERS-DEFENDANTS

Opinion

Filed Oct. 9, 1943

Before BIGGS, Circuit Judge, and FAKE and SMITH, District Judges

FACTS

BIGGS, Circuit Judge.

The suit at bar was brought under the provisions of Acts of Congress approved June 18, 1910 (36 Stat. 539), March 3, 1911 (36 Stat. 1148) and October 22, 1913 (38 Stat. 219), 28 U. S. C. A.,

Secs. 41 (28) and 43 to 48 inclusive, by some fifteen trunk line rail carriers to set aside an order of the Interstate Commerce Commission entered by the Commission in its proceedings at Nos. 25728 and 27878 on October 13, 1941. Though the amended pe-
179 tition complains of two other orders, they are supplementary to or in aid of the order of October 13, 1941, and therefore it is the order of October 13, 1941, with which we are really concerned. Since the case at bar requires extensive findings of fact we shall endeavor to reduce this opinion to essentials in an endeavor to make a complicated factual situation plain. The findings of fact filed with this opinion will state the facts more fully.

The order of October 13, 1941 [1] requires some fifty-two
180 rail carriers, accordingly as they participate in through-rail and water routes with Seatrain Lines, Inc., in interstate commerce between Belle Chasse (New Orleans), Louisiana, and Hoboken, New Jersey, to cease and desist from prohibiting the interchange of their freight cars with Seatrain. The order also requires the rail carriers to establish reasonable rules for freight car interchange with Seatrain at a per diem rate of $1.00 per day per car but provides also that the per diem is to be paid by Seatrain only for such periods of time as the cars are in its actual

[1] As follows:

ORDER

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having on the date hereof made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report together with the prior reports, 206 I. C. C. 328 and 237 I. C. C. 297, are hereby referred to and made a part hereof:

It is ordered, That the defendants listed in the appendix to said report on further hearing, according as they participate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.

It is further ordered, That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day; provided, however, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

And it is further ordered, That this order shall continue in effect until the further order of the Commission.

possession. The Interstate Commerce Commission, Seatrain, New Orleans & Lower Coast Railroad Company, hereinafter referred to as Lower Coast, and Hoboken Manufacturers Railroad Company, hereinafter referred to as Hoboken Railroad, have intervened in this proceeding as parties defendant.

Seatrain is a common carrier by water subject to the Commission's jurisdiction. Investigation of Seatrain Lines, Inc., 195 I. C. C. 215. A description of the manner in which Seatrain operates is set out fully in an opinion of this court reported in 47 F. Supp. 779, at p. 781. Seatrain operates ocean-going vessels having four decks, each deck in turn having four sets of standard gauge, railroad tracks. By means of a special loading device, consisting of a crane and cradle, provided at three ports (Hoboken, New Jersey, Belle Chasse, Louisiana, and Havana, Cuba), loaded freight cars with their contents are put on board Seatrain ships without breaking bulk and are thus transported in commerce. Seatrain's transportation usually takes the cars and their contents into the port of Havana, Cuba, en route to or from Hoboken or Bell Chasse. The loading facilities for Seatrain ships are located at Belle Chasse on the property of Lower Coast, a terminal-switching railroad, a subsidiary of the Missouri-Pacific Railroad Company, connecting in turn with the Southern Pacific and the Texas Pacific Railroad Company. The loading facilities at Hoboken are located on the property of Hoboken Railroad. Hoboken Railroad is a short, single-track terminal-switching line which runs along the water front of Hoboken and connects
181 with the Erie Railroad and via the Erie with other trunk lines reaching New York harbor.

From 1929 to 1932 Seatrain and its predecessor company operated its ships between Belle Chasse and Havana exclusively. During this period most of the petitioners in the case at bar allowed their cars to be delivered freely to Seatrain ships to be delivered to Cuban railroads. In 1931 Seatrain contemplated the extension of its operations into interstate commerce by the use of the Port of New York and in 1932 made arrangements to effect that end with Hoboken Railroad. These arrangements are described at length in our prior opinion. See 47 F. Supp. at p. 783. Just prior to the inauguration of Seatrain's interstate service, the American Railway Association (to which trunk line railroads including the petitioners belong) promulgated a car service rule which was intended to eliminate Seatrain as a competitor. The rule (Rule 4) provides, "Cars of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division."

The promulgation of this rule by the American Railway Association and the refusal of many of the petitioners to permit the delivery of their cars to Seatrain brought an immediate reaction. Hoboken Railroad and the Lower Coast filed two separate complaints with the Commission and attacked the refusal of the railroads to allow their freight cars to be used by Seatrain. Seatrain was permitted to intervene in both proceedings. The two complaints were subsequently consolidated and the consolidated cause has been before the Commission for hearings and argument on at least three different occasions. In 1935 the Commission held in its report in Investigation of Seatrain Lines,
182 Incorporated, at No. 25,565[2] (206 I. C. C. 328) that Seatrain was a common carrier by water and subject to the jurisdiction of the Commission; that the service of Seatrain between Hoboken and New Orleans was in the public interest and (most important of all insofar as the legal questions presented in this case are concerned) that where through routes existed between rail carriers and water carriers the Commission had jurisdiction to require rail carriers who were parties to such through routes to interchange cars with water carriers if such was the reasonable and appropriate method of interchanging traffic moving over such through routes. The Commission stated, "We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist." The Commission also went on to say, "Whether defendants [including some of the petitioners in the case at bar] who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record."

Thereafter on January 2, 1938, in a proceeding at No. 25727, known as the "Seatrain Through Route Case", Seatrain Lines, Incorporated, v. Akron, Canton & Youngstown Railway Company (226 I. C. C. 7), the Commission found that through routes existed between certain rail carriers (including some of the petitioners) in connection with Seatrain "between points in trunk-line and New England territories, on the one hand, and southwestern territory on the other hand"; "That the public interest requires the establishment and maintenance of through routes and joint rates" by certain trunk-line rail carriers (including the petitioners) in connection with Seatrain between designated points in official territory, and southwestern territory; and that these con-

[2] The report also embraced No. 25,546, Application of Missouri Pacific Railroad Company and Texas & Pacific Railway Company under Section 5 (19, 21) of the Interstate Commerce Act in the Matter of Installation of Common Carrier Service by Water Other Than Through Panama Canal, No. 25,728, Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company, and No. 25,878, New Orleans & Lower Coast Railway Company v. Akron, Canton & Youngstown Railway Company.

nections were in the public interest. The Commission then proceeded to prescribe maximum joint rates. These joint rates were modified following a further hearing of the same proceeding
183 in 1940 (243 I. C. C. 199) so as not to exceed the joint rates over comparable routes between rail carriers and break-bulk water lines. The latter of course do not use railroad cars on their ships. It is important to have in mind that The Pennsylvania Railroad and certain of the other petitioners thereupon established the through routes prescribed by the Commission and, as the amended petition alleges, those through routes are now in full force and effect.

The Commission reopened for further hearing the proceedings at Nos. 25,728 and 25,878, Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company, and New Orleans & Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railroad Company, to determine on what terms and conditions, including compensation, the petitioners should be required to interchange their freight cars with Seatrain. On October 13, 1941, after completing its hearings the Commission announced its final decision (248 I. C. C. 169) and entered the cease-and-desist order of October 13, 1941, complained of in this proceeding. The Commission reaffirmed its jurisdiction to require rail carriers, parties to through routes with Seatrain, to permit the use of their freight cars in Seatrain's service.[1] The Commission found that the rail carriers' refusal to permit interchange of cars between themselves and Seatrain was a violation of the Interstate Commerce Act and that the current code of per diem rates governing the interchange of freight cars between the various railroads, including the current inter-railroad rate of $1.00 per day, should be payable by Seatrain, though only for such periods as the rail-carriers' cars were in its actual possession.[2] On the same day the order complained of was entered by the Commission.[3]

184 The petitioners contend that the order of October 13, 1941, should be set aside or at least mitigated for three reasons. First they assert that there is no duty on rail carriers to deliver their freight cars for the use of, or to interchange their cars with, a water carrier and that the Commission has no authority to direct such delivery or interchange. Second, they contend that the Commission is without power to require rail carriers to permit their cars to be taken and used on ocean going vessels of a water

[1] As we have already stated, in its interstate commerce Seatrain usually carried cars destined for Belle Chasse or Hoboken to Havana, Cuba. This is a fact which is conceded by all the parties.

[2] Seatrain has no cars of its own though it has indicated its willingness to buy freight cars. It already rents a substantial number of privately owned cars.

[3] The Commission ordered the proceeding at No. 25,365 to be discontinued, the proceedings at Nos. 25,728 and 25,878 to be dismissed without prejudice to the filing by Hoboken Railroad and Lower Coast of a petition for further consideration or for filing of new complaints after the proceeding at No. 25,727 had been disposed of, if the situation then warranted such action.

carrier for transportation from place to place in the United States, such transportation going into a foreign port and through foreign waters. They assert last that the compensation fixed by the Commission for the use of the rail carriers' freight car by Seatrain is confiscatory and that the orders of the Commission "exempting" Seatrain from paying for the use of railroad cars held for acceptance by it (as distinguished from cars actually in its possession) are unreasonable and arbitrary.

LAW

I

The parties have suggested to the court that this case may be moot because of circumstances brought on by war. This point was raised, we believe, merely for the purpose of fully informing the court as to present condition governing Seatrain's service. Without going into details as to the nature of this service, it is sufficient to state that the order of the Commission is presently in effect and that that order requires the petitioners not only to abstain from enforcing present rules, regulations, and practices which prohibit the interchange of their freight cars for transportation by Seatrain in interstate commerce, but also requires that petitioners to
185 establish on or before a specified date, and thereafter to observe, rules and regulations with respect to the interchange of their freight cars for transportation by Seatrain in interstate commerce. We conclude that there is a justiciable controversy before this court within the purview of the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. A. Sec. 41 (28) and Secs. 43 to 48, inclusive. The Commission's order is a continuing one and embraces not only a negative duty upon the petitioners but requires affirmative conduct upon their part as well. Though the circumstances of Seatrain's service have been changed by the war, the case is not moot and the petitioners are entitled to a review of the order complained of. See Federal Trade Commission v. Goodyear, 304 U. S. 257, and the cases cited therein.

II

The petitioners contend that the history of the Interstate Commerce Act demonstrates that common carriers by rail have no duty to interchange cars with common carriers by water and the Commission has no power to direct interchange of cars between such carriers. If this be true the relief sought by the petitioners must be granted. To ascertain the correctness of this legal proposition a brief history of the Interstate Commerce Act and of some of the amendments to it is necessary.

Section 1 of the original Act of February 4, 1887, 24 Stat. 379, defined the term "railroad." We shall deal more specifically with other provisions of Section 1 at a later point, under heading III, of this opinion. Section 3 provided in part that "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines. * * *."

186 The provisions quoted have remained in substance in the Act since 1887. Section 12 set forth the duties of the Commission which were largely those of an investigatory body.

The Hepburn Act of June 29, 1906, 34 Stat. 584, increased the powers of the Commission and made it to some extent a regulatory as well as an investigatory body. The Hepburn Act also enlarged the definition of a railroad to include water carriers when both are used for continuous carriage or shipment in interstate commerce. The term "railroad" was defined to include the facilities required for "transportation" and the term "transportation" was itself defined so as to include cars. Section 1 of the Hepburn Act provided that it should "be the duty of every carrier subject to the provisions of this Act * * * to establish through routes and just and reasonable rates applicable thereto." The Hepburn Act required connections between lateral or branch-line railroads and trunk-line carriers and required cars to be furnished for the movement of through traffic. The Commission was not expressly given the power to compel carriers to exchange cars.

The Mann-Elkins Act of June 18, 1910, 36 Stat. 539, 545, again amended the Interstate Commerce Act. Section 7 of the Mann-Elkins Act broadened the definition of "transportation" as contained theretofore in Section 1 of the Interstate Commerce Act. The section also provided that the carriers subject to the Act should establish through routes with applicable rates and make reasonable rules and regulations with respect to the "exchange, interchange, and return of cars" used on such through routes.

The Interstate Commerce Act was amended further by the Esch Car Service Act of May 29, 1917, 40 Stat. 101. This statute employed the term "car service" which it defined as including the "exchange, interchange, and return of cars" used by any carrier subject to the provisions of the Interstate Commerce Act. It required every carrier subject to the Interstate Commerce Act to establish reasonable rules and regulations for car service

187 used in connection with through routes and specifically gave the Commission power to establish reasonable rules and

practices in respect to car service if a carrier failed to do so. It also provided a penalty to be imposed if a carrier refused to comply with orders or directions of the Commissioner as to car service. The Commission was empowered by general or special order to require all carriers to file rules and regulations in respect to car service and also was given power, " * * * after hearing, on a complaint or upon its own initiative without complaint [to] establish reasonable rules, regulations, and practices with respect to car service, * * *."

The petitioners take the position that even the Esch Car Service Act did not expressly impose on carriers by railroad a duty to exchange cars and did not impose any duty on carriers by rail to exchange cars with carriers by water. They contend further that the Esch Car Service Act did not give the Commission authority to require such service of them. These contentions cannot be sustained for the contrary clearly appears from the express words of the Esch Car Service Act. After the passage and approval of the Esch Car Service Act the Commission had the power to compel the exchange, interchange, and return of cars between carriers subject to the Act. Since rail carriers and water carriers were subject to the Act, the Commission had the power to compel the interchange of cars between a rail carrier and a water carrier such as Seatrain.

An important change was worked in the Interstate Commerce Act by the Transportation Act, 1920, 41 Stat. 456. Section 400 (4) of Title IV of the Transportation Act, 1920, amended Section 1 of the Interstate Commerce Act and provided that every common carrier subject to the Interstate Commerce Act should establish through routes and reasonable rates applicable thereto, should provide reasonable facilities for operating through routes, and should make reasonable rules and regulations with respect to the operation of such through routes. It will be noted that the express provision of the Mann-Elkins Act which required common
188 carriers subject to the Interstate Commerce Act "* * * to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars * * *" to be employed in connection with through routes, was omitted from the Transportation Act, 1920, in favor of the provisions of the next referred to.

Section 402 of the Transportation Act, 1920, amended the paragraphs added to Section 1 of the Interstate Commerce Act by the Esch Car Service Act to read, in part, as follows:

"(10) The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars * * * by any carrier by railroad subject to this Act.

"(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; * * *."

* * * * *

"(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

"(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

189 The petitioners lay particular emphasis on the provisions of Section 1 (10), (11), (13), and (14) of the Interstate Commerce Act as amended by the Transportation Act and point out that it became the duty of "every carrier by railroad" to furnish safe and adequate "car service." The petitioners argue that since the "car service" provisions of the Act as amended expressly imposed the duty to furnish car service on carriers by railroad and did not impose that duty on carriers by water (the Mann-Elkins Act having expressly imposed this duty on rail and water carriers alike), rail carriers were required, after the enactment of the Transportation Act, 1920, to interchange their cars only with rail carriers and not with water carriers. In short, the petitioners contend that despite the fact that water carriers as well as rail carriers were then subject to the provisions of the Interstate Commerce Act and were required to establish through routes, the duty of car service was limited by the Transportation Act, 1920, to carriers by railroad who were required only to exchange cars with carriers by railroad. The petitioners assert that their argument is strengthened by the fact that while Section 402 (13) of the Transportation Act expressly conferred on the Commission the power to compel a carrier by railroad to furnish its lines with adequate facilities for fulfilling the requirement of car service imposed by the Transportation Act, 1920, it gave no like power to the Commission to compel water carriers to supply such facilities and that therefore it was the intention of Congress not to compel the exchange of cars between carriers by rail and carriers by water.

The Transportation Act of 1940, 54 Stat. 898, recast the Interstate Commerce Act. Provisions respecting railroads were put in part I; those relating to motor carriers, in part II; and those affecting water carriers were placed in part III. Part III, commonly called the Water Carrier Act, 49 U. S. C. A. §§ 901 et seq. Section 2 (c) of the Transportation Act of 1940, 49 U. S. C. A. Sec. 1 (4), amended Section 1 (4) of the Interstate Com-
190 merce Act. Subsections 10, 11, and 13 of Section 1 of the Interstate Commerce Act remained unchanged by the amendments of the Transportation Act of 1940, 49 U. S. C. A. Sec. 11 (10), (11), and (13). Subsection (14) of Section 1 of the Interstate Commerce Act was altered. Section 1 (14) (a), reads as follows, "The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

The petitioners contend that the Transportation Act of 1940 and in particular those provisions just quoted, makes it clear that they have no duty to interchange cars with a carrier by water and that the Commission possesses no power to compel them to do so; that the duty to interchange cars with carriers by water imposed on them by the Esch Car Service Act and allegedly obliterated by the amendment to the Interstate Commerce Act embodied in the Transportation Act, 1920, were not reimposed upon them. They concede that Section 1 (4), 49 U. S. C. A. § 1 (4), requires the establishment of through routes by carriers by rail with carriers by water, but they go no further.

Putting aside the prior decisions of the Commission and of the courts[6] which are not helpful in view of the present
191 form and substance of the Interstate Commerce Act and restricting ourselves to the words of the Interstate Com-

[6] We think that we need not discuss the decision of the Interstate Commerce Commission in Missouri and Illinois Coal Co. v. Illinois Central R. Co., 22 I. C. C. 39, decided in 1911 and cited with approval by the Supreme Court in 1931 in Chicago, Rock Island & P. Ry. Co. v. United States, 284 U. S. 80, 91. The Interstate Commerce Commission in the cited case had before it Section 7 of the Mann Elkins Act of June 18, 1910, 36 Stat. 539, 545, which specifically provided as we have stated that it was the duty of every common carrier subject to the provisions of the Act, not only to provide reasonable facilities for operating through routes but also "* * * to make reasonable rules and regulations in respect to the exchange, interchange, and return of cars used therein, * * *." We have not discussed such decisions as Colorado Coal Traffic Ass'n v. C. & S. Ry Co., 24 I. C. C. 618, or Omaha Grain Exchange v. Great Northern Ry. Co., 47 I. C. C. 532, decided respectively in 1912 and 1917, for similar reasons. These are cases in which the Commission reiterated its authority to require car interchange between carriers by railroad where they were parties to through rates. The provisions of Section 7 of the Mann-Elkins Act were applicable when the first case was decided and those of the Esch Car Service Act, 40 Stat. 101, were pertinent in the latter case. For substantially similar reasons we have omitted also any dis-

merce Act, we are unable to agree with the contentions of the petitioners for the reasons which follow.

Section 1 (1) (a) of the Act, 49 U. S. C. A. § 1 (1) (a), provides that the provisions of part I shall apply to common carriers engaged in the transportation of property "* * * partly by railroad and partly by water when both are used under * * * [an] arrangement for a continuous shipment * * *." The word "both" as used is a term of art. It means that the provisions of part I except where expressly inapplicable by reason of specific terms in some of its sections, are made to apply to common carriers by water where they are engaged in transporting goods as part of a continuous shipment in cooperation with a carrier by railroad.

Section 1 (3) (a), 49 U. S. C. A. § 1 (3) (a), defines the term "common carrier" as including all persons "engaged in such transportation as aforesaid as common carriers for hire." The transportation previously described is that set out in Section 1. Section 1 (3) (a) defines transportation as including "* * * cars * * * and other vehicles * * *, and all instrumentalities and facilities of shipment * * *, irrespective of ownership * * *."

Section 1 (4), 49 U. S. C. A. § 1 (4), provides: "It shall be the duty of every common carrier subject to * * *
192 [part I] to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation, to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

The petitioners and Seatrain are subject to the provisions of part I of the Act since they perform transportation services of the kind described in Section 1 (1) (a). Such carriers are required

cussion of such cases as Flour City C. C. Co. v. Lehigh Valley R. Co., 24 I. C. C. 179, decided in 1912, and Chattanooga Packet Co. v. Illinois Central R. Co., 33 I. C. C. 384, decided in 1915.

We shall not deal with the provisions of the Panama Canal Act of August 24, 1912, 37 Stat. 568, in this phase of our decision because that portion of it remaining in the Interstate Commerce Act (Section 6 (11), 49 U. S. C. A. § 6 (11)) is more pertinent to the subject considered under the next heading of this opinion.

to furnish "transportation" which may include cars as specified by Section 1 (3) (a) needed for the maintenance of through routes. Carriers by railroad are expressly required by Section 1 (4) to establish through routes with carriers by water and the subsection provides also that "every such common carrier [by rail or by water engaged in continuous shipments] * * * establishing through routes to provide reasonable facilities for operating such routes * * *" Cf. Section 305 (b), 49 U. S. C. A. § 905 (b), relating to carriers by water under part III.

We think that it follows that rail carriers are required by the Interstate Commerce Act to supply cars which may go upon the lines of other carriers, including carriers by water, as may be necessary for the maintenance of through routes for continuous shipments at least insofar as the transportation takes place within the United States or its territorial waters. This is so because of
193 the definition of "transportation" contained in Section 1 (3) (a) and because of the further fact that cars indubitably are "facilities" of carriage as described in Section 1 (4). Cf. Tank Car Corp. v. Terminal Co., 308 U. S. 422.[7] Such is the duty of common carriers by rail, but that is not to say that Congress has given the Commission authority to compel reluctant carriers to fulfill this duty. To accertain the authority of the Commission in this respect it is necessary to turn to the "car service" provisions of the Act. Subsection 10 of Section 1 defines the term "car service" as including the use, control, supply, movement, and distribution of cars. Subsection (11) provides that it shall be the duty of "every carrier by railroad" subject to part I to furnish car service. The subsection is notably silent in that it does not state to what carriers (subject to part I) the rail carriers shall supply car service. As we have already indicated, common carriers by water are subject to the provisions of part I upon the existence of the specified conditions of continuous carriage and through routes. We think therefore that carriers by railroad are required to exchange cars with carriers by water where both carriers are engaged in the transportation of property under an arrangement for continuous shipment on through routes. Subsection (13) authorizes the Commission "by general or special orders to require all carriers by railroad" subject to part I to file rules and regulations with the Commission in respect to car service, and, in the Commission's discretion, to direct that these rules and regulations shall be incorporated in the rail carriers' schedules. Subsection 14 (a) gives the Commission authority on a complaint or

[7] It must be noted that the Supreme Court and Mr. Justice Roberts, the author of the opinion in the cited case, were construing the provisions of Section 15 (13) of the Act, 49 U. S. C. A. Sec. 15 (13) which relates to the allowance to the owner of property transported who furnishes an instrumentality for the transportation. But referring to 49 U. S. C. Sec. 1 (3), Mr. Justice Roberts said, 308 U. S. 428, "Freight cars are facilities, as defined by the Act."

upon its own initiative without a complaint, to establish
194 rules and regulations and practices in respect to car service.[8] We think that it is clear that in view of the provisions of subsections (13) and (14) (a) that the Commission possesses the power to require carriers by railroad to supply common carriers by water with cars when necessary to effect transportation by rail and water routes for continuous shipment over through routes in interstate commerce insofar as that transportation takes place within the United States or its territorial waters.

Broad construction is required. A "National Transpor'ation Policy" was declared by the sections preceding Sections 1, 201 and 301 of the Interstate Commerce Act, 49 U. S. C. A. §§ 1, 301 and 901, added by the Transportation Act of 1940. Congress intended the Act to develop, coordinate and preserve "a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." The National Transportation Policy as stated by Congress, requires all of the provisions of the Interstate Commerce Act to be "administered and enforced" with a view to carrying out this intention.

III

The petitioners also take the position that the Commission is without power to require rail carriers to permit their cars to be taken and used on the ocean-going vessels of a carrier by water such as Seatrain, through foreign waters, the vessels of the carrier by water docking during the course of the voyage at a foreign port. The facts are not in dispute. Seatrain carries cars of the petitioners from Hoboken, New Jersey, to Belle Chasse, Louisiana, and from Belle Chasse to Hoboken, frequently operating by way of Havana, Cuba. Graham B. Brush, president of Seatrain, made the character and scope of Seatrain's operations very plain.
195 His testimony is set out in the margin.[9] The Commission found, 226 I. C. C. 7, 13–14, that "* * * the undisputed

[8] See also subsections (15), (17) (a) and (21). These subsections are auxiliary to and in aid of subsections (10) to (14) inclusive.

[9] See p. 21 of the transcript in I. C. C. Docket No. 25,565, which was made part of the record in I. C. C. Docket No. 25,728 and No. 25,878 (I. C. C. Tr. 240–6; Exhibit 36. Mr. Brush testified in this connection as follows:

"Q. Your ships are now operating in what service or in what services, Mr. Brush?

"A. Our present operation is from New York to Havana, thence to New Orleans, returning from New Orleans to Havana to New York; the ships leaving New York and clearing for the foreign ports, entering Havana and again clearing from Havana for a foreign port.

"Q. What is the length of the voyage from New York to Havana?

"A. In time the voyage is three and a half days under the present operating schedule from New York to Havana, a distance of approximately 1,200 nautical miles.

"Q. And from Havana to New Orleans?

"A. From Havana to New Orleans the running time is approximately two days, a distance of 600 nautical miles.

"Q. In those voyages do your ships go out to sea?

"A. Yes, sir * * *."

facts are that the ordinary route of Seatrain between Hoboken and Belle Chasse is via Havana; that over such route the vessels operate in part through foreign waters and touch a foreign port; that occasionally the call at Havana is omitted, in which instances the route is in part outside the territorial waters of the United States; that when the vessels call at Havana, cars containing interstate freight are placed under United States customs seals at the port of departure and remain so until arrival at the port of destination, and the freight contained in such cars is not made accessible to the Cuban authorities; that three sets of manifests are made out at the port of departure, one required by the Cuban authorities and another required by the United States customs relate to freight for Cuba, and the third, which shows only the cars moving in interstate commerce, is given the Cuban customs inspector as a matter of information; that no Cuban official has ever attempted to take jurisdiction over the interestate freight; and that there are no Cuban regulations affecting Seatrain's operations, but its vessels while at Havana are subject to all Cuban laws and regulations, such as those relating to quarantine and health, applicable to vessels of foreign register." It is con-
196 ceded that Seatrain transports a very substantial number of empty cars, routing them preferably by Havana, in the hope that there they may pick up loads.

The Commission based its jurisdiction to require the petitioners to deliver their cars to Seatrain for transportation on its routes via Havana, on the provisions of what was formerly Section 6 (13) (b) of the Interstate Commerce Act, read in conjunction with former Section 5 (19)[10] of the Act. The Commission held that the phrase used in Section 6 (13) "through the Panama Canal or otherwise" was the equivalent of the phrase employed in Section 5 (19), "through the Panama Canal or elsewhere." Section 5 (14) prohibits the ownership or control by a railroad of a competing water carrier operating "through the Panama Canal or elsewhere." We think that the Commission's conclusion that the phrase of Section 6 (13) has the same meaning as that quoted from Section 5 (19), is correct.[11] The Commission has repeatedly construed Section 5 (19) as being applicable to carriers by water operating to or via foreign ports (see New Orleans and Havana Car Ferry Service, 188 I. C. C. 371) and did so in the Seatrain Through Route Case before the Transportation Act of 1940 was enacted.

The respondents assert that the provisions of old Section 6 (13) (b) were in substance rëenacted and broadened by Section

[10] Paragraph (b) of subsection (13) of Section 6 was repealed by the Transportation Act of 1940. See 54 Stat. 910 and Section 6 (11) of the present Act, 49 U. S. C. A. § 6 (11). Subsection (11) was incorporated in the Transportation Act of 1940 and by it was made part of the present Interstate Commerce Act. See Section 5 (14), 49 U. S. C. A. § 5 (14). These provisions were part of the Panama Canal Act of 1912. See Sections 6 (13) (b) and (11) of the Act of August 24, 1912, c. 390, 37 Stat. 566.

[11] Compare Chicago, R. I. & P. Ry. v. United States, 274 U. S. 29.

15 (3) and Section 307 (d), 49 U. S. C. A. §§ 15 (3) and 907 (d), of the Interstate Commerce Act as constituted after the enactment of the Transportation Act of 1940. The respondents go a step further, however. They take the position that Sections 1 (4) and 3 (4) of the Interstate Commerce Act, 49 U. S. C. A. §§ 1 (4) and 3 (4) as constituted by the Transportation Act of 1940, gave carriers by water the benefit of the obligations imposed upon
197 carriers by railroad. The Interstate Commerce Commission took a similar view in the rehearing at No. 25728. See 248 I. C. C. 109.

Section 302 (d), 49 U. S. C. A. § 902 (d), defines a "common carrier by water" as "any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property * * *."

Section 302 (i), 49 U. S. C. A. § 902 (i), defines "interstate or foreign transportation" or "transportation in interstate or foreign commerce" as used in part III as transportation of property "(2) partly by water and partly by railroad * * *, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof such terms shall include transportation by railroad * * * only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States. * * *" Do the words of subparagraph (i) (2) extend the jurisdiction of the Commission to transportation throughout its whole course from a place to a place within the United States despite the fact that that course of transportation transverses extraterritorial waters and goes into a foreign port? We conclude that this was the intention of Congress. We think therefore that the Commission has jurisdiction over transportation such as that carried on by the petitioners and Seatrain, from state to state in the United States, throughout the whole course of that transportation even if it passes through foreign waters and into foreign ports. But the fact that the Commission has jurisdiction of such transportation does not necessarily mean that the Commission can compel carriers by railroad to provide carriers by water with cars for routes passing through extraterritorial waters and into a foreign port.[12] What must be our conclu-
sions as to this question?
198 As we have already stated, part III of the Interstate Commerce Act deal primarily with carriers by water. It expressly contemplates the establishment of through routes by common carriers by water with common carriers by railroad. See

[12] Compare the decision of the Supreme Court in Chicago, R. I. & P. Ry. v. United States, 274 U. S. 29, which was based on old Section 6 (13) (b).

Section 305 (b), 49 U. S. C. A. § 905 (b), which repeats with one very pertinent exception, referred to hereinafter, the substance of Section 1 (4), part I of the Act. Section 305 (b) provides that common carriers by water are required "* * * to provide reasonable facilities for operating such through routes, * * *," i. e., to provide facilities for operating through routes with carriers by railroad. Section 302 (1), 49 U. S. C. A. § 902 (1), provides that the term "common carrier by railroad" means "a common carrier by railroad subject to the provisions of part I." In short, the "common carriers by railroad" referred to in Section 305 (b), with which it is the duty of common carriers by water to establish through routes, are the common carriers by railroad defined in and subject to the provisions of part I. Section 1 (1) of part I defines the transportation to which the provisions of part I are applicable as the transportation of property partly by railroad and partly by water under arrangement for a continuous shipment "from any place in the United States through a foreign country to any other place in the United States * * *, but only in so far as such transportation takes place within the United States." This limitation placed upon the nature of the transportation embraced by Section 1 (1) does not limit the definition of transportation contained in Section 302 (i) (2). This is obvious for the scope of the transportation defined in part III, Section 302 (i) (2) is much broader than the concluding phrases of Section 1 (1). But the common carriers by railroad subject to part III are those which, by express definition, are subject to the provisions of part I, and if cars are to be gotten from carriers by railroad for the use of carriers by water, it must be by virture of the provisions of part I. Does it follow, therefore, that the car service provisions of the Act, subsection (10) to (14) of Section 1 of part I are applicable to compel common carriers by railroad
199 to interchange cars with common carriers by water only for the transportation defined in Section 1 (1); that is to say, for such transportation as takes place within the United States or its territorial waters? This is the gist of the question now before us.

We held under heading II that a common carrier by railroad has the duty to interchange cars with common carriers by water when necessary for the operation of an integrated transportation system as required by the National Transportation Policy declared by Congress. The transportation there dealt with was transportation within the United States or its territorial waters, viz., that described in Section 1 (1) of part I of the Act. We are dealing now with the transportation carried on by Seatrain in conjunction with the petitioners under arrangements for continuous

carriage or shipment from place to place in the United States but through extraterritorial waters and via the port of Havana. Conceding that the provisions of the Interstate Commerce Act are entitled to the broad interpretation which is necessary to effect the National Transportation Policy stated by Congress, should we reach the conclusion that the provisions of the Act compel carriers by railroad to furnish cars to carriers by water for such transportation?[13]

200 Are there other provisions of parts I or II of the Act that will compel the petitioners to furnish cars to Seatrain for Seatrain's extraterritorial transportation? The respondents point to the provisions of Section 305 (b) and the words of that subsection which require common carriers by water to establish through routes with common carriers by railroad "and to provide reasonable facilities for operating such through routes * * *." But, assuming that cars are to be considered as facilities of transportation under this section, the duty is one which is imposed only upon carriers by water and not upon carriers by railroad. The sentence of Section 1 (4), "It shall be the duty of every such common carrier [by railroad and water] * * * to provide reasonable facilities for operating such [through] routes * * *" is absent from Section 305 (b) and there is therefore no conjoint duty imposed by it on carriers by railroad and carriers by water. The respondents therefore cannot maintain any position on the strength of the contents of Section 305 (b).

Does the Panama Canal Act as now constituted in part I, Section 6 (11), 49 U. S. C. A. Sec. 6 (11), serve to support the respondents' position and that of Hoboken Railroad? The latter company lays particular emphasis on the provisions of the Panama Canal Act and has constructed a singularly ingenious argument in aid of its point of view. It points to the provisions of Section 6 (11) as they now exist,[14] and in particular to that

201 clause of the first paragraph which says when the transportation is from point to point in the United States by rail and water through the Panama Canal or otherwise, and not en-

[13] We are not unmindful of the decisions of the Commission referred to in note 11, supra, or to that of the Supreme Court in Chicago, R. I. & P. Ry. v. United States, 274 U. S. 29. In the case last cited the Supreme Court held only that paragraph 13 of Section 6 of the Interstate Commerce Act read in conjunction with paragraph 4 of Section 15 of the Act (both sections being part of the Panama Canal Act as it existed prior to the enactment of the Transportation Act of 1940) gave the Commission power to compel a carrier by railroad to embrace in a through route by rail and water, through the Panama Canal, the transportation of passengers and of freight. The decision did not deal at all with any requirement of car service. Contrast the decision of the Supreme Court in St. Louis, etc., Ry. Co. v. Brownsville Dist., 304 U. S. 295, 300, decided in 1938. In the cited case, Mr. Justice Butler, after setting out the car service provisions of the Interstate Commerce Act as they existed prior to the passage of the Transportation Act of 1940 (unchanged by the latter Act except as to Section 6 (14), stated, "The Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation or tariff to furnish cars for transportation in Mexico." The Supreme Court, however, was dealing only with transportation by rail and not with transportation by rail and water.

[14] Section 6 (13) of the Panama Canal Act as amended by the Transportation Act, 1920, provides, "When property may be or is transported from point to point in the

tirely within the limits of a single State, the "* * * Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in addition to the jurisdiction given by * * *" the Interstate Commerce Act as amended, "* * * in the following particulars * * *," viz., those set out in subparagraphs (a) and (b). The Hoboken Railroad lays emphasis on the phrase "in addition to the jurisdiction given by * * *" the Interstate Commerce Act and contends that these words enlarge the powers given to the Commission under the Act. This is true, but that enlargement of jurisdiction goes only to the particulars set out in subparagraphs (a) and (b). Subparagraph (a) deals with the establishment of physical connections between the lines of the rail carrier and the dock of the water carrier. Subparagraph (b) requires the establishment of proportional rates between the rail carrier and the water carrier. There is no aid here for the respondents. The fact is that the Panama Canal Act has been emasculated. If the statute stood as it did in former Section 6 (13) (b) and the Commission had retained the power "* * * to determine all the terms and conditions under which such lines [rail and water] shall be operated in the handling of the traffic embraced * * *" the respondents' position would be a much stronger one.

Another argument can be made, however, which, perhaps, will indicate with some sharpness the issue of statutory interpretation presented for our determination. Section 303 (a), 49 U. S. C. A. § 903 (a) provides: "In the case of transportation which is subject both to this part and part I, the provisions of part I shall apply only to the extent that part I imposes, with respect to such transportation, requirements not imposed by the provisions of this part." These are words of limitation. They mean that the provisions of part I shall be applicable to transportation
202 subject both to parts III and I only to the extent that part I makes them applicable.

Turn again to Section 1 (1). May it be said that if transportation by rail to the port of ship-loading (say Hoboken) and transportation by rail from the port of ship-unloading (say Belle Chasse) takes place within the United States, carriers by rail-

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United States by rail and water through the Panama Canal or otherwise, * * * the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

"(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made * * *.

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

road must interchange cars with Seatrain at these points, the whole of the ensuing transportation by water, (most of which takes place outside the territorial waters of the United States) becoming subject to all of the provisions of part I, those of Section 1 (4) as well as the car service provisions contained in Section 1 (10), (11), (13) and (14)? In other words, should Section 1 (1) be construed as if some such phrase as "by rail" were inserted between the words "transportation" and "takes" in its final clause?

We think that there are several answers to this argument. The first is that the last clause of Section 1 (1), "but only insofar as such transportation takes place within the United States * * *" modifies the whole sentence of which it is a part and therefore must be deemed to limit the application of the provisions of part I to transportation "from any place in the United States through a foreign country to any other place in the United States." The clause of limitation certainly does not limit only the phrase immediately preceding it. Second, the provision of Section 1 (1) by its own terms applies to transportation of property "partly by railroad and partly by water" and therefore it is manifestly improper to insert some such phrase as "by rail" as we have suggested. Such an interpretation would amount to rewriting the statute. Last, Section 1 (2), 49 U. S. C. A. Sec. 1 (2), reiterates the identical limitation enunciated in Section 1 (1) and does so unqualifiedly.

It may be argued that the phrase of Section 1 (1), "from any place in the United States through a foreign country to any other place in the United States," possesses little meaning when read with the clause of limitation. With this we may agree. The
203 original Act to Regulate Commerce, 24 Stat. 379, while it made use of the phrase "from any place in the United States through a foreign country to any place in the United States," contained no phrase of limitation such as that under consideration. In the Act of June 29, 1906, 34 Stat. 584, amending Section 1 of the Interstate Commerce Act, the phrase last quoted was used again with any words of limitation. The clause of limitation was brought into the Act by Section 400 of the Transportation Act, 1920, 41 Stat. 474. We can find no legislative history which informs us adequately why it was inserted; but we must give
204 to it the effect which we think Congress intended.[15] We con-

[15] We have been unable to find any legislative history adequately explaining the inclusion of the clause "* * * but only in so far as such transportation takes place within the United States.", first found in Section 400 (1) of the Transportation Act, 1920, 41 Stat. 474. We have examined those portions of the Congressional Record which report the discussions of the bills originally introduced in the Senate and in the House of Representatives. The House and Senate bills did not contain the clause. Both the Senate and the House submitted bills which did not contain the clause to the Conference Committee. The Conference Report sets out the clause under consideration for the first time. See House Report No. 650 to accompany H. R. 10453 (66th Congress, 2nd Session, 59th Cong. Rec. Part III, pp. 3043 et seq.). The report of the Committee contains no explanation for the clause. We have been unable to find any transcript of hearings before the Conference Committee. Available indices contain no reference to such hearings and their absence indicates that there were none.

clude that it means precisely what it says however inconsistent its provisions may seem when read with the phrase "from any place in the United States through a foreign country to another place in the United States." The effect of the limitation is to restrict the operation of the provisions of part I of the Interstate Commerce Act to transportation taking place within the United States. It follows that the provisions of Section 1 (4) and Section 1 (10), (11), (13), and (14), the car service provisions, are applicable to transportation "only insofar as such transportation takes place within the United States." To conclude that the provisions of part I apply throughout the whole of a course of transportation, which, though it goes from place to place within the United States, in part moves outside of the United States and its territorial waters, would be casuistry.

We can find no provision in the Interstate Commerce Act that imposes a duty upon carriers by railroad to exchange cars with carriers by water engaging as does Seatrain in transportation through extraterritorial waters and through a foreign port
205 and we can find nothing in the Act which authorizes the Commission to impose such a duty on the petitioners.[16]

The Commission's order must be read against the background of the record. The record is clear as to the nature and extent of transportation of cars by Seatrain beyond the United States and

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We can find no textbook which deals with this particular clause, and we have been unable to find any pertinent discussion in any law review article.

The following discussion, which relates to the similar provision of what became Section 400 (2) of the Transportation Act, 1920, took place in the House of Representatives on November 14, 1919. See 58 Cong. Rec. p. 8256.

"Mr. EDMONDS. Mr. Chairman, I would ask the chairman of the committee a question. I move to strike out the last word.

"On page 39, sections (a) and (b), is it the intention of the committee to include our foreign commerce under the Interstate Commerce Commission, or to make rates and supervise and regulate?

"Mr. ESCH. That does not change the existing law. It has been the law for years.

"Mr. EDMONDS. That is true; but has the Interstate Commerce Commission operated in foreign Commerce?

"Mr. ESCH. No. Its jurisdiction would not extend beyond the 3-mile limit anyhow.

* * * * * *

"The gentleman will find the limitation as to transportation over which the committee has exercised jurisdiction on line 3, page 40, to the effect in so far as such transportation and transmission takes place within the United States. The words "within the United States" would not permit it to go beyond the 3-mile limit.

[16] We are not unmindful of the rule of the ship's flag and that the nationality of American flag vessels by rule of law, comity and practice of nations remains that of the United States. See Taylor, International Public Law, Section 268. The doctrine, however, will not serve to extend the jurisdiction of the Interstate Commerce Act or the authority of the Commission.

"Mr. EDMONDS. That does not apply then, as I understand it, to the transportation of passengers or property outside the 3-mile limit?

"Mr. ESCH. No."

The discussion quoted related as we have stated to the provision of subparagraph (2) of Section 400 of the Transportation Act, 1920, viz. "The provisions of this Act shall also apply to such transportation of passengers and property * * *, but only in so far as such transportation * * * takes place within the United States." The specific clause of subparagraph (1) was not included in the bill at the time the discussion took place, but it would seem that it must have been the intention of Congress to attribute the same meaning to identical clauses. Congressman Esch thought that the jurisdiction of Congress did not "go beyond the 3-mile limit" in respect to foreign commerce and that this view was generally accepted by his colleagues. Would it not follow, therefore, that the clause of subparagraph (1) should be given the same limiting effect? See the dissenting opinion of Mr. Esch, as a Commissioner of Interstate Commerce in International Nickel Company v. Director General, 66 I. C. C. 631.

its territorial waters. We have decided that the provisions of the Interstate Commerce Act do not compel the petitioners to interchange cars with Seatrain for such service, nor do they confer authority upon the Commission to compel such interchange. Insofar as the order of the Commission relates only to transportation within the United States or its territorial waters, it will be sustained. Insofar as it serves to compel the petitioners to interchange cars with Seatrain for transportation beyond the United States and its territorial waters, in foreign waters or to a foreign port, it must be modified and limited.[17]

In reaching these conclusions we have endeavored to give to the Interstate Commerce Act the broadest justifiable construction in view of the intention of Congress as declared in the National Transportation Policy. We cannot legislate, however.

What we have said renders it unnecessary to discuss the last point raised by the petitioners; the question of whether the compensation fixed by the Commission for the use of the petitioners' cars is confiscatory.

An order may be submitted.

206 Findings of fact and conclusions of law are filed with this opinion in accordance with Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A. following § 723c.

JOHN BIGGS, Jr.,
United States Circuit Judge.
GUY L. FAKE,
United States District Judge.
WILLIAM F. SMITH,
United States District Judge.

OCTOBER 9, 1943.

[File endorsement omitted.]

207 In United States District Court

Findings of fact

Filed Oct. 9, 1943

1. This suit is brought under the provisions of Title 28, United States Code, Sections 41 (28) and 43–48, inclusive, to enjoin, set aside, annul, and suspend orders of the Interstate Commerce Commission which require certain railroads, including petitioners, to permit the interchange of their cars with Seatrain Lines, Inc. The

[17] We think we should state that we can see no practical way in which Seatrain can operate its ships between Hoboken and Belle Chasse without going outside of the territorial waters of the United States. We appreciate the effect which this ruling, if it be sustained by the Appellate Tribunal, must have upon Seatrain transportation. The remedy, however, must lie with Congress.

said orders were entered in the Commission's Docket No. 25728, Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company et al., and its Docket No. 25878, New Orleans & Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railway Company et al., and are as follows:

Order of October 13, 1941, which incorporates therein the Commission's report of the same date, 248 I. C. C. 109, together with its prior reports of February 5, 1935, 206 I. C. C. 328, and January 8, 1940, 237 I. C. C. 97;

Order of March 2, 1942, which denied various petitions indicated therein; and

So much of the order of the Commission of February 5, 1935, dismissing the complaints in said Docket Nos. 25728 and 25878 as incorporates and makes a part thereof Finding 6 in its report of the same date, 206 I. C. C. 328, 344.

2. All of the petitioners are common carriers of property by railroad subject to the Interstate Commerce Act, were defendants in the proceedings before the Interstate Commerce Commission in said Dockets Nos. 25728 and 25878, and are parties to the said orders entered by the Commission therein.

3. The United States of America is made a defendant herein by virtue of said statutes. The Interstate Commerce Commission, Hoboken Manufacturers Railroad Company, New Orleans & Lower Coast Railroad Company, and Seatrain Lines, Inc., intervened as defendants herein.

208 4. The Hoboken Manufacturers Railroad is a single-track terminal-switching line extending along the water front of Hoboken, N. J., a distance of 1.632 miles and connecting, at its northern end, with the Erie Railroad and through the Erie with other trunk lines reaching New York Harbor. In addition to its main line, the Hoboken has numerous yard tracks and sidings, a freight house, and team tracks. It serves numerous piers, at which various steamship lines regularly dock, and about 20 industries.

5. New Orleans & Lower Coast Railroad Company, a corporation of the State of Louisiana, herein sometimes called the Lower Coast, is a common carrier by railroad and makes physical connection with the dock at which vessels of Seatrain receive and deliver railroad cars at Belle Chasse, La., and acts as an intermediate switching railroad between Seatrain and the trunk line railroad carriers at New Orleans. It is an affiliate of Seatrain.

6. Seatrain Lines, Inc., is a common carrier by water subject to the Commission's jurisdiction. (Investigation of Seatrain Lines, Inc., 195 I. C. C. 215.) Since October 6, 1932, Seatrain has operated vessels, on which it transports freight in railroad cars, between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba.

Belle Chasse is on the west bank of the Mississippi River about 17 miles south of New Orleans. The method of interchanging freight with Seatrain is described in Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 219.

7. The Seatrain vesesls could not operate without the loading devices that make possible the transfer of cars between the tracks of the vessels and the tracks of the Hoboken and of the New Orleans & Lower Coast, or without the use of railroad cars, or without the cooperation of the railroad at each of these terminals.

8. From January 1929 to October 6, 1932, Seatrain and its predecessor operated vessels in foreign service between New Orleans (Belle Chasse) Louisiana, and Havana, Cuba, trans-
209 porting freight in railroad cars on vessels and interchanging cars with Cuban railroads at Havana. During this period cars of all railroads, including petitioners, were delivered to Seatrain or its predecessor for movement from New Orleans to Havana without objection by petitioners or other owners. 18,159 loaded cars moved over this route, upon which per diem at the per diem rates of the American Railway Association was paid to the owning roads by the Lower Coast for the time the cars were in its possession and that of Seatrain or the Cuban railroads. During that period there was no car service rule requiring the consents of the owners of cars for their delivery to Seatrain.

9. In 1932, Seatrain entered into negotiations with the railroads serving New York Harbor, including petitioner The Pennsylvania Railroad Company, regarding the possibility of a service between New York Harbor and New Orleans via Havana for which Seatrain would construct two new vessels. No objection was made by the railroads to the interchange of their cars with Seatrain and the railroads expressed their desire that Seatrain should inaugurate the proposed service. Seatrain caused two new vessels to be constructed for this service and arranged for a New York Harbor terminal at Hoboken on the tracks of the Hoboken Manufacturers Railroad. In September 1932 a conference was had between the officials of Seatrain and the Chairman of the Car Service Division of the American Railway Association in regard to the interchange of cars. It was represented by the Chairman of the Car Service Division that the Hoboken, like the Lower Coast, would have to be responsible for the payment of per diem on cars delivered to Seatrain and that if Seatrain should enter into a contract to reimburse the Hoboken for per diem and to handle cars in accordance with the Car Service Rules the interchange of cars of railroads, members of the Association, with Seatrain would be permitted. Such contract was entered into between Seatrain and the Hoboken.

210 10. Prior to October 6, 1932, when Seatrain began operating in service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, to wit: on or about October 3, 1932, petitions, The Pennsylvania Railroad Company and The Long Island Rail Road Company, and other carriers by railroad had notified the Hoboken and Seatrain, respectively, in writing not to deliver, accept, or use their cars in Seatrain service.

11. The American Railway Association was an association of railroads each of which was a subscriber to an agreement known as the Car Service and Per Diem Agreement under which the subscribers thereto agreed to abide by the Codes of Car Service and Per Diem Rules promulgated by the Association. The American Railway Association on November 15, 1932 promulgated, effective as of that date, Car Service Rule 4 which had been adopted by the members thereof, reading as follows:

"Cars of railroad ownership must not be delivered to a steamship, ferry, or barge line for water transportation, without permission of the owners, filed with the Car Service Division."

Subsequent to November 1933, the American Railway Association was, by consolidation, succeeded by the Association of American Railroads. The petitioners herein, and also Hoboken Manufacturers Railroad Company and New Orleans & Lower Coast Railroad Company, interveners-defendants herein, are and were subscribers to the Car Service and Per Diem Agreement by which they agree and agreed to abide by the rules promulgated by the American Railway Association and its successor, the Association of American Railroads. Petitioners herein have not given their permission for the delivery of their cars to Seatrain for use between Hoboken and New Orleans.

12. Following the promulgation of Rule 4 the Hoboken, on December 30, 1932, filed with the Commission a complaint, known as Docket No. 25728, Hoboken Manufactur-
211 ers Railroad Co. v. Abilene & Southern Ry. Co., et al., and on March 9, 1933, the New Orleans & Lower Coast Railroad filed with the Commission a similar complaint, Docket No. 25878. Both complaints were consolidated by the Commission and the hearings therein were had on one record. Both complaints alleged that Car Service Rule 4 was unlawful under Section 1 (4) and (11), and other sections, of the Interstate Commerce Act.

13. A petition by Seatrain for intervention was submitted on November 2, 1933, and was allowed on the record and filed in said consolidated proceeding. Said petition alleged that Seatrain "is a common carrier by water engaged in the transportation of freight in railroad cars partly by railroad and partly by water between Hoboken, New Jersey, and Belle Chasse (New Orleans), Louisiana, and between each of these ports and Havana, Cuba."

Seatrain therein adopted and realleged as its own the allegations of the complaints in Docket Nos. 25728 and 25878, and joined in and adopted the prayers for relief contained therein. After the said intervention was allowed and before any testimony was taken, the defendants therein moved to dismiss the complaints therein on the ground that the Commission was without authority to grant the relief sought and was without jurisdiction of the matters complained of. Thereafter testimony was taken on November 2, 3, and 4, 1933, and thereafter and on or about March 30, 1934, the Examiner issued his report in which he concluded that the Commission should find that it had no jurisdiction of the matter in controversy and that even if the Interstate Commerce Act could be construed as conferring jurisdiction, the rules, regulations, and practices assailed were not unreasonable, unduly prejudicial, or otherwise unlawful, and that the complaints should be dismissed.

14. Following extensive hearings, the filing of briefs and oral arguments, on February 5, 1935, the Commission decided the
212 consolidated Dockets Nos. 25728 and 25878. The Commission rejected the conclusions of the Examiner and made the following pertinent findings:

(a) Seatrain's vessels are designed primarily for the handling of railroad cars in non-break-bulk transportation, and the cooperation of railroads is essential to their successful operation.

(b) For its supply of railroad cars, Seatrain depends in part upon contracts with the New Orleans & Lower Coast Railroad, a wholly-owned subsidiary of the Missouri Pacific and of the Texas & Pacific Railroad Company.

(c) The only through routes that Seatrain has been able to establish between Hoboken and points to the Southwest are via the lines of the Missouri Pacific and the Texas & Pacific and some of their short line connections. Both the Missouri Pacific and the Texas & Pacific have a direct and active interest in the operation of Seatrain in that thereby they are afforded through routes by water between points in the Southwest and points on the Atlantic Seaboard, in competition with similar routes afforded by subsidiaries of the Southern Pacific Company.

(d) Where the rates are substantially the same the traffic will ordinarily move all rail because of the faster service and other advantages, whereas if the rail-water rates are substantially less than the all-rail rates the traffic will move over the rail-water routes unless shorter time in transit or some other factor requires all-rail service.

(e) The Seatrain's policy has been to maintain rates no higher than those charged by the break-bulk water lines and its service thus affords the same advantage of lower rates as the break-bulk

lines. The Seatrain has advantages over the latter because of its more expeditious service, and because of its non-break-bulk service, enabling it to handle all traffic that rail carriers can handle.

(f) One of its disadvantages is that transportation by Seatrain takes longer, usually from 1 to 7 days between representative points, than all-rail routes.

213 (g) It is manifest from this and other evidence of record that the all-rail routes actively compete with the break-bulk water-routes and that Seatrain with its many advantages and no disadvantage over break-bulk water-routes, can more effectively compete with the all-rail routes.

(h) The operation of Seatrain is in the public interest and is of advantage to the convenience and commerce of the people.

15. In this decision in respect to transportation between United States ports and Cuba, the Commission said:

"We have no jurisdiction over the rates and practices of Seatrain in its strictly foreign commerce between United States ports and Cuba. There is nothing of record to indicate that its rates and practices respecting foreign commerce are used as cloaks or devices for according to shippers engaged in both foreign and interstate commerce concessions from the tariff rates applicable to interstate commerce."

16. The report of the Commission discusses Car Service Rule No. 4, the practices of the carriers thereunder, and shows that as of March, 1933, 26 railroads had consented to the delivery of their cars to Seatrain without restriction; several others had granted such consent with restriction, but that most of the railroads had refused to permit delivery of their cars to the Seatrain. The Commission further stated that "No railroad had refused to permit delivery of their cars to any of the other 11 water lines listed in a circular of the Association as coming within the intendment of the rule."

17. In this report the Commission found that the sole object of Car Service Rule No. 4 "is to prevent the diversion of traffic from the all-rail routes to Seatrain" and that for four years prior

214 to the inauguration of this service cars were delivered to Seatain or to its predecessor Overseas for movement from New Orleans to Havana without objection by any of the railroads, during which time 18,159 loaded cars moved over that route.

18. In this report the Commission also found that Rule 4 is not strictly observed by the Hoboken and New Orleans & Lower Coast Railroad Companies.

19. Finding No. 6 of the Commission reads as follows: "That we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such through routes

are established pursuant to our order or voluntarily, to require the rail carriers parties thereto to interchange cars with the water carrier, if that is the reasonable and appropriate method of interchanging traffic moving over such through routes."

20. The Commission in its report discussed the question as to whether it had any jurisdiction over the interchange of cars with Seatrain, reviewed pertinent provisions of the Interstate Commerce Act, decisions of the Commission and of the courts thereunder, amendments made to the Act over a period of years and the broadening of the control of the Commission over rail-and-water transportation, and reached the conclusion that it had the authority to require the interchange of cars by the rail defendants with Seatrain. The Commission concluded that it had jurisdiction to require the establishment of through routes between rail-and-water carriers and where such through routes are established, pursuant to its order or voluntarily, to require the rail carriers parties thereto to interchange cars with the water carrier if that is the reasonable and appropriate method of interchanging traffic moving over such through routes.

21. The Commission found in its report that the record showed that Seatrain lines participated in through routes and joint
215 rates with the Missouri Pacific and the Texas & Pacific Railroad Companies, but added "whether defendants who refuse to permit delivery of their cars to Seatrain participated in through routes with Seatrain cannot be determined upon this record." It directed attention to the fact that whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided.

22. On or about February 20, 1935, the defendants in Docket Nos. 25728 and 25878 filed their petition with the Commission for a reconsideration of Finding No. 6 in its report of February 5, 1935, 206 I. C. C. 328, and of the legal conclusions upon which the Commission based its order of the same date. On April 1, 1935, the Commission entered its order denying the said defendants' petition.

23. The report of the Commission of February 5, 1935, referred to, relied upon, and adopted parts of its prior report dated July 11, 1933, in its Docket No. 25565, 195 I. C. C. 215, and in particular the following findings therein: "Upon consideration of the evidence, we are of the opinion and find (1) that Seatrain Lines, Incorporated, is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act, (2) that Seatrain Lines, Incorporated, is a common carrier by water engaged in the transportation of property partly by railroad and partly by water, that Seatrain Lines, In-

corporated, and the Hoboken Manufacturers Railroad Company are used under a common control, management, and arrangement for continuous carriage or shipment of property in railroad cars, in interstate and foreign commerce, that Seatrain Lines, Incorporation, and the New Orleans & Lower Coast Railroad Company are used under a common arrangement for such continuous carriage, and therefore, that Seatrain Lines, Incorporated, is subject to all the provisions of the act applicable to such a carrier, (3) that Seatrain Lines, Incorporated, is not a 'carrier' within the meaning of section 20a of the act, and (4) that the Hoboken
216 Manufacturers Railroad Company does not and may not compete for traffic with Seatrain, and therefore neither is subject, because of any community of interest between them to the provisions of section 5 (19–21) of the Act." Docket No. 25565 was an investigation by the Commission in a proceeding entitled "Investigation of Seatrain Lines, Inc.," instituted on its own motion October 4, 1932, prior to the inauguration by Seatrain of its service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, with a view to determining the lawfulness thereof and in said proceeding Seatrain and Hoboken Manufacturers Railroad Company were made respondents.

24. In the case entitled Seatrain Lines, Inc., v. Akron, C. & Y. Ry. Co., Docket No. 25727, the primary relief sought by Seatrain was an order requiring the establishment of through routes with the railroads operating in the East, South, and Southwest where such through routes do not already exist, and the establishment of joint rates in connection with such through routes. This case, following full hearings, was decided January 28, 1938, and is reported in 226 I. C. C. 7. In this case, so far as here material, the Commission found that through routes existed in connection with the Seatrain between points in trunk line and New England territories on the one hand and Southwestern territory on the other, and that the public interest required the establishment and maintenance of through routes and joint rates in connection with Seatrain between certain portions of official territory on the one hand and Southwestern territory and a portion of southern territory on the other. It is not denied that the rail defendants, including some of the petitioners in this case, established the through routes so prescribed in Docket No. 25727, and now participate therein as directed by said order, and that said through routes are now in full force and effect.

25. By motion dated July 20, 1938, and filed with the Com-
217 mission jointly by the Hoboken as complainant and Seatrain as intervener in Nos. 25728 and 25878, said Hoboken and Seatrain sought an order therein requiring the defendants therein, including petitioners herein, to permit their cars to be used in

Seatrain service. A similar motion dated July 26, 1938, was filed therein by the Lower Coast. The reply, dated July 29, 1938, of the Pennsylvania Railroad Company and certain other petitioners herein to said motions asserted that the Commission was without authority to enter the order requested, but, without waiving such contention, urged that, if the Commission should adhere to its opinion that it had such authority, a further hearing would be necessary in order that appropriate compensation might be fixed for such use of railroad-owned cars in Seatrain service, and that without prior compensation or responsible assurance of such compensation an order of the Commission requiring such interchange of cars would contravene the requirements of due process under the Fifth Amendment to the Constitution of the United States.

26. By its order of November 21, 1938, the Commission reopened Nos. 25728 and 25878 "for further hearing to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc." Thereafter further hearings were held in 1939 and on January 8, 1940, the Commission made its Report on Further Hearing, 237 I. C. C. 97, wherein it clarified the issues and again reopened the proceedings for further hearing, which was had in 1940.

27. After full hearing following the reopening, on October 13, 1941, the Commission made its Second Report on Further Hearing in Docket Nos. 25728 and 25878 and on the same day entered its final order in which there were incorporated its said Second Report, 248 I. C. C. 109, and its Reports of February 5, 1935 (206 I. C. C. 328) and January 8, 1940 (237 I. C. C. 97).

218 28. In its report on further hearing in Dockets Nos. 25728 and 25878, the Commission considered the issue as to what terms and conditions, including compensation, should be required in the interchange of cars with Seatrain, reaffirmed its earlier conclusion that it had jurisdiction to require the railroads to interchange their cars with Seatrain when through routes between Seatrain and rail carriers exist, pointed out that in addition to the amount of compensation which the rail defendants should receive for use of their cars by Seatrain, other terms and conditions were in issue, upon which evidence has not been received, and, therefore, the proceedings should be reopened.

29. The Commission issued a second report on further hearing, 248 I. C. C. 109, dated October 13, 1941, wherein it again affirmed its conclusion that it had power to require the rail defendants to permit use of their cars by Seatrain.

30. The Commission found that Seatrain had offered to acquire cars for interchange with the railroads if desirable from the stand-

point of car supply of the country, and that it also rents a substantial number of privately owned cars. For almost 4 years prior to the inauguration of its coastwise service, the railroads freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service. Moreover, a large number of railroads operating in official and southwestern territories, some of which are defendants in these proceedings, have voluntarily consented to the delivery of their cars to Seatrain. Also, 19 defendants which have not consented to the use of their cars by Seatrain in its coastwise traffic permit such use in its Cuban traffic.

31. With respect to the contention that in furnishing equipment for transportation beyond the United States over the Florida East Coast Railroad Company, the rail carriers violated Sections 3 (1) and 3 (4) of the Act, the Commission overruled these
219 claims stating: "We therefore adhere to the view that we have no power to make a finding which directly or indirectly would require defendants to turn over their cars to complainants for use by Seatrain in its Cuban traffic."

32. The ultimate findings of the Commission based on subsidiary findings, before referred to, were in part: "1. We find that the defendants in these proceedings listed in the appendix, according as they participate in through routes with complainants and Seatrain, have failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operations, in violation of section 1 (4) of the Interstate Commerce Act, by refusing to agree to the interchange of freight cars owned by them with complainants for delivery to Seatrain for use in interstate commerce between points in the United States."

33. On October 13, 1941, the Commission entered an order, which after referring to its reports in 206 I. C. C. 328, 237 I. C. C. 297 and 248 I. C. C. 109, read as follows: "It is ordered, That the defendants listed in the appendix to said report on further hearing, according as they participate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Bell Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.

"It is further ordered, That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to ob-

serve and enforce rules, regulations, and practices with
220 respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between the said defendants and other rail carriers, Provided, however, That such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

"And it is further ordered, That this order shall continue in effect until the further order of the Commission."

The order has been subsequently amended to become effective October 5, 1942. The Commission has denied various applications of the petitioners for a reconsideration and clarification of its order.

34. On April 15, 1942, the amended petition was filed by plaintiffs in this case, and in it it was alleged that the Commission's order is void and beyond its statutory power in requiring the railroads to permit the use of their cars by Seatrain; that the Commission's decision was based upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission; that the order is beyond the Commission's statutory power in requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, and that neither the Interstate Commerce Act nor any other statute authorizes the Commission to require railroads to permit the use of their cars except by other railroads; that the order is void in that it requires the rail carriers to permit the use of their cars by Seatrain in and through a foreign country and in and through foreign waters; and that the order is in excess of the Commission's powers in that the rate of $1 per car per day for such period only when the cars are in Seatrain's actual possession is so low as to be confiscatory.

It was also alleged that the Commission erred in refusing to overrule certain rulings by its examiner and that the order is void in imposing obligations upon the petitioners but does not
221 run against or impose any obligations on Seatrain, with respect to its use of, or for the return of, cars of petitioners. The New Orleans & Lower Coast and Seatrain Lines, Inc., were permitted to intervene, and answers were filed by the United States, the Interstate Commerce Commission, and intervening defendants, denying the material allegations of the amended petition.

35. A three-judge court was convened pursuant to the provisions of the statute, 28 U. S. C. A. § 41, and the court has jurisdiction to entertain and pass upon the issues involved in this case.

36. The entire record upon which the Commission's report and order of October 13, 1941, is based has been introduced and is before the court for its consideration in reaching a decision herein.

Conclusions of law

1. The case is not moot.

2. The Commission acted within its statutory power in requiring the railroads to permit the use of their cars by Seatrain insofar as such transportation is within the United States or its territorial waters.

3. The Commission did not base its decision upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission insofar as such through routes are within the United States or its territorial waters. In requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, the Commission did not exceed the authority conferred upon it by statute.

4. The orders of the Commission are beyond the statutory
222 power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port. Neither the Interstate Commerce Act nor any other statute authorizes the Commission to require carriers by railroad to permit such use of their cars.

5. The orders of the Commission are based upon a mistake of law in that in making them the Commission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars for the transportation referred to in the preceding paragraph.

JOHN BIGGS, JR.,
United States Circuit Judge.
GUY L. FAKE,
United States District Judge.
WILLIAM F. SMITH,
United States District Judge.

OCTOBER 9, 1943.
[File endorsement omitted.]

223 In District Court of the United States

[Title omitted.]

Opinion on argument in respect to form of final decree

Dec. 8, 1943

Before BIGGS, Circuit Judge, and FAKE and SMITH, District Judges

BIGGS, Circuit Judge:

In our original opinion we stated that the conclusions reached by us rendered it unnecessary to discuss the last point raised by the petitioners; the question of whether the compensation fixed by the Commission for the use of the petitioners' cars is confiscatory. Counsel for Seatrain has now suggested the possibility, however impractical, that Seatrain might be able to maintain routes from Hoboken to Belle Chasse entirely within the United States
224 and its territorial waters.[1] If this be the case, the issue of whether the compensation fixed by the Commission for the use by Seatrain of the petitioners' cars is confiscatory is not moot. There is also the consideration that if on appeal our decision that the Commission was without authority to compel the petitioners to interchange their cars with Seatrain for transportation beyond the United States and its territorial waters should be reversed, a remand would be necessary to permit this court to decide the issue of confiscation. We feel, therefore, that we should decide it now.

The order of the Commission imposes on Seatrain an obligation to pay to the petitioners $1 per day for each car supplied by them to Seatrain but provides also that this rate shall be paid by Seatrain only for the period in which the car is in the actual possession of Seatrain. The Commission thus has relieved Seatrain of the obligation to compensate the petitioners for the period of time during which a car may be held by Seatrain's connecting railroad carriers because there is no ship immediately available to receive the car at Hoboken or at Belle Chasse. The nature of this exception in Seatrain's favor is made plain by an examination of Rule 15 of the Car Service and Per Diem Agreement of the trunk line carriers. The rule is set out below.[2]

225 As the Commission states, there are two faces to the problem. See Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.,

[1] There is no evidence in the record from which an opinion in respect to this question can be formed. Navigation maps and similar documents of which we may take judicial notice seem to indicate that such routes would be impractical.

[2] The pertinent provisions of Rule 15 are as follows: "(a) A road failing to receive promptly from a connection cars on which it has laid no embargo, shall be responsible to the connection for the per diem of the cars so held for delivery, including the home cars of such connection."

248 I. C. C. 117–119. The Commission points out that the period of detention of cars before acceptance by Seatrain, longer in fact than the period of detention required by carriers by railroad, is the consequence of the nature of Seatrain's operation, ships sailing less frequently than trains run. Seatrain might well be obliged to assume the obligations imposed by its method of operation. But, as the Commission says, Seatrain's position in respect to car-detention is analogous to that of the break-bulk carriers by water. The disability of the break-bulk water carriers to accept merchandise promptly in all instances is reflected in the demurrage rates and presumably also in the rail rates and divisions applicable to traffic between them and the railroads. The Commission concludes that Seatrain's car-detentions are properly a matter for consideration in connection with the rates and divisions to be made between Seatrain and the petitioners rather than in determining the per diem rate which Seatrain should pay. The result, as the Commission points out, will be, or should be, much the same in either event for if the railroads are relieved by per diem payments by Seatrain of the burden of car detention which they bear on traffic interchanged with the break-bulk lines, the railroads will "* * * be entitled to relatively lower divisions of through rail-water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination." The Commission goes on to state that, "Considerable difficulty, however, would be encountered in making any such adjustment. From a practical point of view, therefore, the simple and desirable way of
226 handling the matter is to leave the burden of car detention with * * * [the petitioners] when traffic is interchanged with Seatrain just as when it is interchanged with the break-bulk lines." The finding set out below followed.[3]

A careful consideration of the record and the briefs of the parties convinces us that the determination of the per diem rate and of its method of application rested with the Commission in the exercise of its expert administrative judgment. We conclude that the per diem rate and the condition of its application are not confiscatory or even unreasonable. The rate and the condition of its application as ordered by the Commission in fact are not confiscatory even if petitioners' cars be carried from Hoboken to Belle Chasse via Havana. The per diem rate is applicable throughout the whole of the time that the cars are upon the Seatrain ships.

[3] The pertinent finding of the Board was as follows:
"2. We find further than the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain."

The nonpayment of the per diem rate during detention periods at Hoboken and Belle Chasse forms the substance of the petitioners' complaint.[4] We think *think* that the findings and conclusions of the Commission have an adequate basis in the facts and in the law.

227 Additional findings of fact, additional conclusions of law, and the final decree are filed with this opinion.

JOHN BIGG, JR.,
United States Circuit Judge.
GUY L. FAKE,
United States District Judge.
WILLIAM F. SMITH,
United States District Judge.

DECEMBER 8, 1943.

228 In United States District Court

Additional findings of fact

Dec. 8, 1943

1. The Commission's report of October 13, 1941, considered the question of what compensation the railroad defendants required to interchange their cars with Seatrain should receive for the use of such cars, and what other terms and conditions should be imposed. It pointed out that the Association of American Railroads published rules governing the settlement of railroad-owned freight cars between all common-carrier railroads, known as the Code of Per Diem Rules, Rule 1 of which provided that the rate for the use of freight cars shall be $1 per car per day, and that this has been the per diem rate for many years and is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 percent interest on the investment.

2. The Commission's report on further hearing points out that the reasonableness of the per diem rate is not here questioned insofar as it applies between the railroads; that Seatrain is willing to pay that rate, although believing that the cost of maintenance is less when the cars are in its possession, because they are not in motion, and therefore are not subject to the stress incidental to train movements, and are, in some degree, protected from the elements. The Association and defendants contended that repairs are responsible for a large proportion of the cost of car owner-

[4] As we have indicated, as we construe the Commission's opinion, findings and order, the Commission would permit Seatrain to transport the petitioners' cars by through routes from Hoboken to Belle Chasse and from Belle Chasse to Hoboken via Havana, the cars remaining on the Seatrain ships at Havana, and not entering into commerce on Cuban railroads.

ship, and the railroad defendants conceded that about 61.5 percent of the average running-repair expenses of 16 cents per car per day, or about 9.8 cents, are avoided when cars are not moving. The carriers' claim that this saving was more than offset by the corrosive effect of the ocean atmosphere on steel cars was considered by the Commission and rejected.

229 3. The Commission's report on further hearing, in discussing the rail carriers' contention that the Seatrain should pay per diem not only for the time the car was actually in its possession but in addition that an allowance for the time in which the car is idle or unproductive should be made, found that the record in this case showed that the present cost of ownership and maintenance did not exceed the average of $1 per car per day for the period in which the cars were actually in service, concerning which contention the Commission said:

"A similar burden results from the fact that many cars must return empty after moving under load. While foreign lines pay per diem to the car owner for such empty movements over their rails, such receipts are offset by corresponding payments to the foreign lines."

4. The Commission found that Seatrain had offered to acquire cars for interchange with the railroads if desirable from the standpoint of car supply of the country, and that it also rents a substantial number of privately owned cars. Even as between railroads themselves, the Commission found that there is no such thing as balancing of burdens, and that not all railroads own cars. It further found that ownership is not always proportionate to car use. Further findings of the Commission in the report last referred to on this question were stated as follows:

"The car-hire rules do not differentiate between railroads because of such differences in conditions. It is also the fact that these rules have always been applied uniformly where cars are interchanged voluntarily with water lines such as the various so-called car ferries. For almost 4 years prior to the inauguration of its coastwise service the railroads freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service at the regular per diem rate. Moreover, a large number of railroads operating in official and southwestern territories, some of which are defendants in these proceedings, have voluntarily consented to the delivery of their cars to Seatrain at that rate.

230 Also, 19 defendants which have not consented to the use of their cars by Seatrain in its coastwise traffic permit such use in its Cuban traffic at the prevailing per diem rate.

"In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the $1 now applied uniformly by the car-hire rules, especially when the record shows,

and it is admitted, that the cost of maintaining the cars is decreased approximately 10 cents per day while they are in its possession."

5. At Belle Chasse, the Lower Coast has a tariff providing that it will receive cars from connecting railroads for movement over Seatrain only upon written delivery orders from Seatrain and then only subsequent to 12:01 a. m. of the day prior to the scheduled sailing date from that point. In this way the Lower Coast obligates itself to pay only 1 day's per diem, for which it is reimbursed through the payment to it by its line-haul rail connections of a switching reclaim averaging 54 cents per car under the prevailing per diem rule governing the payment of reclaims to an intermediate switching road.

6. At New Orleans when carload freight is interchanged with a break-bulk steamer, there must be unloading from the railroad cars and when the traffic moves on joint water-rail rates the line-haul railroads perform this work, which fact is taken into account in determining their divisions. This detention may be somewhat less than that of the cars interchanged with Seatrain, totalling 2.58 days as compared with 3.3 days per car in the case of interchange with Seatrain. The periods used in arriving at these averages were not the same.

7. In the case of the interchange at Hoboken, there is no controversy with the line-haul railroads, including the New York Central, the Erie, the Delaware, Lackawanna & Western, the Central Railroad of New Jersey and the Lehigh Valley. These companies have entered into an agreement with complainants before the
231 Commission under which they undertake to assume the per diem charges and other expenses of detention of cars held at Hoboken awaiting delivery to Seatrain. The Pennsylvania Railroad, however, has had a controversy of long standing with the Hoboken involving the payment of per diem and reclaims on Seatrain traffic prior to January 1, 1937.

8. The report on further consideration finds that payment of rental for use of freight cars by railroads other than those owning the cars has been an established transportation practice for over 70 years; that under the system of per diem charges now in force, the line-haul rail carrier using the cars of another pays the owner according to the time covered by its use of the car; that the fact or the amount of the payment is not conditioned on the profitability of that use; that a break-bulk water carrier does not have occasion to use railroad cars and accordingly is not required to pay per diem rental; that Seatrain's operation is anomalous in that it requires the use of railroad freight cars, and that the purpose of the complaints is to permit it to use railroad

cars owned by others upon terms comparable to railroad cars available generally. The Commission concluded:

"We have found that it is entitled to the privilege of such use, and, on the theory stated above, it should also be willing to assume the obligations incident thereto."

9. The Commission in its report on reconsideration recognized that while in cases where the detention was one attributable to Seatrain's mode of transportation, in one view of the matter the rail carriers should not be compelled to assume the cost of this detention, but pointed out that—

"On the other hand, it is clear that, on traffic interchanged with the break-bulk lines, defendants bear a burden through car detention which is analogous to the burden which they would bear on traffic interchanged with Seatrain if the latter should pay per diem only when the cars are in its actual possession,"

232 and that it was also clear that this car detention in the case of traffic interchanged with water lines, due to infrequent service, is a disability which has always been recognized and which is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic. The Commission continued:

"For this point of view, such detention is a matter for consideration in connection with these rates and divisions, rather than in determining the per diem rates which Seatrain should pay."

10. In this connection the Commission concluded that the result will be about the same in either event because if the rail defendants are relieved by per diem payments of Seatrain from a burden of car detention which they bear on traffic interchanged with the break-bulk lines, theoretically they will be entitled to relatively lower divisions of through rail-water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination. It found that considerable difficulty would be encountered in making any such adjustment, and that the simple and desirable way of handling the matter is to leave the burden of car detention with the rail carriers when traffic is interchanged with Seatrain, just as when it is interchanged with the break-bulk lines. The Commission further found that under this method, Seatrain would pay per diem only when the cars are in its actual possession or are being held for its use awaiting loading at the ports. Accordingly, reinforcing this view by a statement that the Seatrain's line-haul connections at Hoboken have agreed to this method, the Commission stated it would make no findings having the effect of forcing Seatrain to assume the payment of reclaim to complainants on cars being held at the ports for delivery to its vessels.

233 *Additional conclusions of law*

1. The findings of the Commission in respect to the compensation to be paid by Seatrain to the petitioners for the use of petitioner's cars find adequate support in the evidence, as do the Commission's conclusions in the law.

2. The rate of compensation ordered by the Commission to be paid by Seatrain to the petitioners for the use of petitioner's freight cars interchanged with Seatrain, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, is not confiscatory but is reasonable.

(s) JOHN BIGGS, Jr.,
United States Circuit Judge.
(s) GUY L. FAKE,
United States District Judge.
(s) WILLIAM F. SMITH,
United States District Judge.

DECEMBER 8, 1943.

234 In the District Court of the United States for the District of New Jersey

Civil No. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE BOSTON AND MAINE RAILROAD, MERREL P. CALLAWAY, TRUSTEE OF CENTRAL OF GEORGIA RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, THE LONG ISLAND RAIL ROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, MAINE CENTRAL RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, LEGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TEXAS AND NEW ORLEANS RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

THE INTERSTATE COMMERCE COMMISSION, HOBOKEN MANUFACTURERS RAILROAD COMPANY, SEATRAIN LINES, INC., NEW ORLEANS AND LOWER COAST RAILROAD COMPANY, INTERVENERS-DEFENDANTS

Final decree

Dec. 8, 1943

This cause coming on to be heard before a specially constituted Court of three judges, duly assembled pursuant to the Urgent

Deficiencies Act, 28 U. S. C., Secs. 41, 43–48, and having been submitted for final decree, and the pleadings, evidence, and arguments having been heard and considered, and the Court
235 having been fully advised in the premises, and having filed its opinion, findings of fact, and conclusions of law, it is

Ordered, adjudged, and decreed that the order of the Interstate Commerce Commission, dated October 13, 1941, in the proceedings entitled Docket No. 25728, Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company, et al., and Docket No. 25878, New Orleans and Lower Coast Railroad Company v. Akron, Canton & Youngstown Railway Company, et al., as from time to time amended, in so far as said order directs petitioners to permit the interchange of their freight cars with or for the use of Seatrain Lines, Inc., for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port, is erroneous and beyond the lawful authority of the Interstate Commerce Commission and is void, and to the extent indicated said order is hereby set aside, annulled and the enforcement thereof enjoined.

JOHN BIGGS, JR.
United States Circuit Judge.
GUY L. FAKE,
United States District Judge.
WILLIAM F. SMITH.
United States District Judge.

Dated December 8, 1943.

238 In District Court of the United States

[Title omitted.]

Petition for appeal

The United States of America, the Interstate Commerce Commission, Seatrain Lines, Inc., and The New Orleans & Lower Coast Railroad Company, defendants in the above-entitled cause, feeling themselves aggrieved by the final decree of the District Court of the United States for the District of New Jersey, entered in said court on December 8, 1943, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the Assignment of Errors accompanying this petition and to which reference is hereby made.

Said defendants pray that a transcript of the record, proceeding and papers on which said decree was made and entered, duly

239 authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated January 28, 1944.

Wendell Berg, Assistant Attorney General; Robert L. Pierce, Special Assistant to the Attorney General; Thorn Lord, United States Attorney (For the United States of America); Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (For the Interstate Commerce Commission); Duane E. Minard, 1180 Raymond Bldg., Newark, N. J.; Parker McCollester (For Defendant, Seatrain Lines, Inc.); Arthur T. Vanderbilt, 744 Broad St., Newark, N. J.; H. H. Larimore (For New Orleans & Lower Coast Railroad Company).

240 In District Court of the United States

[Title omitted.]

Order allowing appeal

Jan. 28, 1944

In the above-entitled cause, the United States of America, the Interstate Commerce Commission, The New Orleans & Lower Coast Railroad Company and Seatrain Lines, Inc., defendants, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered on December 8, 1943, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

Dated January 28, 1944.

GUY L. FAKE,
United States District Judge.

241 In District Court of the United States

[Title omitted.]

Assignment of errors

Filed January 28, 1944

Now come the United States of America, the Interstate Commerce Commission, the Seatrain Lines, Inc., and the New Orleans & Lower Coast Railroad Company, defendants in the above-entitled cause, by their respective counsel and in connection with

their appeal, file the following assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the Untied States from the final decree of this court entered December 8, 1943.

The District Court erred:

242 1. In not dismissing the petition herein.

2. In setting aside the Commission's order of October 13, 1941, involved in this case.

3. In holding that the Commission's power to require carriers by railroad to interchange or permit the interchange of their cars with common carriers by water and to supply cars which may go upon the lines of common carriers by water when necessary to effect transportation by rail and water routes for continuous shipment over through routes is limited "insofar as that transportation takes place within the United States or its territorial waters."

4. In holding that the legislative history of the Transportation Act of 1940 throws no direct light upon the question before the court.

5. In holding that although "the Commission has jurisdiction over transportation such as that carried on by the petitioners and Seatrain, from state to state in the United States, throughout the whole course of that transportation even if it passes through foreign waters and into foreign ports" nevertheless this fact "does not necessarily mean that the Commission can compel carriers by railroad to provide carriers by water with cars for routes passing through extraterritorial waters and into a foreign port."

6. In holding that the Panama Canal Act was emasculated by the Transportation Act of 1940.

7. In holding that the provisions of Section 303 (a), 49 U. S. C. A. Section 903 (a) mean that the provisions of Part I shall be applicable to transportation subject both to Parts III and I only to the extent that Part I makes them applicable.

243 8. In holding that the operation of Part I of the Interstate Commerce Act is restricted to transportation taking place within the United States, and that "It follows that the provisions of Section 1 (4) and Section 1 (10), (11), (13), and 14), the car service provisions, are applicable to transportation 'only insofar as such transportation takes place within the United States.' To conclude that the provisions of Part I apply throughout the whole of a course of transportation which, though it goes from place to place within the United States, in part moves outside of the United States and its territorial waters, would be casuistry."

9. In holding that "We can find no provision in the Interstate Commerce Act that imposes a duty upon carriers by railroad to exchange cars with carriers by water engaging as does Seatrain

in transportation through extraterritorial waters and through a foreign port and we can find nothing in the Act which authorizes the Commission to impose such a duty on the petitioners."

10. In holding that "Insofar as the order of the Commission * * * serves to compel petitioners to interchange cars with Seatrain for transportation beyond the United States and its territorial waters, in foreign waters or to a foreign port, it must be modified and limited."

11. In concluding and holding that "The orders of the Commission are beyond the statutory power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port. Neither the Interstate Commerce Act nor any other statute authorizes the Commission to require carriers by railroad to permit such use of their cars."

244 12. In concluding that "The orders of the Commission are based upon a mistake of law in that in making them the Commission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars for the transportation referred to" in paragraph 11, supra.

13. In entering its final decree, dated December 8, 1943.

14. In failing to hold that under the Transportation Act of 1940, the Commission has full power to require carriers by railroad and carriers by water to establish through routes and facilities for the operation of through routes for through transportation between points in the United States whether or not the vessels of the water carrier pass outside the territorial waters of the United States or through a foreign port and that this authority includes authority to require railroads to provide cars which may be used for such through transportation and consent to their interchange with water carriers and to require water carriers to do likewise.

15. In failing to hold that the adoption by Congress of the Transportation Act, 1940, following and in the light of the decision of the Commission in both Docket No. 25728, 206 I. C. C. 328 (1935) and Docket No. 25727, 226 I. C. C. 7 (1938), that it had jurisdiction to require the defendant railroads to interchange or permit the interchange of their cars with Seatrain in the performance of through transportation, constituted legislative confirmation of the Commission's authority in this regard.

245 Wherefore, defendants pray that the said decree be reversed.

Wendell Berge, Assistant Attorney General; Robert L. Pierce, Special Assistant to the Attorney General;

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Thorn Lord, United States Attorney (for the United States of America); Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (for the Interstate Commerce Commission); Duane E. Minard, 1180 Raymond Bldg., Newark, N. J.; Parker McCollester (for defendant, Seatrain Lines, Inc.); Arthur T. Vanderbilt, 744 Broad St., Newark, N. J.; H. H. Larimore (for New Orleans & Lower Coast Railroad Company).

246 In District Court of the United States

[Title omitted.]

Defendants' (appellants') praecipe for transcript of record

To the Clerk of the Above-named Court:

You are hereby requested to prepare a transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, and to include in such transcript of record the following, to wit:

(1) Amended Petition and Exhibits A, B, C, D, E, F, G, H, I, and J thereto, filed April 15, 1942;

(2) Order of Judge Fake, dated April 16, 1942;

(3) Answer of United States to Amended Petition;

(4) Intervention of Interstate Commerce Commission;

(5) Answer of Interstate Commerce Commission;

247 (6) Order of Judge Fake, dated April 18, 1942, fixing date of hearing;

(7) Order of Judge Fake, dated April 18, 1942, to show cause;

(8) Motion of Hoboken Manufacturers' Railroad Company and Seatrain Lines, Inc., for leave to intervene;

(9) Order of Court (Judge Fake) dated April 1942, granting Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., leave to intervene;

(10) Notice of motion referred to in (9), dated May 1942;

(11) Answer of Hoboken Manufacturers R. Co. and Seatrain Lines, Inc., to amended petition;

(12) Motion of New Orleans & Lower Coast Railroad for leave to intervene;

(13) Notice of New Orleans & Lower Coast Railroad of motion for leave to intervene;

(14) Order of Court (dated May 14, 1942) permitting the New Orleans & Lower Coast Railroad Company to intervene;

(15) Answer of New Orleans & Lower Coast Railroad Company to amended petition;

(16) Certificate of Secretary of Interstate Commerce Commission (dated April 9, 1942, five pages) and documents and papers referred to in, and covered by, said certificate;

(17) Service Order No. 75, of Interstate Commerce Commission;

(18) Order of May 23, 1942, concluding argument and taking case under advisement;

(19) Orders of Commissioner Porter of Interstate Commerce Commission, extending effective date of order, issued May 25, 1942, October 2, 1942, December 26, 1942, February 25, 1943, May 14, 1943, July 9, 1943, July 29, 1943, September 10, 1943, October 27, 1943, and November 9, 1943;

248 (20) Order of Chairman Alldredge of Interstate Commerce Commission, dated December 11, 1943;

(21) Opinion of Court, filed October 9, 1943;

(22) Findings of Fact and Conclusions of Law entered by Court on October 9, 1943;

(23) Supplemental opinion, and additional findings of fact and conclusions of law, dated December 8, 1943;

(24) Final decree, dated December 8, 1943;

(25) Petition for Appeal;

(26) Notice of Appeal and Acknowledgement of Service;

(27) Assignments of Error;

(28) Order Allowing Appeal;

(29) Notice to Attorney General of State of New Jersey, and acknowledgement of service;

(30) Citation on Appeal;

(31) Order of Judge Fake, dated January 28, 1944, directing the Clerk to transit original record to Supreme Court of the United States; and consent of counsel thereto;

(32) Statement of Jurisdiction of Supreme Court of the United States (Rule 12);

(33) Praecipe for Transcript of Record and acknowledgement thereof;

(34) All docket entries in their appropriate order.

Wendell Berge, Assistant Attorney General; Robert L. Pierce, Special Assistant to the Attorney General; Thorn Lord, United States Attorney (for the United
249 States of America), Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (for the Interstate Commerce Commission); Duane E. Minard, 1180 Raymond Bldg., Newark, N. J.; Parker McCol-

lester (for defendant, Seatrain Lines, Inc.); Arthur T. Vanderbilt, 744 Broad St., Newark, N. J.; H. H. Larimore (for New Orleans & Lower Coast Railroad Company).

Service of the foregoing praecipe for transcript of record and receipt of copy thereof are hereby acknowledged this 28th day of January 1944.

JOHN A. HARTPENCE,
168 W. State St., Trenton, N. J.
(S) CONBOY, HEWITT, O'BRIEN & BOARDMAN,
(*Attorneys for Petitioners*).

250–319 [Citation in usual form showing service on John A. Hartpence et al., omitted in printing.]

325 In District Court of the United States

[Title omitted.]

Petition for appeal

The Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, The Boston and Maine Railroad, Merrel P. Callaway, Trustee of Central of Georgia Railway Company, Great Northern Railway Company, The Long Island Rail Road Company, Louisville and Nashville Railroad Company, Maine Central Railroad Company, Norfolk and Western Railway Company, Northern Pacific Railway Company, Legh R. Powell, Jr., and Henry W. Anderson, receivers of Seaboard Air Line Railway Company, Southern Railway Company, Southern Pacific
326 Company, Texas and New Orleans Railroad Company, Union Pacific Railroad Company, Petitioners in the above-entitled cause, feeling themselves aggrieved by the final decree of the District Court of the United States for the District of New Jersey, entered in said court on December 8, 1943, pray an appeal to the Supreme Court of the United States from said decree in so far as the said decree fails to set aside in its entirety the Commission's report and order of October 13, 1941, in Docket Nos. 25728 and 25878 Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co., 248 I. C. C. 109.

The particulars wherein they consider the decree erroneous are set forth in the Assignment of Errors accompanying this petition and to which reference is hereby made.

Said petitioners pray that a transcript of the record, proceedings, and papers on which said decree was made and entered, duly

authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated January 31, 1944.

JOHN A. HARTPENCE,
Attorney for Petitioners,
168 W. State Street, Trenton, N. J.

JOHN VANCE HEWITT,
JOSEPH F. ESHELMAN,
J. R. BELL,
W. C. BURGER,
CHARLES CLARK,
FRANK W. GWATHMEY,
G. H. MUCKLEY,
CONRAD OLSON,
J. P. PLUNKETT,
EDWARD W. WHEELER,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Of Counsel.

327 In District Court of the United States

[Title omitted.]

Order allowing appeal

Jan. 31, 1944

In the above-entitled cause, The Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, The Boston and Maine Railroad, Morrel P. Callaway, Trustee of Cenrtal of Georgia Railway Company, Great Northern Railway Company, The Long Island Rail Road Company, Louisville and Nashville Railroad Company, Maine Central Railroad Company, Norfolk and Western Railway Company, Northern Pacific Railway Company, Legh R. Powell, Jr., and Henry W. Anderson, receivers of Seaboard Air Line Railway Company, Southern Railway Com-
328 pany, Southern Pacific Company, Texas and New Orleans Railroad Company, Union Pacific Railroad Company, Petitioners, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered on December 8, 1943, in so far as the said decree fails to set aside in its entirety the Commission's report and order of October 13, 1941, in Docket Nos. 25728 and 25878, Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co., 248 I. C. C. 109, and having also made and filed an assignment of errors, and a state-

ment of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

Dated January 31, 1944.

GUY L. FAKE,
United States District Judge.

329 In District Court of the United States

[Title omitted.]

Assignment of errors

Filed January 31, 1944

Now come The Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, The Boston and Maine Railroad, Merrel P. Callaway, Trustee of Central of Georgia Railway Company, Great Northern Railway Company, The Long Island Railroad Company, Louisville and Nashville Railroad Company, Maine Central Railroad Company, Norfolk and Western Railway Company, Northern Pacific Railway Company, Leigh R. Powell,
330 Jr., and Henry W. Anderson, receivers of Seaboard Air Line Railway Company, Southern Railway Company, Southern Pacific Company, Texas and New Orleans Railroad Company, Union Pacific Railroad Company, Petitioners in the above-entitled cause, by their counsel and in connection with their appeal, file the following Assignment of Errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree of this Court entered December 8, 1943.

The District Court erred:

(1) In not setting aside, annulling and enjoining, in its entirety, the Commission's Order of October 13, 1941, involved in this case.

(2) In not setting aside, annulling and enjoining the Commission's said Order in so far as the said Order required the railroad petitioners to permit the use of their cars by Seatrain Lines, Inc. (hereinafter referred to as "Seatrain"), a carrier by water.

(3) In not setting aside, annulling and enjoining the Commission's said Order to the extent that said Order requires the railroads petitioners to permit their cars to be used by Seatrain on any through routes existing or prescribed by the Commission in so far as such through routes are within the United States or its territorial waters.

(4) In concluding and holding as a matter of law that the Commission acted within its statutory power in requiring the rail-

roads petitioners to permit the use of their cars by Seatrain in so far as such transportation is within the United States or its territorial waters.

331 (5) In concluding and holding as a matter of law that the Commission did not base its decision upon a mistake of law to the extent that it held that the railroads petitioners were under a duty to permit their cars to be used by Seatrain on any through routes existing or prescribed by the Commission in so far as such through routes are within the United States or its territorial waters.

(6) In concluding and holding as a matter of law that the Commission, in requiring the railroads petitioners to permit the use of their cars by Seatrain, a carrier by water, did not exceed the authority conferred upon it by statute.

(7) In concluding and holding as a matter of law that the Commission did not base its decision upon a mistake of law in holding that the railroads petitioners were under a duty to permit the use of their cars by Seatrain, a carrier by water.

(8) In failing to conclude and hold that the Commission based its decision upon a mistake of law in holding that the railroads petitioners were under a duty, and that the Commission had the authority to require them, to permit the use of their cars by Seatrain, a carrier by water.

(9) In not setting aside, annulling, and enjoining the Commission's said order to the extent that it requires the railroads petitioners to cease, desist and abstain from observing and enforcing their rules, regulations, and practices which prohibit the interchange of their freight cars for transportation by Seatrain.

332 (10) In not setting aside, annulling, and enjoining the Commission's said order to the extent that it requires the railroads petitioners to establish, observe, and enforce rules, regulations, and practices with respect to the interchange of their freight cars for transportation by Seatrain.

(11) In failing to find that the Texas and New Orleans Railroad Company, Louisville and Nashville Railroad Company, and Southern Railway Company, are trunk line railroads connecting with the New Orleans and Lower Coast Railroad Company (hereinafter referred to as "Lower Coast"), at New Orleans, Louisiana, which connects with Seatrain's dock at Belle Chasse, Louisiana.

(12) In failing to find that the schedule of the sailings of Seatrain's vessels between Hoboken, New Jersey, and Belle Chasse, Louisiana, was weekly in each direction; that cars routed for movement on its vessels necessarily reached the ports in ad-

vance of sailing dates; that the Lower Coast, which makes the interchange at Belle Chasse, has a tariff providing that it will receive cars from connecting railroads for movement on Seatrain's vessels only upon written delivery orders from Seatrain and then only subsequent to 12:01 A. M. of the day prior to the scheduled sailing date from that point; that in this way the Lower Coast obligates itself to pay no more than one day's per diem for which it is reimbursed by the connecting trunk line; that the defendants before the Commission, the petitioners herein, which connect with Seatrain through the Lower Coast, urged before the Com-
333 mission that they should not be required to assume the per diem payments on cars held at New Orleans to await Seatrain's sailings; that the average detention was 3.3 days per car after such car had been tendered or made available for Seatrain and before it had been accepted; that if the connecting trunk line so delivering cars to Lower Coast for Seatrain's transportation is not the owner of the car it is obliged to pay the compensation of $1.00 per day to the owner for the said period of detention; and that on the other hand, if the connecting trunk line is the owner of the said car it is compelled to forego the opportunity of using the car in its own service or of obtaining the per diem for its use by other carriers: And in not finding that the foregoing is established by the uncontroverted evidence and was or should have been found by the Commission.

(13) In failing to find that the Code of Per Diem Rules with respect to interchange of freight cars by railroad carriers with each other provides that each railroad carrier must pay $1.00 per diem not only for each calendar day in which a loaded car owned by another carrier is in its actual possession, but also for each calendar day during which it is detained for it or made available to it, and also to pay the $1.00 per diem for the period during which the car is being transported empty by it on return: And in not finding that the foregoing is established by the uncontroverted evidence and was or should have been found by the Commission.

(14) In failing to find that the Codes of Car Service and
334 Per Diem Rules oblige each railroad carrier to bear its fair proportion of the burden of returning freight cars to their owners empty where necessary, and further that such compensation in cash and service contemplates that each of the long-haul carriers, commonly referred to as the "trunk line carriers" contributes its share of the freight cars to the supply of freight cars available for such interchange in the United States, all of which services are herein referred to as the "reciprocal service

of the railroad carriers" and in its consideration of the case the Commission failed and refused to give consideration or legal effect thereto.

(15) In failing to find that the Commission's conclusion, that Seatrain rented a substantial number of privately owned cars thereby implying that the said cars were available for or were used in interchange with the petitioners and other trunk line railroads, or that it otherwise supplied them or made a bona fide offer to do so, and the Commission's conclusion that Seatrain moved a substantial number of empty cars, in so far as the Commission thereby implied that Seatrain moved such empty cars in interchange with and on through routes prescribed by the Commission, and in so far as it thereby implied that Seatrain otherwise returned or assisted in the return of said interchanged cars to their owners, are without any evidence to support them.

(16) In failing to find that the pertinent provisions of Rule 15 of the Code of Per Diem Rules are as follows: "(a) A road failing to receive promptly from a connection cars on which it has laid no embargo, shall be responsible to the connection for the per diem of the cars so held for delivery, including the home cars of such connection."

335 (17) In failing to find that: a car in general railroad use spends an average of only one day in "active and productive transportation service" out of a period ranging, in accordance with the definition of such service, from 3.82 to 19 days; if such service is defined to include only the time when the car is moving under load in line haul, including the time spent in intermediate switching, only 1 day out of every 19 days in the year is so spent; if such service is defined to include only the time which elapses between placement of the car for the consignor and release of the car by the consignee, only 1 day out of 3.82 days of the year is so spent; if from the period of "active and productive transportation service" as last defined there is excluded the time the car is in the possession of the shipper and the consignee, only 1 day out of every 7 days of the year is spent in such "active and productive transportation service"; if there is also excluded the time spent in switching at origin and destination, there is only 1 day of active and productive service so defined out of every 11 days of the year: And in not finding that the foregoing is established by the uncontroverted evidence and was or should have been found by the Commission.

(18) In failing to find that in general railroad service a car does not spend each day of the calendar year in active or productive transportation service, but

"that a car in general railroad use spends an average of only 1 day in 'active and productive service' out of a period
336 ranging, in accordance with the definition of such service, from 3.82 to 19 days. If such service is assumed to include only the time in which the car is moving under load in line haul, not including the time spent in intermediate switching, only 1 out of every 19 days is so spent. If it includes the time which elapses between placement of the car for the consignor and release of the car by the consignee, 1 out of 3.82 days is so spent. If the time the car is in the possession of the shipper and the consignee is excluded, the ratio is 1 out of every 7 days, and if the time spent in switching at origin and destination is also excluded, it is only 1 out of every 11 days."

And in not finding that the foregoing is established by the uncontroverted evidence and was or should have been found by the Commission.

(19) In failing to find that the use of cars by Seatrain Lines, Inc., differs substantially from that of railroads in that Seatrain own no general-purpose freight cars for its own use or for exchange with other lines; as freight traffic does not originate or terminate on vessels of Seatrain, it does not bear any expense for railroad-owned cars while they are in the possession of the consignor or consignee; Seatrain does not bear any expense for cars while they are being switched in origin or destination terminal switching service; Seatrain does not bear any expense for cars while they are awaiting or undergoing repairs; Seatrain does not bear any expense for cars comparable to that of railroads in providing cars to meet the needs of peak or seasonal traffic movements; Seatrain's transportation of empty railroad-owned cars is negligible in comparison with total cars carried by it; and
337 the payment by Seatrain of $1.00 per car per day only for such period as cars are in its actual possession exempts Seatrain from paying the market value therefor or from bearing a ratable proportion of the actual cost of car ownership and maintenance during their active and productive time or from performing or paying for the reciprocal service as defined in Assignments 13 and 14 hereof; and in failing to find that the Commission failed to give any consideration thereto in prescribing the rates of compensation.

(20) In failing to find that the Commission in its report of October 13, 1941, adopted a finding theretofore made by it that "the average cost to the owner of freight-car ownership and maintenance," embracing cost of maintenance and repair, cost of taxes, cost of replacement, miscellaneous expenses, and 6% on

the investment, was 83.812 cents per car for each day of the calendar year, or was the amount of $305.91 per car unit in a calendar year, and that the Commission also found that cars were idle during a portion of the year due in part to unserviceable condition and in part to the fact that there is a surplus supply of cars during certain seasons and years.

(21) In failing to find that the Commission by its said order of October 13, 1941, and the reports made a part thereof, having found a market value for the use of freight cars for interchange purposes and having found that Seatrain should pay $1.00 per diem only for a portion of the time that the loaded car is devoted to its use and having relieved Seatrain from rendering the other services required and contemplated in the payment of the
338 said market value, failed to provide just compensation for the use of cars of each of the petitioners herein.

(22) In failing to find that the Commission having sustained its examiner in excluding the evidence offered by petitioner, The Pennsylvania Railroad Company, that Seatrain without its consent had been taking its freight cars for interchange and use on Seatrain's ocean-going vessels since 1932, and had paid no compensation therefor, failed and refused to give any consideration thereto and to require Seatrain to make a concurrent payment or give security therefor as a condition to requiring petitioners to permit their cars to be interchanged with Seatrain, and also failed and refused to direct Seatrain to make any payment to the railroad carriers for the use of their cars as required by the order.

(23) In failing to find that the Commission denied the various applications of the petitioners for a reconsideration and clarification of its order.

(24) In failing to conclude and hold that the findings of the Commission in respect to the compensation to be paid by Seatrain for the use of petitioners' cars was without adequate evidence to support it, and in holding and concluding to the contrary.

(25) In failing to hold and conclude that the Commission's conclusion of law in respect to the compensation to be paid by Seatrain for the use of petitioners' cars was without adequate evidence to support it and in holding and concluding to the contrary.

339 (26) In failing to hold and conclude that the rate of compensation to be paid by Seatrain for the use of petitioners' freight cars at $1.00 per day for such period only as the cars were in Seatrain's actual possession was confiscatory.

(27) In failing to conclude and hold that the adoption of the provisions of the current Code of Per Diem Rules governing the

interchange of cars as a standard of value of just compensation for the use thereof, and then relieving Seatrain from paying a part thereof, resulted in the adoption of a measure of value arbitrary, unreasonable, contrary to law, and in violation of the Fifth Amendment to the Constitution of the United States which guarantees to the petitioners just compensation.

(28) In failing to conclude and hold that the Commission's said order in finding that the compensation to which petitioners are entitled for the use of their freight cars by Seatrain is only $1.00 per car per day payable only for the time that the cars are in Seatrain's actual possession, denies to each of the petitioners the just compensation to which each is entitled and deprives each of them of the use of its property without due process of law and in violation of the Fifth Amendment to the Constitution of the United States.

(29) In failing to conclude and hold that the Commission's said order in finding that the compensation to which the petitioners are entitled for the use of their cars is only $1.00 per car per day
340 payable only for the time that the cars are in Seatrain's actual possession, is unsupported by any basic findings and unwarranted by any evidence in the record, and is arbitrary and deprives each of the petitioners of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(30) In failing to hold and conclude that the Commission's said order is arbitrary, capricious, and unwarranted in law in that it does not run against or impose any obligation upon Seatrain with respect to its use of the cars of petitioners herein, and the said order fails to direct Seatrain to make any payment therefor.

(31) In failing to hold and conclude that the Commission's said order lacks the degree of definiteness and certainty essential to its validity.

(32) In failing to find that the railroads petitioners were not compensated for the detention of their cars at the ports, after tender and prior to acceptance for Seatrain's use, by divisions or rates and that any finding of the Commission to the contrary was without evidence to support it.

(33) In failing to conclude and hold that the Commission erred in failing and refusing to direct Seatrain to pay petitioners for the use of their cars.

(34) In failing to conclude and hold that the railroads petitioners were entitled to just compensation for the use of their cars to be determined and paid or adequately secured by Seatrain before or at the time they were required to interchange their cars with Seatrain.

341 Wherefore petitioners pray that the said decree be reversed or modified and that the Commission's said order be set aside, annulled, and enjoined in its entirety.

JOHN A. HARTPENCE,
Attorney for Petitioners,
168 W. State Street, Trenton, N. J.

JOHN VANCE HEWITT,
JOSEPH F. ESHELMAN,
J. R. BELL,
W. C. BURGER,
CHARLES CLARK,
FRANK W. GWATHMEY,
G. H. MUCKLEY,
CONRAD OLSON,
J. P. PLUNKETT,
EDWARD W. WHEELER,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Of counsel.

342 [Citation in usual form showing service on Wendell Berge et al. omitted in printing.]

345 In District Court of the United States

[Title omitted.]

Petitioners-appellants' praecipe for transcript of record

To the Clerk of the Above-named Court:

You are hereby requested to prepare a transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, and to include in such transcript of record in addition to the documents numbered (1) to (16), both inclusive, and (18) to (24), both inclusive, (31) and (34) mentioned in defendants-appellants' praecipe, the following, to wit:

(1) Petitioners' petition for appeal;

(2) Petitioners' notice of appeal and acknowledgment of service;

(3) Petitioners' assignments of error;

(4) Order allowing petitioners' appeal;

(5) Petitioners' notice to Attorney General of State of New Jersey, and acknowledgment of service;

(6) Citation on petitioners' appeal;

346 (7) Petitioners' statement of jurisdiction of Supreme Court of the United States (Rule 12);

(8) Petitioners' praecipe for transcript of record and acknowledgment thereof;

(9) Statement by petitioners-appellants directing attention to paragraph 3 of Rule 12;

(10) Petitioners' Proposed Finding of Fact and Conclusion of Law;

(11) Petitioners' Cost Bond;

(12) All Proofs of Service.

JOHN A. HARTPENCE,
Attorney for Petitioners,
168 W. State Street, Trenton, N. J.

JOHN VANCE HEWITT,
JOSEPH F. ESHELMAN,
J. R. BELL,
W. C. BURGER,
CHARLES CLARK,
FRANK W. GWATHMEY,
G. H. MUCKLEY,
CONRAD OLSON,
J. P. PLUNKETT,
EDWARD W. WHEELER,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Of Counsel.

347 Service of the foregoing praecipe for transcript of record and receipt of copy thereof are hereby acknowledged this 31st day of January 1944.

Wendell Berge, Assistant Attorney General; Robert L. Pierce, Special Assistant to the Attorney General; Thorn Lord, United States Attorney (For the United States of America); Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (For the Interstate Commerce Commission); Duane E. Minard, 1180 Raymond Building, Newark, N. J.; Parker McCollester (For defendant Seatrain Lines, Inc.); Arthur T. Vanderbilt, 744 Broad Street, Newark, N. J.; H. H. Larimore (For New Orleans and Lower Coast Railroad Co.); James D. Carpenter, Jr. (Attorney for Forrest S. Smith, Trustee of Hoboken Manufacturers Railroad Co.).

417 [Bond on appeal for $250 approved, omitted in printing.]

419 In District Court of the United States

[Title omitted.]

Order as to exhibits

January 31, 1944

In accordance with the provisions of petitioners' and defendants' praecipe for transcript of record on appeal of the above-entitled matter to the Supreme Court of the United States, and it appearing that the parties have consented thereto.

It is hereby ordered, That the documents and papers covered by the five-page certificate of the Secretary of the Interstate Commerce Commission, dated April 9, 1942, and transmitted with said certificate, in Dockets Nos. 25728, Hoboken Manufacturers Railroad Co. v. Abilene & Southern Ry. Co., et al., and No. 25878, New Orleans & Lower Coast Railroad Co. v. The Akron, Canton & Youngstown Ry. Co., et al., all of which documents and
420 papers were received in evidence in the District Court in the trial of this cause, may all be forwarded, in lieu of copies of such documents and papers, to the Clerk of the Supreme Court of the United States as a part of the transcript of the record on appeal herein.

Dated this 31st day of January 1944.

GUY L. FAKE,
United States District Judge.

We consent to the entry of the above order by the court.

Wendell Berge, Assistant Attorney General; Robert L. Pierce, Special Assistant to the Attorney General; Charles M. Phillips, United States Attorney (For the United States of America); Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (For the Interstate Commerce Commission); Duane E. Minard, 1180 Raymond Bldg., Newark, N. J.; Parker McCollester (For defendant, Seatrain Lines, Inc);
421 Arthur T. Vanderbilt, 744 Broad St., Newark, N. J.; H. H. Larimore (For New Orleans & Lower Coast Railroad Company); John A. Hartpence, 168 W. State St., Trenton, N. J.; Conboy Hewitt, O'Brien & Boardman (Attorneys for Petitioners).

JANUARY 31, 1944.

422 In United States District Court

[Title omitted.]

Order substituting trustee for Hoboken Manufacturers Railroad Company and permitting him to adopt appeal papers, etc.

It appearing that Hoboken Manufacturers Railroad Company, an intervener-defendant herein, filed its petition with this court in a proceeding wherein it is named as "Debtor" (No. 4873A) on July 26, 1943, for reorganization under section 77 of the Bankruptcy Act, as amended, which petition was duly approved by an order entered on the same day, and that Forrest S. Smith was duly appointed and on November 12, 1943, qualified as Trustee of said Debtor; and it further appearing that by order of this court entered in said reorganization proceedings on January 28, 1944, said Trustee was directed to join in and become a party to the proposed appeal of the interveners-defendants herein to the United States Supreme Court from the final decree entered in this suit on December 8, 1943; and the court having duly considered said facts,

It is, on this 31st day of January 1944 on motion of James D. Carpenter, Jr., attorney for said Trustee,

Ordered that Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor, be and he hereby is substituted, as such Trustee, for and in the place and stead of Hoboken Manufacturers Railroad Company as an intervener-defendant in this suit, and it is

Further ordered that said Trustee be and he hereby is permitted to adopt and become a party to the petition
423 for appeal and assignment of errors, as well as any other appeal papers, filed by and on behalf of the Interstate Commerce Commission and the other interveners-defendants herein, and said Trustee is hereby joined as a party to the appeal of said interveners-defendants heretofore duly allowed by the order of this court entered on January 28, 1944, as though actually named therein.

GUY L. FAKE,
United States District Judge.

424 In District Court of the United States

[Title omitted.]

Notice of appeal

To the Attorney General for the State of New Jersey:

You are hereby notified that the District Court of the United States for the District of New Jersey, on January 28, 1944, filed

and entered an order allowing an appeal by the United States of America, the Interstate Commerce Commission, Seatrain Lines, Inc., and the New Orleans & Lower Coast Railroad Company, to the Supreme Court of the United States from a final decree filed and entered on the 8th day of December 1943 in the above-entitled cause, and that the citation signed by such Court on January 28, 1944, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents:

425 The citation referred to above, the petition for and the order allowing said appeal, defendants' jurisdictional statement pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States, and the Statement required to be served on appellees by said Rule 12.

This notice is given to you pursuant to the provisions of U. S. Code, Title 28, sec. 47a, enacted March 3, 1911, c. 231, sec. 210, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220.

Dated January 28, 1944.

Wendell Berge, Assistant Attorney General; Robert L. Pierce, Special Assistant to the Attorney General; Thorn Lord, United States Attorney (For the United States of America); Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (For the Interstate Commerce Commission); Duane E. Minard, 1180 Raymond Bldg., Newark, N. J.; Parker McCollester (For defendant, Seatrain Lines, Inc.); Arthur T. Vanderbilt, 744 Broad St., Newark, N. J; H. H. Larimore (For New Orleans & Lower Coast Railroad Company).

Received a copy of the foregoing notice this 31st day of January 1944.

DAVID T. WILENTZ,
Attorney General of the State of New Jersey.

426 In District Court of the United States

[Title omitted.]

Notice of appeal

To the Attorney General for the State of New Jersey:

You are hereby notified that the District Court of the United States for the District of New Jersey, on January 31, 1944, filed and entered an order allowing an appeal by The Pennsylvania

Railroad Company, Atlantic Coast Line Railroad Company, The Boston and Maine Railroad, Merel P. Callaway, Trustee of Central of Georgia Railway Company, Great Northern Railway Company, The Long Island Rail Road Company, Louisville and
427 Nashville Railroad Company, Maine Central Railroad Company, Norfolk and Western Railway Company, Northern Pacific Railway Company, Legh R. Powell, Jr., and Henry W. Anderson, receivers of Seaboard Air Line Railway Company, Southern Railway Company, Southern Pacific Company, Texas and New Orleans Railroad Company, Union Pacific Railroad Company, Petitioners, to the Supreme Court of the United States from a final decree filed and entered on the 8th day of December 1943, in the above-entitled cause, and that the citation signed by such Court on January 31, 1944, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, petitioners' jurisdictional statement pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States, and the statement required to be served on appellees by said Rule 12.

This notice is given to you pursuant to the provisions of U. S. Code, Title 28, sec. 47a, enacted March 3, 1911, c. 231, sec. 210, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220.

Dated January 31, 1944.

JOHN A. HARTPENCE,
John A. Hartpence,
Attorney for Petitioners.
168 W. State Street, Trenton, N. J.

JOHN VANCE HEWITT,
JOSEPH F. ESHELMAN,
J. R. BELL,
W. C. BURGER,
CHARLES CLARK,
FRANK W. GWATHMEY,
G. H. MUCKLEY,
CONRAD OLSON,
J. P. PLUNKETT,
EDWARD W. WHEELER,
CONBOY, HEWITT, O'BRIEN & BOARDMAN.
Of Counsel.

428 ceived a copy of the foregoing notice this 31st day of
J ary 1944.

DAVID T. WILENTZ,
For the Attorney General of the State of New Jersey.

429 In District Court of the United States

[Title omitted.]

Affidavit of service

DISTRICT OF COLUMBIA, *ss:*

I. R. Aubrey Bogley, a member of the law firm of McKenney, Flannery & Craighill and a member of the bar of the District Court of the United States for the District of Columbia, being first duly sworn on oath depose and say that I, this 1st day of February 1944, made service upon the Interstate Commerce Commission and the United States of Citation of Appeal, Notice of Appeal, Petitioners-Appellants' Praecipe for Transcript of Record and Statement by Petitioners-Appellants' directing attention to Paragraph 3 of Rule 12 of the revised rules of the Supreme Court of the United States, in the above entitled action, by personally handing copies of each of said documents to E. M. Reidy, Assistant Chief Counsel for the Interstate Commerce Commission and Robert L. Pierce, Special Assistant to the Attorney General for the United States of America, and taking their written acknowledgments thereof.

R. AUBREY BOGLEY.

430 Subscribed and sworn to before me this 1st day of February 1944.

[SEAL] ELIZABETH R. YOUNG,
Notary Public, D. C.

448 In United States District Court

[Title omitted.]

Supplement to defendants' (appellants') praecipe for transcript of record

To the Clerk of the Above-named Court:

You are hereby requested to add the order of Judge Fake, Dated January 31, 1944, substituting Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor, for Hoboken Manufacturers Railroad Company as an intervener-defendant and permitting said Trustee to adopt and become a party to the petition for appeal, etc., to the transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, which you were requested to prepare by the other parties taking said ap-

peal in their praecipe for transcript of record served on the Petitioners' attorneys January 28, 1944.

JAMES D. CARPENTER, Jr.,
James D. Carpenter, Jr.,
75 Montgomery Street, Jersey City 2, N. J.

(For substituted defendant Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor.)

Service of the foregoing Supplement to defendants' (Appellants') Praecipe for Transcript of Record and receipt of a copy thereof is hereby acknowledged this — day of February 1944.

JOHN A. HARTPENCE,
Atty. for Petitioners.

449 In District Court of the United States

[Title omitted.]

Order enlarging time

March 3, 1944

This cause coming on this 3 day of March 1944 to be heard before Guy L. Fake, District Judge, one of the Judges who participated in the trial of said cause before the statutory three-judge court, upon the motion and petition of the plaintiffs and defendants for enlargement of the time within which the parties are required under the Rules of the Supreme Court of the United States to docket the case and file the record thereof with the Clerk of said court, and said petition having been heard and considered and it appearing that good cause exists for enlargement of the time:

450 It is ordered and adjudged that the defendants herein on their appeal, and the petitioners on their cross appeal, do have until the 8th day of April 1944 within which to docket this case and file the record thereof with the Clerk of the Supreme Court of the United States. The said date within which the said record shall be filed being not more than 90 days from the date of the first notice of appeal in this cause.

It is also ordered and adjudged that the Clerk consolidate the record on defendants' appeal and petitioners' cross appeal and transmit to the Clerk of the Supreme Court one record in this cause.

Ordered and adjudged this 3 day of March 1944.

GUY L. FAKE,
Guy L. Fake,
United States District Judge.

451 [Clerk's certificate to foregoing transcript omitted in printing.]

453 *Petitioners' exhibit No. 1*

Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY, COMPLAINANT

vs.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL., DEFENDANTS

COMPLAINT

Filed Dec. 30, 1942

[Omitted. Printed side page. 28 ante.]

475 Interstate Commerce Commission, Washington

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

Order

January 19, 1933

Herewith is a copy of a petition filed with the Interstate Commerce Commission in the above entitled case.

Defendants are hereby called upon to satisfy the complaint or to answer the same in writing within thirty[1] (twenty) days from this date.

By the Commission:

GEORGE B. McGINTY,
Secretary.

476 Before the Interstate Commerce Commission

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

vs.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

Answer of Texas and New Orleans Railroad Company

[1] Indicates Thirty Day Road.

Filed Feb. 6, 1933

Comes now Texas and New Orleans Railroad Company, one of the defendants in the above entitled and numbered proceeding, and, answering the complaint heretofore, on December 30, 1932, filed herein, says:

I

It admits the allegations of paragraph I of the complaint.

II

It admits the allegations of paragraph II of the complaint.

III

As far as it is itself concerned and as far as a great many of the defendants are concerned, it admits the allegations of paragraph III of the complaint. As to the other defendants and as to
477 the complainant it is without sufficient information to form a belief and demands proof of said allegations.

IV

It is without information sufficient to form a belief with respect to the allegations of paragraph IV and demands proof of same.

V

It is without information sufficient to form a belief with respect to the allegations of paragraph V and demands proof of same.

VI

It admits the allegations of paragraph VI of the complaint.

VII

It is without information sufficient to form a belief with respect to the allegations of paragraph VII of the complaint and demands proof of same.

VIII

It is without information sufficient to form a belief with respect to the allegations of paragraph VIII of the complaint and demands proof of same.

IX

It is without information sufficient to form a belief with respect to the allegations of paragraph IX of the complaint and demands proof of same.

478

X

It is without information sufficient to form a belief with respect to the allegations of paragraph X of the complaint and demands proof of same.

XI

It is without information sufficient to form a belief with respect to the allegations of paragraph XV of the complaint and demands proof of same.

XII

It is without information sufficient to form a belief with respect to the allegations of paragraph XII of the complaint and demands proof of same.

XIII

It is without information sufficient to form a belief with respect to the allegations of paragraph XIII of the complaint and demands proof of same.

XIV

It is without information sufficient to form a belief with respect to the allegations of paragraph XIV of the complaint and demands proof of same.

XV

It is without information sufficient to form a belief with respect to the allegations of paragraph XV of the complaint and demands proof of same.

XVI

It denies the allegations of paragraph XVI of the complaint.

479

XVII

It denies the allegations of paragraph XVIII of the complaint.

XVIII

It denies the allegations of parapragh XVIII of the complaint.

XIX

It is without information sufficient to form a belief with respect to the allegations of paragraph XIX of the complaint and demands proof of same.

XX

It is without information sufficient to form a belief with respect to the allegations of paragraph XX of the complaint and demands proof of same.

XXI

It denies the allegations of paragraph XXI of the complaint.

XXII

It denies the allegations of paragraph XXII of the complaint.

XXIII

It denies the allegations of paragraph XVIII of the complain.

480 Premises considered, this defendant prays that the complaint be dismissed.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
J. R. BELL,
By J. R. Bell,
G. H. MUCKLEY,
G. H. Muckley,
J. H. TALLICHET,
BAKER, BOTTS, ANDREWS & WHARTON,
Baker, Botts, Andrews & Wharton,
Attorneys for defendant.

Dated at Houston, Texas, February 2, 1933.

I hereby certify that I have this day served the foregoing document upon complainant in this proceeding by mailing a copy thereof properly addressed to Mr. Parker McCollester, Attorney for said complainant, at 25 Broadway, New York, N. Y.

Dated at Houston, Texas, this 2nd day of February, 1933.

J. H. TALLICHET,
Of Counsel for defendant, Texas and New Orleans Railroad Company.

481 Before the Interstate Commerce Commission

I. C. C. Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY, COMPLAINANT

vs.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL., DEFENDANTS

Answer

Filed Feb. 20, 1933

Defendants, Abilene and Southern Railway Company, The Beaumont, Sour Lake & Western Railway Company, International-Great Northern Railroad Company, Missouri Pacific Railroad Company, Missouri Pacific Railroad Corporation in Nebraska, New Orleans and Lower Coast Railroad Company and The Texas and Pacific Railway Company, for answer to the complaint herein, respectfully state:

I

Defendants are without information concerning the allegations of Paragraph I and leave complainant to its proof thereof.

II

Defendants admit that they are common carriers engaged in interstate commerce.

III

Defendants admit the allegations of Paragraph VI respecting the adoption and promulgation of new Car Service
482 Rule 4, but deny that the adoption and promulgation of said Rule were favored or supported by these defendants.

IV

These defendants are informed and believe that the allegations of Paragraph XI are substantially correct and therefore admit their correctness, except that these defendants deny that they have attempted or are attempting to withhold authority for the delivery of their cars to any water line or lines, and state that, on the contrary, they have filed with the Car Service Division of the American Railway Association their authority for the delivery of their cars to all water lines without restriction.

V

In response to the allegations of Paragraph XII, these defendants deny the existence, in so far as they are concerned, of any concerted plan to prevent the delivery by complainant of cars to Seatrain Lines, Inc.

VI

These defendants deny that they have done or omitted to do anything unreasonable, unjust, discriminatory or otherwise contrary to the terms and provisions of the Interstate Commerce Act, and that they have caused or are causing damage to complainant in respect of the matters in issue.

Wherefore, having thus fully answered, these defendants
483 pray to be dismissed.

Abilene and Southern Railway Company, The Texas and Pacific Railway Company, The Beaumont, Sour Lake & Western Railway Company, International-Great Northern Railroad Company, New Orleans and Lower Coast Railroad Company, Missouri Pacific Railroad Corporation in Nebraska, Missouri Pacific Railroad Company, by T. D. Gresham, H. H. Larimore, Geo. W. Holmes, Chas. M. Spence, Their Counsel.

484 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

Answer of the Pennsylvania Railroad Company, and the Long Island Railroad Company

Filed February 21, 1933

The above named defendants, for answer to the Complaint filed in this proceeding, respectfully state:

I. These defendants are without information as to the averments of Paragraph I of the complaint, and they ask, therefore, that due proof be furnished by the complainant, insofar as it be deemed material.

II. These defendants admit that they are common carriers engaged in part in interstate commerce, and as to such commerce they are subject to the act to regulate commerce approved Febru-

ary 4, 1887, and the acts amendatory thereof and supplementary thereto, insofar as the same are constitutional and enforceable.

III. These defendants admit the averments of Paragraph III of the complaint that they are members of the American Railway Association. They deny that the said American Railway Association acts as their agent in the matters as alleged in Paragraph III of the complaint. They admit that the complainant is a subscriber to the car service and per diem agreement, and is without vote with respect to the provisions of the car service rule promulgated by the American Railway Association.

IV. These defendants admit the averments of Paragraph IV of the complainant that ships operated by Seatrain Lines, Inc., dock at the piers of the complainant, and that the said Sea-
485 train Lines, Inc., is a common carrier by water operating ships specially designed for the transportation by water of freight in railroad cars, two of which are operated between the points alleged in said Paragraph IV. These defendants are without information as to the averments of the said Paragraph IV with respect to the expenditure by the complainants of large sums of money in the rearrangement of its terminal and the construction of special facilities for the interchange of railroad cars between its rails and the vessels of Seatrain Lines, Inc., and ask, therefore, that due proof be furnished by the complainant, insofar as it is deemed material.

V. These defendants are without information as to the averments of Paragraph V of the complaint, and ask, therefore, that due proof be furnished by complainant, insofar as it be deemed material.

VI. These defendants deny that the new car service Rule 4, as quoted in Paragraph VI of the complaint, was adopted and promulgated by the American Railway Association. They aver that the said new car service Rule 4 was adopted by a vote of the common carrier railroads who are members of the said American Railway Association, and that these defendants are members of the said Association, that they voted in favor of the adoption of the said new rule, and that the said new rule was promulgated by the American Railway Association.

VII. These defendants admit the averment in Paragraph VII of the complaint that the complainant has in the past delivered railroad cars belonging to them to Seatrain Lines, Inc. They aver that the said delivery of railroad cars was without their consent or authority and in disregard of their property rights in the said railroad cars. They further aver that the future delivery of their railroad cars by the complainant to said Seatrain Lines, Inc., would be without their consent or authority.

These defendants are without information as to the averment in Paragraph VII of the complaint that shippers direct freight transported by the complainant to be forwarded via vessels
486 of the said Seatrain Lines, Inc., in cars in which the said freight is loaded when received by complainant from its connections, and ask, therefore, that due proof be furnished by the complainant, insofar as it be deemed material. These defendants aver, however, that they are not parties to any through routes or joint rates with the Seatrain Lines, Inc., that they have not and do not consent to the use of their railroad cars by the said Seatrain Lines, Inc., that shippers do not have the right to direct the use by the Seatrain Lines, Inc., of the railroad cars of these defendants, and that the delivery by the complainant to the said Seatrain Lines, Inc., of the said railroad cars of these defendants constitutes a conversion of the property of these defendants and a violation by the complainant of the per diem and car service rules and agreement under which railroad cars are interchanged between these defendants and the complainant.

VIII. These defendants are without information as to the averments of Paragraph VIII of the complaint, and ask, therefore, that due proof be furnished by the complainant, insofar as it is material. They refuse, however, to permit their railroad cars to be delivered by the complainant or by any carrier by railroad to the Seatrain Lines, Inc., and railroad cars of these defendants so delivered to the said Seatrain Lines, Inc., without the consent of these defendants, is in violation of the car service rules and agreement, and constitutes a conversion of the property of these defendants.

IX. The allegations of Paragraph IX of the complaint are denied. These defendants aver that the railroad cars which they own, or in which they have an interest, were acquired for the purpose of transporting freight by railroads operated by them or by other carriers by railroad with which these defendants interchange railroad cars; that the said cars were acquired for the purpose of earning railroad revenue that accrues from the carriage of freight by carriers operating lines of railroad. They aver that the
487 Seatrain Lines, Inc., desires to use their said railroad cars as bunkers or containers for freight which is transported by water, and that the said cars were not acquired for such use or for any other use by the said Seatrain Lines, Inc.

X. These defendants are without information as to the averments of Paragraph X of the complaint, and ask, therefore, that due proof be furnished by the complainant, insofar as it be deemed material. They aver, however, that such undertaking of the complainant to deliver the railroad cars of these defendants to the

Seatrain Lines, Inc., is without the consent or authority of these defendants, and constitutes a violation of the car service rules and agreement, and of the property rights of these defendants in the said railroad cars.

XI. These defendants are without information as to the averments of Paragraph XI of the complaint, and ask, therefore, that due proof be furnished by the complainant, insofar as it be deemed material. They refuse, however, to give their consent to the complainant or to any carrier by railroad to deliver to Seatrain Lines, Inc., railroad cars which they own or in which they have an interest.

XII. These defendants deny the averments of Paragraph XII of the complaint. The delivery to and the use by Seatrain Lines, Inc., of the railroad cars of these defendants, without their consent, constitutes a violation of the car service rules and agreement and of the property rights of these defendants in the said railroad cars.

XIII. These defendants are without information as to the averments of Paragraph XIII of the complaint, and ask, therefore, that due proof be furnished by the complainant, insofar as it be deemed material. However, these defendants are under no duty to permit their railroad cars to be delivered by the plaintiff to Seatrain Lines, Inc., in order to relieve the complainant or the Seatrain Lines, Inc., from their duty to furnish adequate and efficient facilities for the transfer of lading from railroad cars to vessels.

488 XIV. These defendants are without information as to the averments of paragraph XIV of the complaint, and ask therefore, that due proof be furnished by the complainant, insofar as it be deemed material. However, no duty rests upon them to permit their railroad cars to be delivered to the vessels of Seatrain Lines, Inc.

XV. These defendants admit that there is at the present time no car shortage. They deny the remaining averments of Paragraph XV of the complaint. Their refusal to permit the delivery of their railroad cars to Seatrain Lines, Inc., is based on their property rights in the said railroad cars, and their right to prevent the conversion or misuse of the said cars.

XVI. These defendants deny the averment of Paragraph XVI of the complaint that new car service Rule 4 is unjust or unreasonable. The said new rule is based on the right of carriers by railroad to prevent the conversion or misuse of their railroad cars. These defendants do not participate in through routes or joint rates with Seatrain Lines, Inc. However, if the shipper should desire to transport the lading in railroad cars of these defendants

via vessels of the Seatrain Lines, Inc., no duty rests upon these defendants to permit their railroad cars to be delivered to and used by Seatrain Lines, Inc., so that the shipper, or the complainant, or the Seatrain Lines, Inc., may be relieved from the duty of transferring the lading from railroad cars to vessels.

XVII. The allegations of Paragraph XVII of the complaint are denied.

XVIII. The allegations of Paragraph XVIII of the complaint are denied. These defendants do not consent to the delivery of their railroad freight cars to Seatrain Lines, Inc., by any carrier by railroad.

XIX. These defendants admit that they permit their railroad cars to be interchanged with the Florida East Coast Railway Company for transportation on the car ferries of the Florida East Coast Car Ferry Company between Key West, Florida, and
489 Havana, Cuba. They aver, however, that the said car ferries of the Florida East Coast Car Ferry Company are used by or operated in connection with the railroad of the Florida East Coast Railway Company, are operated as parts of through rail routes, and are included within the definition of "railroad" in Paragraph 3, Section 1, of the Interstate Commerce Act. They aver that Seatrain Lines, Inc., is not a carrier by railroad, and is not entitled to the use of the railroad cars of these defendants. They deny the averments of unlawful and undue prejudice and preference in paragraph XIX of the complaint.

XX. The averments of Paragraph XX of the complaint are based on speculation and are argumentative, and require no answer at this time. However, new car service Rule 4 is based on a lawful exercise by carriers by railroad subject to the Interstate Commerce Act of their right to protect their interest in railroad cars, purchased or acquired by them; and these defendants deny that this exercise of dominion by them over their said property may result in an embargo in violation of the regulations of the American Railway Association or in an unlawful interference with the through movement of freight.

XXI. The allegations of Paragraph XXI of the complaint are denied. Paragraphs 4 and 11 of Section 1, and Paragraphs 1 and 3, of Section 3, of the Interstate Commerce Act, impose no duty upon them to permit their railroad cars to be delivered to and used by Seatrain Lines, Inc.

XXII. These defendants deny the averments of Paragraph XXII of the complaint.

XXIII. These defendants deny the averments of Paragraph XXIII of the complaint. If the complainant should incur a loss or be put to any expense, it would be damnum absque injuria.

490 Wherefore these defendants pray that as to them the complaint filed in this proceeding be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY,
By (S) J. R. DOWNES,
Chief of Freight Transportation.
THE LONG ISLAND RAIL ROAD COMPANY,
By (S) J. R. DOWNES,
Chief of Freight Transportation.

ALBERT WARD,
HENRY WOLF BIKLE,
Of Counsel.

491 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY, COMPLAINANT

vs.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL., DEFENDANTS

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY, COMPLAINANT

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL., DEFENDANTS

Petition for leave to intervene

[Omitted, Printed side page. 50 ante.]

496 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY, COMPLAINANT

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL., DEFENDANTS

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY, COMPLAINANT

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL., DEFENDANTS

ASSEMBLY ROOM, MERCHANTS ASSOCIATION,
233 Broadway, New York City, N. Y.,
November 2, 1933.

Before HARRIS FLEMING, Examiner.

Met pursuant to notice at 10 o'clock a. m.

Appearances

PARKER MCCOLLESTER, 25 Broadway, New York City, New York, appearing for the complainant in Docket No. 25728 and appearing for intervenor, Seatrain, Inc.

497 Frank J. Clark, 25 Broadway, New York City, New York, appearing for the complainant in Docket No. 25728 and the intervenor Seatrain Lines, Inc.

Lord, Day & Lord, 25 Broadway, New York City, New York, appearing for the complainant in Docket No. 25728 and the intervenor Seatrain Lines, Inc.

H. H. Larimore, Missouri Pacific Building, St. Louis, Missouri, appearing for the complainant in Docket No. 25878, the Abilene & Southern Railway; the B., S. L. & W. Railway Company, I. G. N. Railway Company, Missouri Pacific Railway Company, New Orleans & Lower Coast Railway Company, Texas & Pacific Railway Company.

C. M. Spence, Missouri Pacific Building, St. Louis, Missouri, appearing for the complainant in Docket No. 25878, the Abilene & Southern Railway, the B., S. L. & W. Railway Company, I. G. N. Railway Company, Missouri Pacific Railway Company, New Orleans & Lower Coast Railway Company, and Texas & Pacific Railway Company.

Graham M. Brush, 39 Broadway, New York City, New York, appearing for the Hoboken Manufacturers Railroad Company and the intervenor Seatrain Lines, Inc.

W. N. McGehee, Southern Railway Building, Washington, D. C., appearing for the Southern Railway System.

Joe Marks, Southern Railway Building, Washington, D. C., appearing for the Southern Railway System.

498 Roland J. Lehman, 143 Liberty Street, New York City, New York, appearing for the Eastern Trunk Line Association.

Alfred S. Knowlton, 143 Liberty Street, New York City, New York, appearing for the Eastern Trunk Line Association.

Alfred P. Thom, Transportation Building, Washington, D. C., appearing for the American Railway Association.

J. R. Bell, Transportation Building, Washington, D. C., appearing for the Southern Pacific Railway and the Texas & New Orleans Railroad Company.

G. H. Muckley, Transportation Building, Washington, D. C., appearing for the Southern Pacific Railway Company and the Texas & New Orleans Railroad Company.

Henry Thurtell, 1210 Shoreham Building, Washington, D. C., appearing for the Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, Central of Georgia Railway Company, Florida East Coast Railway Company, Georgia Railroad Company, M. & W. P. Railroad Company, and the N. C. & St. L. Railroad Company.

William C. Burger, 902 West Broadway, Louisville, Kentucky, appearing for the Louisville & Nashville Railroad Company.

J. G. Kerr, 902 West Broadway, Louisville, Kentucky, appearing for the Louisville & Nashville Railroad Company.

499–501 PROCEEDINGS

Exam. FLEMING. The Interstate Commerce Commission has assigned for hearing at this time and place Dockets Nos. 25728, Hoboken Manufacturers Railroad Company v. Abilene & Southern Railroad Company et al.

Who appears for the complainant in this proceeding?

Mr. MCCOLLESTER. Parker McCollester, Frank J. Clark, Lord, Day & Lord and Graham M. Brush. My address is 25 Broadway.

Exam. FLEMING. Do all of these parties appear in person?

Mr. MCCOLLESTER. Except my firm, of which I am a member.

Exam. FLEMING. I will ask that the appearances noted in answer to my call for appearances be limited to those who are actually present at this hearing.

Are all of those gentlemen here, Mr. McCollester?

Mr. MCCOLLESTER. I will repeat them. Parker McCollester, Frank J. Clark, Graham M. Brush—my firm is Lord, Day & Lord and I am a member of that firm.

Exam. FLEMING. What appearances for defendants?

Mr. SPENCE. H. H. Larimore and C. M. Spence, Missouri Pacific Building, St. Louis, Missouri—I beg your pardon.

Exam. FLEMING. I was calling for appearances for defendants in this case.

Mr. SPENCE. I beg your pardon.

Mr. LEHMAN. Roland J. Lehman and Alfred S. Knowlton, 143 Liberty Street, New York City, New York, appearing for
502 the Eastern Trunk Lines.

Mr. MUCKLEY. J. R. Bell and G. H. Muckley, Transportation Building, Washington, D. C., appearing for the Southern Pacific Railway and the Texas & New Orleans Railroad.

Mr. THURTELL. Henry Thurtell, 1210 Shoreham Building, Washington, D. C., appearing on behalf of the Atlantic Coast Line Railroad, Florida East Coast Railway, and certain other defendants—railroads named in my appearance blank.

Mr. MCGEHEE. Joe Marks and W. N. McGehee, Southern Railway Building, Washington, D. C., appearing for the Southern Railway System, and certain other defendants in Docket No. 25728.

Mr. BURGER. William C. Burger and J. G. Kerr, Louisville, Kentucky, appearing for the Louisville & Nashville Railroad Company.

Mr. THOM. Alfred P. Thom, Transportation Building, Washington, D. C., appearing for the American Railway Association.

Exam. FLEMING. Any other appearances for defendants?

Mr. MCCOLLESTER. I have an intervening petition for leave to intervene in both proceedings on behalf of Seatrain Lines, Inc.

Exam. FLEMING. We will take that up later.

Mr. MCCOLLESTER. Yes, sir.

Exam. FLEMING. The Commission has also assigned for hearing this morning Docket No. 25878; New Orleans & Lower Coast Railroad v. the Akron, Canton & Youngstown Railway Company et al.

503 What appearances for the complainant in this proceeding?

Mr. SPENCE. C. M. Spence, Missouri Pacific Building, St. Louis, Missouri.

Exam. FLEMING. What appearances for defendants in this proceeding?

Mr. LEHMAN. Roland J. Lehman and Alfred S. Knowlton, 143 Liberty Street, New York City, New York, appearing for the Eastern Trunk Line Association.

Mr. MUCKLEY. J. R. Bell and E. H. Muckley, appearing for the Southern Pacific and Texas & New Orleans Railroad.

Mr. THURTELL. Henry Thurtell, on behalf of the same defendants I named in stating the appearances in regard to the Hoboken case.

Mr. MCGEHEE. Joseph Marks and W. N. McGehee, Southern Railway System Lines.

Mr. BURGER. J. C. Kerr and William C. Burger, for the Louisville & Nashville Railroad.

Exam. FLEMING. I noted an appearance for Mr. Thom. Is he present?

(There was no response.)

Now, there are certain petitions for intervention which have been received by the Commission. Are there any appearances for such intervenors in this case?

(There was no response.)

Gentlemen, is there any objection to the consolidation of
504 the two cases that have just been called?

It will be assumed, if no objection is made at this time that this is agreeable to all parties.

Are there any intervening petitions to be offered at this time?

Mr. MCCOLLESTER. Mr. Examiner, I have an intervening petition for leave to intervene in both proceedings on behalf of Seatrain Lines, Inc., which intervenes in support of the complainants in both proceedings. The intervening petition does not broaden the issues and it is stipulated that it shall be considered to raise no new issues, and it does support and make its own all of the allegations of the complaints in so far as they are applicable to it, and prays for the same relief as prayed for in the complaints and so far as is proper, it seeks by this petition to obtain, and it does pray for relief.

I now offer five copies.

Mr. MUCKLEY. May I ask what Seatrain's interest is in the case?

Exam. FLEMING. Is this a joint petition to intervene in these respective cases; it is not asking for reparation?

Mr. MCCOLLESTER. It does not ask for reparation.

Exam. FLEMING. Your statement that it is similar to the petitions in these cases, in so far as applicable, has reference to the other allegations of the complaint?

505 Mr MCCOLLESTER. Yes.

Exam. FLEMING. Any other intervening petitions to be offered? Is there any objection to the petition, which has been offered? Is there any objection?

It will be received.

(The intervening petition was received and made a part of this record.)

Mr. MCCOLLESTER. That is all I have to offer at this time.

Exam. FLEMING. Speaking of these cases collectively, the complaints assail the lawfulness of Car Service Rule 4 maintained by the American Railway Association on behalf of its common carrier railroad members; also defendants' rules regulations, and instructions and practices under such Rule 4 or in connection therewith, alleging a violation of Section 1, paragraphs 4 and 11; Section 3, paragraphs 1 and 3, and of Section 7, all of the Interstate Commerce Act.

Complainants ask the Commission to establish and put in force reasonable rules, regulations, and practices in conformity with the provisions of said Act in regard to car service by defendant rail carriers, subject to said Act, and with respect to the interchange of cars between the lines of such defendants, the lines of complainants, and the vessels of Seatrain Lines, Inc.; also, to award reparation for damage claimed to have been sustained by reason of the alleged violations of said Act.

506 This summary of the issues states and sets forth all of the major issues presented. I will ask any of the parties if they find error in that view, to point to such errors at this time.

Mr. LEHMAN. I do not, offhand, see that there is any error in that statement made by you, Mr. Examiner. I believe, however, it should be stated, on behalf of defendants that, in their opinion, there are certain jurisdictional matters involved with respect to the right of the Seatrain Lines, Inc., or either of the complainants in this proceeding, to act in this manner, in seeking any relief under the Car Service Rules, of the Commission under the Interstate Commerce Act.

Exam. FLEMING. The Examiner stated that the summary stated by him is based upon the allegations of the complaints. The matters to which you refer are issues raised in that connection but, by answers of the defendants; is that the fact?

Mr. LEHMAN. That is correct.

Exam. FLEMING. Any further statements by counsel in this connection to be made at this time?

Mr. MCCOLLESTER. Except, Mr. Examiner, to challenge the last statement of opposing counsel that the objections to the Commission's jurisdiction were made in answers of defendants. I think there is no answer of the defendant or any of them that challenges the Commission's jurisdiction. All of the defendants have answered the complaint on the merits, and have submitted,

507 as we contend, to the Commission in the adjudication of this matter by the Commission, and have not challenged its jurisdiction.

Mr. LEHMAN. Mr. Examiner, when I stated the answer of the defendants, I did not have in mind the technical pleadings which are referred to by Mr. McCollester. I thought you had in mind what our general defense would be, among others, and that is why I made the statement I did.

Exam. FLEMING. In any event, the jurisdictional question would not be waived by failure to formally raise that question prior to the present time.

Mr. MCCOLLESTER. I think that is a question for argument. I do not want to argue at this time.

Mr. McGehee. I wish now, on behalf of the Southern Railway System Lines to put on this record our position to the effect that the Commission is without power, under the allegations of the complaint, to award the relief sought, and it is without any jurisdiction under the facts and statements contained in the complaint, and I make a motion that these two complaints be dismissed.

Exam. Fleming. Let it be understood that the question the Examiner just asked in connection with the jurisdictional question, of course, is without prejudice to any of the parties' rights, and with a view of seeking to clarify the issues and get the views of counsel on that subject at this time.

Mr. Lehman. Mr. Examiner, I would like to make a
508 motion on behalf of all defendants that these proceedings be dismissed upon the ground that the complaints under consideration seek relief on behalf of Seatrain Lines, Inc., which has been held by the Commission to be a common carrier by water, and for that reason is not, itself, entitled to claim any rights or privileges by virtue of the Car Service Rules of the American Railway Association or any privileges under the Interstate Commerce Commission Act—the Interstate Commerce Act.

The facts which I have stated: Namely, that Seatrain Lines, Inc., is a water carrier, and that the interests of the complainants is in seeking relief on behalf of that carrier which are plainly demonstrated by the facts stated in the petition of the intervenor's intervention filed by Seatrain Lines, Inc.

Mr. Spence. It is only necessary to point out that the complaint in Docket No. 25878 seeks relief on behalf of the New Orleans & Lower Coast Railroad, a common carrier by rail.

Exam. Fleming. Is there anything else?

Mr. Spence. Counsel has just stated that complainants ask relief on behalf of Seatrain Lines, Inc. I desire to point out that we ask relief on behalf of the New Orleans & Lower Coast Railroad, and the Hoboken Manufacturers Railroad Company themselves, which are common carriers by rail.

Exam. Fleming. There is nothing further before we proceed with the taking of testimony, is there?

The complainants may call their first witness.

509 Mr. McCollester. Mr. Examiner, before calling the witness, I desire to state that the purpose here is to conduct these hearings just as quickly and rapidly as possible. Further, that with the purpose of endeavoring to shorten the proceeding and simplify the presentation of the pertinent facts to the Commission, counsel for the defendants and I have conferred as to possible stipulations of facts that could be made.

Exam. FLEMING. Yes. Proceed.

Mr. MCCOLLESTER. I shall endeavor, now, to state the stipulations which I understand both parties in the Hoboken case are prepared to enter into; if my opponents take exception to my statements I trust they will so indicate.

Exam. FLEMING. When you state "both parties," what do you mean?

Mr. MCCOLLESTER. I mean all the parties.

In Docket 25728, all the parties referred to in that complaint, Mr. Examiner, the parties, as I understand it, are prepared to stipulate, and it is true of my client, we are prepared to stipulate that the facts alleged in paragraph 1 of the complaint may be taken as true; that the allegations in paragraph 4 of the complaint, except the last sentence thereof may be taken as true; that the allegations of paragraph 6 may be taken as true except the strike out the words "as complainant is informed." In other words, those allegations are to be taken as true statements of fact and not as
510 complainant's information of the facts.

It is further to be stipulated that the defendants generally make no restrictions of their cars—I suppose you mean restrictions against the movement of their cars, on delivery to railroads operation in Canada or Mexico, or as to movements of their cars to Cuba via the Florida East Coast Car Ferry route.

It is further to be stipulated that no defendant, generally, has refused to permit the delivery of its cars to a competing rail carrier for movement via such carrier if otherwise in accordance with the American Railway Association rules. It was further understood between the parties, to simplify the proceedings, that copies of the circulars of the American Railway Association relating to the adoption of Car Service Rule 4 and the securing of consent or refusal of railroads thereunder to permit delivery of their cars to water carriers and showing the results of such consents and refusals may be put into the record without calling a witness, the parties agree that these circulars are correct; in other words, they do not question the authenticity, either side, as to the circulars.

(Discussion off the record.)

Mr. MCCOLLESTER. As a stipulation of fact, the parties stipulate on the record that there was no car shortage at the time Car Service Rule 4 was adopted nor is there a car shortage at the present time.

511 It is to be further stipulated as a fact that prior to the commencement of the Seatrain operations to and from New York and during the period that Seatrain and its predecessor—its predecessor, the Overseas Railways—we operated between New Orleans and Havana, Cuba, and the defendants made no objection to the delivery of their cars to the vessels of Seatrain or Over-

seas and that various cars of the various defendants were so delivered.

Mr. MUCKLEY. When did Seatrain start operating? I think that ought to be in the record.

Mr. MCCOLLESTER. September 3, 1931. That is Seatrain. Do you want Overseas?

Mr. MUCKLEY. Yes.

Mr. MCCOLLESTER. Overseas began operating in January 1929.

Mr. MUCKLEY. That is the way I understand it.

Mr. MCCOLLESTER. There will be offered into the record, Mr. Examiner, without objection, that there is no witness to identify them, letters addressed to Hoboken and Seatrain on behalf of the Eastern Trunk Lines in 1932. There will also be offered the replies to these letters, which letters indicate the refusal at that time of trunk lines to let their cars move via Seatrain.

It is also agreed that figures as to the number of cars delivered to Seatrain may be put into the record without a witness, those figures being taken from the official records.

512 We want to offer into this record evidence, Mr. Examiner——

Mr. THURTELL. Before you proceed with that, do you not think that the matter of the operation of Overseas which began in 1929, and then the operation of the Seatrain Lines, Inc., which began in 1931, should be stated that that was merely a change in name, it was the same vessel, over the same route.

Mr. MCCOLLESTER. It was the same vessel, but it was a succeeding corporation, if you want to put it that way.

Mr. THURTELL. Yes.

Mr. MCCOLLESTER. Mr. Examiner, we also want to refer you, in the decision of this case—in your report in this case, to the report of the Commission in the Investigation of Seatrain Lines, Docket 25565, and I should like to offer a copy of that report for inclusion in the record in this proceeding, in order, Mr. Examiner, that it may save time in proving a great many facts that are stated in that report.

Exam. FLEMING. It will be received.

(Exhibit 1, no witness, received in evidence.)

Exam. FLEMING. Are counsel for the defendants prepared to stipulate as to the statement just made by Mr. McCollester?

Mr. LEHMAN. Mr. Examiner, for the purpose of this case, we are prepared to stipulate as correct for the purposes of this proceeding, with the exception of the following statements contained therein:

513 First, the statement contained on page 6 of the mimeographed decision to the effect that the Seatrain method of

operation avoids "delays and expenses incident to ordinary steamship operation."

The statement contained on page 19 of the mimeographed decision which reads as follows: "For the use of the cars the railroads connecting with Seatrain pay per diem to the owning railroads and are reimbursed by Seatrain."

With that exception we are prepared to stipulate as true the facts as set forth in Exhibit 1 just referred to.

Mr. McCollester. I offer the copy of the Commission's report in the proceeding referred to and ask that it be marked as Exhibit 1.

Exam. Fleming. It has been so marked.

Mr. Muckley. There is another report that we would like to refer to at this time of the Commission, the report of the Commission in New Orleans Car Ferry Service 188–371, Peninsular & Occidental Steamship Company, 37 I. C. C. 432, and the decision with reference to exclusion of the Seatrain from the Southern Railway, I believe it is—I do not have the exact title before me—194 I. C. C. 309. Also, I would like to refer to the Commission's order of December 15, 1932, denying the suspension of Car Service Rule 4 by which suspension denial to the Seatrain Lines and the Hoboken Manufacturers Railroad, they eventually brought about this case.

514 Mr. McCollester. We do not agree with the statement and findings in all of these reports nor that they may be taken as true and correct statements of facts for the purposes of this case. That relates particularly to the report in New Orleans-Havana Car Service where we challenge the correctness of the Commission's findings and where evidence will be produced to indicate that those findings are incorrect and based on an incomplete record at that time; therefore, we cannot accept these findings as findings of fact. Of course, our opponents can make any argument from the Commission's report in those cases as may be appropriate if it is understood that they would agree to consider that we do not agree to these findings as facts in this case.

If they will agree that we do not agree to these findings as facts in this case we will not object to that procedure.

Mr. Muckley. In other words, if it is understood that you do not agree to these findings as facts in this case.

Exam. Fleming. It is important, before we go any further with the record, that the record be very clear as to what is stipulated and made a part of this record by stipulation or agreement, and what is not.

(Discussion off the record.)

Exam. Fleming. As I understand, the parties agree that such facts as have been covered in the statement of counsel for the Hoboken Railroad may be considered as evidence in the

present record, but that there is no agreement that the facts as contained in the report in these three cases referred to by Mr. Muckley shall be made a part of this record.

Mr. LEHMAN. That is correct, with the further exception that there is no agreement as to those portions of the decision of the Commission in I. C. C. Docket 25565, which I indicated.

Mr. MCCOLLESTER. That is correct.

Exam. FLEMING. I think that is clear.

Mr. MUCKLEY. I think attention should also be called to the fact that the stipulation referred only to the complaint of the Hoboken Manufacturers Railroad Company and we made no stipulation as to the New Orleans & Lower Coast so far. We might do so later.

Exam. FLEMING. How does the record stand as to whether the order of the Commission referred to by Mr. Muckley denying or refusing to sustain the request for suspension of the operation of Rule 4; is there any agreement as to that?

Mr. MCCOLLESTER. I am prepared to agree that the Commission did refuse to suspend Rule 4 and issued an order to that effect.

Mr. MUCKLEY. December 15, 1932, to that effect.

Exam. FLEMING. That is all in that connection that you expect to have made a part of this record as a fact?

Mr. MUCKLEY. I would like the caption—in fact, I would like to have copies of the petition for suspension incorporated into the record by reference if that is satisfactory. You have copies and we have.

Mr. MCCOLLESTER. All right.

Mr. MUCKLEY. To show that generally the same allegations were made there as here.

Mr. MCCOLLESTER. I think that is entirely immaterial. When the Commission suspends or refuses to suspend a rate or a car service rule, or whatever it may be, it does not mean that the Commission has decided the issue. I think it simply means that the Commission has refused to suspend.

Mr. MUCKLEY. If you think that, I do not see any reason why you should refuse to include that, including your own very fine arguments in that record, in this case.

Mr. MCCOLLESTER. I do not know whether they are in that record.

Mr. MUCKLEY. We will include them.

Mr. MCCOLLESTER. Mr. Examiner, if we go into that, I do not know whether our opponents will want to put in their replies to that.

Mr. MUCKLEY. We made no replies, the railroad that I represent. I do not know that any were filed.

Mr. MCCOLLESTER. Yes; there were. I think this is getting beyond the scope of this proceeding. I have no objection to having

the record show that we did make an application for the
517 suspension of the rule and the Commission declined to suspend, and that the Commission's records will so show.

Exam. FLEMING. It appears, then as I understand it, that the agreement in connection with this order of the Commission goes no further than to this effect: That the order itself shall be considered in the present record as a part of the present record.

Mr. MUCKLEY. That is the existing agreement. I will offer the petition as a part of our exhibits, very probably.

Mr. SPENCE. I think the record should be perfectly clear that the complainant in Docket 25878 is prepared to stipulate all the documents and facts stated by Mr. McCollester on behalf of the complainant in Docket 25728. In connection with what Mr. Muckley said about stipulations as to matters of fact stated in the New Orleans & Lower Coast complaint, I might say that the paragraphs in our own complaint are numbered the same as the paragraphs in the Hoboken complaint, and the substance is the same in each paragraph.

So, if you will agree to stipulate those portions of our complaint similarly numbered to the ones stated by Mr. McCollester, why, it will expedite the matter.

Mr. MUCKLEY. We are willing to stipulate the facts.

Mr. SPENCE. I am sure you were willing to do that.

Mr. MUCKLEY. Where the complaint in Docket No. 25878 is the same as that of the complainant in Docket No. 25728, on Mr.
518 Spence's statement that the allegations of his complaint are the same as those in Docket No. 25728, paragraph by paragraph, I am willing to take his word for that and agree that the facts as stated in those paragraphs of the complaint in Docket No. 25878 should be stipulated as true to the same extent that we agreed with the Hoboken complaint.

Exam. FLEMING. Any other expression in that connection from anyone?

Mr. MCGEHEE. I do not question at all what Mr. Spence had said; I know every word he says is right, but we have agreed to certain paragraphs of Mr. Collester's petition, and before I would agree to these others I would just like to have a chance to check them over. It would be better for all of us and it would relieve Mr. Spence of any responsibility.

Exam. FLEMING. Why cannot that agreement be deferred until later in the proceeding, and you gentlemen can give the matter the necessary check in the meantime, and determine whether you are willing to so agree? Anything else in this connection?

Mr. MCCOLLESTER. I should think it would be appropriate to put into the record and offer in evidence the documents which have been referred to and those which it is understood may be put

in. I will do so before we call the witness so that that phase of the proceeding will be over with now, pursuant to the understanding between counsel that I referred to.

Mr. MUCKLEY. I think this would be a good time to do it.

519 Mr. MCCOLLESTER. I offer the report, Mr. Examiner.

Exam. FLEMING. That has been received and marked "Exhibit 1" already.

Mr. MCCOLLESTER. I offer as Exhibit No. 2 copies of the articles of association, or, rather, the articles of organization of the American Railway Association, as my Exhibit No. 2.

Exam. FLEMING. Received.

(Exhibit 2, no witness, received in evidence.)

Mr. MCCOLLESTER. I offer as Exhibit No. 3 circular D-III-385 of the American Railway Association transportation division, being a copy of the Code of Car Service Rules, Code of Per Diem Rules, and regulations governing placing and handling of embargoes in effect April 1, 1933, together with new Rule 7, appendix B of the Code of Per Diem Rules.

(Discussion off the record).

Exam. FLEMING. It will be received.

(Exhibit 3, no witness, received in evidence.)

Mr. MCCOLLESTER. I offer as my next exhibit circular No. 2951 of the American Railway Association bearing the caption "Proposed New Car Service Rule 4," the circular being dated October 29, 1932.

Exam. FLEMING. It will be received.

(Exhibit 4, no witness, received in evidence.)

Mr. MCCOLLESTER. In connection with this offer I should say that these complainants will contend, among other things,

520 that Car Service Rule No. 4 was adopted by the defendants, through the American Railway Association, not for the purpose of any legitimate car service consideration, but as a means to hamper the operations of what they consider a new competitive organization: Namely, Seatrain Lines; that it was the entry of Seatrain Lines into business which prompted the rule and that the rule was aimed directly at Seatrain Lines as a competitive measure, or more probably as a hampering measure, and I direct your attention, in connection with this circular No. 2951, to the fact that it asks—in fact, it begins by saying "Attention has been called to the inauguration of 'Seatrain' service on a weekly basis beginning October 6, 1932," and all the way through, it indicates that it was the inauguration of Seatrain service that was responsible for this car-service rule.

Mr. MUCKLEY. Of course, we do not agree with Mr. McCollester's argument; we will make our argument on this later, at a more appropriate time.

Mr. McCollester. I make the point at this time because I want you to keep in mind the significance of our testimony as it is offered, and I think that if the statements of some of our contentions are made to you in advance it will enable you to follow the testimony more conveniently.

Mr. Muckley. We hope our testimony will be so clear that it will not have to be explained in advance.

521 Mr. McCollester. The next document that we have to offer as an exhibit in this case is circular No. 2953 of the American Railway Association, bearing the caption "New Car Service Rule 4." It is dated November 15, 1932.

Exam. Fleming. It will be received.

(Exhibit 5, no witness, received in evidence.)

Mr. McCollester. In connection with this exhibit, Mr. Examiner, I direct your attention particularly to page 2, the third paragraph on that page, wherein the American Railway Association authorities described therein suggested that "In the case of water carriers operating between more than two points, the car owner may grant permission for cars to be used between certain points and refuse permission between certain other points."

Then, it gives examples, and these examples are those that describe Seatrain service and plainly suggests, as we will argue, that the railroads may, if they want to, refuse permission for delivery of cars to Seatrain service where it competes with them and give their permission to Seatrain where it is not competitive with them, or where they think it does not compete with them.

The next document we offer, Mr. Examiner, is circular No. 2960 of the American Railway Association entitled "Proposed Revised Note (a) and caption to 'Notes to Car Service Rules 1 to 6, inclusive.'"

522 It bears the date January 1, 1933. That will be Exhibit 6.

Exam. Fleming. It will be received.

(Exhibit 6, no witness, received in evidence.)

Mr. Lehman. Mr. Examiner, the records of the American Railway Association show that Messrs. G. M. Brush, president of the Hoboken Manufacturers Railroad, 39 Broadway, New York City, and L. W. Baldwin, president, New Orleans & Lower Coast Rail-Road, Missouri Pacific Building, St. Louis, Missouri, respectively, were sent the following quoted telegram February 28, 1933: "As result letter Ballot circular twenty-nine sixty dated January thirty first caption and Note (A) have been revised to become effective March first nineteen thirty-three reading quote notes A Car service rules one, two, and three do not apply to cars re consigned with original lading under duly filed and published tariffs

end quote H. J. Forster, Secretary American Railway Association."

I understand that Mr. McCollester is willing to agree that copies of the adoption of the amendment were received by the Hoboken Railway.

Mr. McCollester. I am prepared to so stipulate.

Mr. Muckley. And the New Orleans & Lower Coast also?

Mr. Spence. Yes.

Mr. McCollester. The next document we offer, Mr. Examiner, is American Railway Association Circular No. C. S. D.-142, dated November 21, 1932, and addressed to all railroads. This
523 will be our Exhibit 7.

Exam. Fleming. It will be received.

(Exhibit 7, no witness, received in evidence.)

Mr. McCollester. I direct your attention to the fact that this document, which is addressed to all railroads, is a set of instructions to how the railroads make their application for permission to deliver cars of railroad ownership to steamship, ferry, or barge lines for water transpotation, and quotes the paragraph from circular 2953, to which I addressed your attention previously.

I offer in evidence, if the Examiner please, American Railway Association circular No. C. S. D.-143, dated January 17, 1933.

Exam. Fleming. It will be received.

(Exhibit 8, no witness, received in evidence.)

Exam. Fleming. This is a statement consisting of three sheets?

Mr. McCollester. No; it is two long sheets and one short sheet——

Mr. Muckley. That is wrong—it is two short sheets and one long sheet.

Mr. Lehman. No; that is not right, it is two short sheets and two long sheets.

Mr. Mcukley. That is 142.

Mr. McCollester. This is 143. I think I have it correctly.
524 Mr. Muckley. No; here is the right one.

Mr. Lehman. There are two short sheets and two long sheets. The two long sheets are duplicates.

(Discussion off the record.)

Mr. McCollester. Mr. Examiner, in connection with Exhibit No. 8, C. S. D.-143, you will note that Seatrain Lines is the only water carrier mentioned by name, and that both in the letter and in the attached ballot that is true. Also, in the attached ballot, arrangement is all laid out there for the railroads to give its permission for the delivery of cars to Seatrain, the word "Seatrain" being set out specifically in the ballot, and reference to other routes,

or to the permission to move cars over any other route than the routes of Seatrain are not set forth by name.

Mr. MUCKLEY. I call your attention on the sheet that all the water carriers are named by name and simply a description of the service.

Mr. MCCOLLESTER. But when it comes to the balloting part, the Seatrain is the only one that is mentioned by name. That is the point I want to make.

Exam. FLEMING. Your Exhibit 8, while consisting of 3 sheets, the third sheet is nothing but a duplicate of the second sheet?

Mr. MCCOLLESTER. Mr. Examiner, I will hand you a better ballot. Exhibit No. 8, in fact, consists of fours sheets, two
525 short sheets and two long sheets.

Exam. FLEMING. Suppose you describe them so that we will get the record clear on this.

Mr. MCCOLLESTER. Exhibit No. 8 consists of four sheets; the first one is a letter from M. J. Gormley, chairman of the Car Service Division of the American Railway Association; the second sheet bears the caption circular No. C. S. D.-143; the last two sheets are *in*dentical and bear on the top line American Railway Association Car Service Division, below that a list of the water carriers, and at the bottom a blank for voting.

Exam. FLEMING. Proceed.

Mr. MCCOLLESTER. Mr. Examiner, we offer in evidence a copy of the American Railway Association special car order No. 30, dated March 17, 1933.

Exam. FLEMING. This consists of four pages.

Mr. MCCOLLESTER. Yes; this exhibit consists of four pages.

Exam. FLEMING. It will be received.

(Exhibit 9, no witness, received in evidence.)

Mr. MCCOLLESTER. This exhibit is important in that it illustrates and sets forth the railroads that have given their permission for the delivery of their cars to Seatrain Lines, Inc.; those that have refused; and those that have given their permission for the delivery of their cars to Seatrain between certain routes and
526 no others. You will note, from the exhibit, that Seatrain is the only water carrier of all those listed to which any of the railroads shown on there withhold their consent for the delivery of cars.

I also direct your attention to paragraphs C and D of page 3 and particularly to statements contained in paragraph D. You will note that the Atlantic Coast Line Railroad has given its consent to the movement of cars, its cars via Seatrain between New Orleans and Havana, but has refused its permission for the delivery of its cars to Seatrain for the movement between New York and Havana, the Atlantic Coast Line Railroad Company presum-

ably considering that it competes with the latter road over the latter route, but does not compete with the route between New Orleans and Havana, and similar comments could be made on some of the other routes.

The next exhibit is supplement 1 to Special Car Order No. 30, dated April 5, 1933.

Exam. FLEMING. It will be received.

(Exhibit 10, no witness, received in evidence.)

Mr. MCCOLLESTER. We offer next Supplement No. 2 to Special Car Order No. 30, dated May 3, 1933.

Exam. FLEMING. It will be received.

(Exhibit 11, no witness, received in evidence.)

Mr. MCCOLLESTER. According to our information supplement No. 2 is the last supplement. Special Car Order No. 30, taken together with supplements 1 and 2, shows the present status of
527 the railroads' consents and refusals for the delivery of their cars to Seatrain Lines, Inc.

Mr. LEHMAN. We so understand.

Mr. MUCKLEY. Yes.

Mr. MCCOLLESTER. Next, Mr. Examiner, we offer a letter of Mr. M. J. Gormley of the American Railway Association, addressed to Graham M. Brush, president of the Hoboken Manufacturers Railroad Company, 39 Broadway, New York City, New York, dated March 20, 1933, which is a letter addressed to Mr. Brush and transmitting to him three copies of Special Order—Special Car Order No. 30.

Exam. FLEMING. It will be received.

(Exhibit 12, no witness, received in evidence.)

Mr. MCCOLLESTER. We offer as our next exhibit—at the request of the defendants—we have no objection to it—copy of another letter from Mr. M. J. Gormley and addressed to Mr. L. W. Baldwin, president of the New Orleans & Lower Coast Railroad Company, St. Louis, Missouri, and dated March 20, 1933, and transmitting to Mr. Baldwin copies of Special Car Order No. 30.

Exam. FLEMING. It will be received.

(Exhibit 13, no witness, received in evidence.)

Mr. MCCOLLESTER. I next offer in evidence a copy of Mr. Brush's letter to Mr. Gormley, Mr. Brush's letter being dated March 29, 1933, asknowledging and in reply to Mr. Gormley's letter
528 to him, which was Exhibit No. 12. The copy which I offer in evidence being taken from the files the complainants, and being a carbon copy of the letter that is in the files, it does not show Mr. Brush's signature, but the letter was signed by Mr. Brush. I am not sure that it was, it was either signed by Mr. Brush or by the vice president, Mr. Hodgson.

Exam. FLEMING. It will be received.

(Exhibit 14, no witness, received in evidence.)

Mr. McCollester. It shows the initials J. H., and therefore it was probably signed by Mr. Hodgson and not by Mr. Brush.

Mr. Muckley. I have the original letter in front of me. It was signed by Mr. Hodgson.

Mr. McCollester. Do you have the letter?

Mr. Muckley. Yes. I have a copy of the original letter, and it was signed that way.

Mr. McCollester. Mr. Examiner, it is understood that we do not accept as correct the facts which are stated in the letter received in evidence as Exhibit 14. In other words, we have no objection to the receipt of the letter, but we do not accept the facts therein as correct unless proved by a witness later on in the proceedings.

Exam. Fleming. That is in accord with the agreement—you understand it, Mr. McCollester?

Mr. McCollester. Yes, Mr. Examiner; that letter is
529 offered in as part of the correspondence, not as proof of the facts stated therein, but as necessary to complete the record of the correspondence.

Mr. Lehman. In order to complete the record with respect to the Car Service Rule 4, I would like to file as an exhibit letters dated November 21, 1932, and November 25, 1932, which were signed by the vice president of the New Orleans & Lower Coast Railroad, and the president of the Hoboken Manufacturers Railroad Company, addressed to Mr. M. J. Gormley, chairman, Car Service Division, American Railway Association.

Mr. McCollester. Will you identify those please for the introduction into evidence?

Mr. Lehman. I offer the letter dated November 21, 1932, which was sent to Mr. Gormley by Mr. E. M. Durham, Jr., vice president of the New Orleans & Lower Coast Railroad Company, as Exhibit 15.

(Exhibit 15, no witness received in evidence.)

Mr. Lehman. I offer the letter which was sent to the American Railway Association, 30 Vesey Street, New York City, New York, by Mr. Graham M. Brush, president of the Hoboken Manufacturers Railroad Company, on November 25, 1942, as my Exhibit No. 16.

(Exhibit 16, no witness received in evidence.)

Mr. Lehman. In accordance with the stipulation referred to by Mr. McCollester, I offer in evidence as my Exhibit 17 a
530 statement of the Rule 4 violations which occurred in the month of December 1932. The statement shows the dates of arrival and departure of the vessels both north-bound and south-bound, the total number of cars carried, the total number of

cars of restricted ownership which were carried, and the names of the carriers owning said cars.

(Exhibit No. 17, no witness, received in evidence.)

Mr. McCollester. Mr. Lehman, in connection with Exhibit 17 did you state the source of the figures shown therein and the data shown there?

Mr. Lehman. The data was furnished us by the American Railway Association. The representative of the Association which is stationed at New York obtained the information. I believe he got it from the interchange records of the Hoboken. At any rate, the information has been furnished by the American Railway Association and is filed for the record in accordance with our agreement.

Mr. McCollester. I see. You do not know, do you, Mr. Lehman, in connection with this last exhibit—go ahead.

Mr. Lehman. In accordance with the same stipulation I now offer for the record as Exhibit 18 a statement of the cars of restricted ownership which arrived at Hoboken on boats docked August 8, 15, 22, and September 1, 1933; and to Bellchasse on August 1, 9, 14, 21, 26, and 29, 1933. The information shown on Exhibit 18 shows the total movement both north-bound and
531 south-bound and number and percentage of restricted cars which were carried on the vessels for both the north-bound and the south-bound movement. This information was obtained from the American Railway Association.

(Exhibit 18, no witness, received in evidence.)

Mr. McCollester. In connection with this last exhibit, Mr. Lehman, take, for example, the first section.

Mr. Muckley. You mean Exhibit 18?

Mr. McCollester. Yes. The first section listing the cars that arrived at Hoboken.

Do the records from which this was taken indicate how many of those cars originated at Havana and how many originated at New Orleans, or do they just list the cars of railroads that have prohibited the movement of their cars to Seatrain without distinguishing between those that have permitted their cars to go there either from New Orleans to Havana, but have not allowed their cars to go from Havana to Hoboken?

Mr. Lehman. I think the information relates only to the cars with respect to which movement via Seatrain was prohibited. However, there is considerable detail underlying Exhibit 18, and I presume that such information is available from that detail.

Mr. McCollester. I should like to have the opportunity to examine the detail.

Mr. LEHMAN. The detail is not at New York, Mr. Examiner.
532 We will be glad to make it available to Mr. McCollester within any time limit set by you.

Mr. MUCKLEY. I do not think we can, unless we go to Washington. I do not know whether the American Railway Association has it here; I presume Mr. McCollester's client has the record of the cars that they have handled. I will be glad to ascertain from the chairman of the Car Service Division whether or not the cars shown of restricted ownership include only cars moving on trips to parts of the Seatrain route which were restricted.

Mr. MCCOLLESTER. Mr. Examiner, I should like to make this statement on the record: At the request of the American Railway Association, Seatrain has, from time to time, furnished the American Railway Association information as to cars which have been delivered to its vessels where the delivery was not permitted under Car Service Rule 4. That information was furnished to the American Railway Association under the express understanding that the representatives of the American Railway Association that the information would be and was confidential and was not to be turned over to any of the interested railroads concerned and was not to be made public under any circumstances. I do not know whether or not the information which is shown on these exhibits, or, rather, this exhibit, is taken from that source or whether it is taken from the records of the independent investigation
533 made by the American Railway Association. If it is the latter, of course, we have no objection to it under the stipulation that we made that any investigation made by the American Railway Association in the course of its legitimate functions and in the regular course of its business, the result of such investigations might be brought in here without calling an American Railway Association witness to prove the statements, unless further information is necessary.

If it was compiled from the information from Seatrain to which I have referred, we will object to it as not taken from the records of the Seatrain and as an improper disclosure of confidential information.

Mr. MUCKLEY. Do you take the position that the information you have compiled from your records is incorrect?

Mr. MCCOLLESTER. I should want, on that point, to have the opportunity of an American Railway Association witness for cross-examination—that is, on the point as to the source of the information. We do not, of course, contend that we have given incorrect information to the American Railway Association; we do, however, feel that the information which we have given confidentially should not be used against us in this proceeding. We do not object to any information taken from the American Rail-

way Association's records provided it is correct. I do object to Exhibit 18, whatever the source may be, to the figures there
534 shown, on the ground it is not complete and misleading, unless it is supplemented with further detail as to the route over which the particular cars moved.

Mr. McGehee. Of course, you have the original records, and for the purpose of this proceeding will you agree to check your records and furnish a complete statement of the information to the Commission, in this case? That is, as to those particular cars?

Mr. Thurtell. May I call attention that when we took to enter into the stipulation it was agreed, as I understand, that something like this would be filed which could be taken from the records.

Mr. McCollester. From the records of the American Railway Association?

Mr. Thurtell. Up to this time you never made any suggestion as to—to us, anyway, that certain of the information that you have furnished the American Railway Association was in confidence and might not be used without your consent.

Mr. McCollester. I never knew it.

Mr. Thurtell. The matter of information which you furnished in confidence, that is furnished in confidence for this particular reason: Namely, to protect you against your competitors knowing exactly where you get your freight, and so forth; that is the reason for the confidential nature of it. I understand.

535 Mr. McCollester. Yes; except as it is compiled it does not have the effect of exposing us to the knowledge of our competitors as to the exact movement of traffic, and I do not see how it could have been compiled by defendants unless they could have gotten a copy of it in the original file—unless, as I said, they made an independent investigation. I am not saying that they did so, but I think further investigation should be sought upon this matter.

Mr. Muckley. I happened to request the American Railway Association to furnish these figures, in line with our understanding. I assume that when they furnished such figures they did not compile them in violation of any confidence and I think Mr. McCollester is wrong in assuming that they did violate such confidence. I know that the American Railway Association, under the per diem rules, have the right to check the records of the members, including the Hoboken and New Orleans and Lower Coast, and I know that they have checked such records, and I assume that they got the information from those records.

(Discussion off the record.)

Exam. Fleming. Proceed on the record.

Mr. McCollester. I withdraw my objection to Exhibits 17 and 18 provided it is understood that we may later, within 10 days,

furnish such additional information supplementing and ex-
536 plaining those exhibits as may be necessary to make them clear and complete.

Mr. MUCKLEY. You mean that we will furnish it.

Mr. MCCOLLESTER. Yes; that is what I meant to say.

Mr. MUCKLEY. We will do that if you want us to furnish it.

Mr. MCCOLLESTER. No; on second thought, I prefer it be understood that we may, ourselves, later, and within 10 days, furnish such additional information supplementing and explaining these two exhibits as may seem necessary or advisable to make them clear and complete to the Commission.

Exam. FLEMING. Mr. Muckley, will you do that if Mr. McCollester will let us know what explanation he makes?

Mr. MCCOLLESTER. I will, providing that we furnish that. We may not do so.

Mr. MUCKLEY. I think we should have the right to check Mr. McCollester's check also.

(Discussion off the record.)

Exam. FLEMING. Will it be satisfactory for you gentlemen to to follow this procedure? Leave will be granted for the complainant in Docket 25728——

Mr. MUCKLEY. That also includes the New Orleans and Lower Coast, too.

Exam. FLEMING. Leave will be granted to the complainants in these proceedings to file supplemental statements with respect to Exhibits 17 and 18, making any corrections that they deem proper to make as to the showing on those exhibits and
537 when that is prepared it will be filed with the Commission, but before filing with the Commission it will be submitted to Mr. Muckley for inspection and also for the privilege of making any further showing as to what he considers an inaccuracy in the figures as shown by the complainants. Such supplemental exhibit, so compiled, can be filed with the Commission within 15 days?

Mr. MUCKLEY. That is satisfactory to the defendants.

Mr. LEHMAN. He said within what time?

Mr. MUCKLEY. Fifteen days.

Exam. FLEMING. Parties waive the copies of this, or copies to be furnished to all opposing counsel?

Mr. MUCKLEY. I think, as the record goes, we should have copies.

Exam. FLEMING. Copies to be furnished to all opposing counsel.

(Discussion off the record.)

Mr. LEHMAN. In accordance with stipulation entered into with Mr. McCollester, I now offer for the record letters which were addressed by Mr. D. T. Lawrence, chairman Trunk Line Associa-

tion, to Hoboken Manufacturers Railroad Company, and to Seatrain Lines, Inc., instructing them not to use equipment of the Trunk Line carriers designated in his letter for use on Seatrain.

The correspondence in connection therewith has been made
538 up into the form of an exhibit. It also contains an acknowledgment from the Hoboken Manufacturers Railroad under date of October 6, 1932. It is the third letter in the file.

I think the letters are self-explanatory, Mr. Examiner, so I will not comment—I will not make any further comment concerning them at this time.

Exam. FLEMING. That exhibit consists of how many pages?

Mr. LEHMAN. Five pages. It will be Exhibit 19.

(Exhibit 19, no witness, received in evidence.)

Mr. LEHMAN. I do not know whether all the exhibits offered by me were received in evidence, so I will now offer them all again, Mr. Examiner, in order that there may be no mistake in that manner.

Mr. MCCOLLESTER. I also offer all of my exhibits at this time.

Exam. FLEMING. The record will show that Exhibits 1 to 19, inclusive, will be received. However, I understood they were offered and received as you went along.

Mr. LEHMAN. I think that is correct.

Exam. FLEMING. Before you proceed further, merely for further clarification of the record, am I correct in understanding that among the facts agreed to by the parties, are those set forth in Exhibit 1?

Mr. LEHMAN. Those are the articles of incorporation.

Mr. MCCOLLESTER. No; they are not.

Mr. THURTELL. Except with reservations made by Mr.
539 Lehman in respect to that.

Exam. FLEMING. There were certain reservations made as to the reports.

Mr. THURTELL. Yes.

Exam. FLEMING. Except those subject to the reservations made by Mr. Lehman in connection with the exhibit?

Mr. MCCOLLESTER. Yes.

Mr. LEHMAN. Yes.

Exam. FLEMING. Just what is the agreement in connection with the matters contained in Exhibit 2 to 19, inclusive?

Mr. MCCOLLESTER. As to those, Mr. Examiner, the corespondence, of course, is not offered as proof of the matters in the correspondence, but simply proof that the correspondence took place, that these letters were written and received, which we agreed to and which our opponents agreed to. As to the American Railway Association documents which I offered, they are not state-

ments of facts contained in those exhibits as to the consents or refusals of the railroads as shown in the exhibit but bear the caption circular 30, and supplement 1 and supplement 2, thereto.

Mr. MUCKLEY. They show the results of the vote.

Mr. MCCOLLESTER. Yes; I have them before me now. I think it is agreed to that any facts that are stated in those exhibits are correct.

Mr. MUCKLEY. Yes.

540 Mr. LEHMAN. Yes.

Mr. MCCOLLESTER. I have reference now to circular 30 and supplement 1 and supplement 2 thereof.

Mr. LEHMAN. That is right.

Mr. MCCOLLESTER. I have stated as to the general correspondence, and it shows simply the correspondence. As to these documents of the American Railway Association, I think it is agreed that these are authentic documents from the records of the American Railway Association?

Mr. LEHMAN. Yes.

Mr. MUCKLEY. Yes.

Exam. FLEMING. It is assumed that that will be the understanding of all of the parties in the absence of objection now made. It is further clear, is it, Gentlemen, that all of these matters so stipulated are by agreement of the parties under Rule 9 of the Rules of Practice and not under Rule 13?

(Discussion off the record.)

Mr. MCCOLLESTER. That is correct.

Mr. LEHMAN. That is correct.

Exam. FLEMING. Proceed.

Mr. MCCOLLESTER. I will call Mr. Brush.

GRAHAM M. BRUSH was sworn and testified as follows:

541 Direct Examination by Mr. MCCOLLESTER:

Q. Mr. Brush, will you please state your full name and where you reside.

A. Graham M. Brush, Greenwich, Connecticut.

Q. You are president of the Hoboken Manufacturers Railroad Company and president of the Seatrain Lines, Inc., are you?

A. I am.

Q. Will you briefly outline your previous experience in the steamship business before becoming engaged in this business?

A. From 1920 to 1925 I was assistant to the president of the Ward Lines, operating vessels to Cuba and to Mexico, and to the Bahama Islands.

Q. When did you begin to work on the project of developing Seatrain type of ships, so-called?

A. 1925.

Q. At that time did you investigate other types of vessels, on which cars are carried?

A. I did.

Q. What types of vessels in particular?

A. The car ferries in the Great Lakes, and the car ferries operating from U. S. to Havana and the car ferries across the North Sea as well as the car ferries in Chesapeake Bay and the car floats in various harbors such as New York and on the Pacific Coast.

Q. Did you investigate those ships from the standpoint of both the method of handling of the cars and of their
542 seaworthiness?

A. Yes.

Mr. McCollester. Mr. Examiner, one of the purposes of stipulating was to save time on the record and I will not ask Mr. Brush to reproduce a complete description of the Seatrain ships which is contained in the report of the Commission. It has been stipulated in the record here that that report will be taken as factual.

By Mr. McCollester:

Q. I will show you a pamphlet, Mr. Brush, and ask you if that shows a description of the Seatrain ships and contains pictures therein which pictures therein contained are correct pictures and diagrams of the Seatrain ships and the methods under which cars are handled and secured therein?

A. Yes; these pictures are various photographs of our ships taken at various terminals and show clearly just the method of handling the cars off of the tracks and into the holds of the vessels.

Mr. McCollester. We offer this pamphlet in evidence.

(Discussion off the record.)

Exam. Fleming. It will be Exhibit 20.

(Exhibit 20, witness Brush, received in evidence.)

By Mr. McCollester:

Q. Mr. Brush, will you briefly describe the method of loading and unloading, and particularly of securing the cars on board Seatrain ships?

543 A. The method of loading cars——

Mr. Thurtell. I do not mean to interrupt, but is that not all contained in the Commission's report?

Mr. McCollester. No, Judge; that method of securing the cars is not described.

By Mr. McCollester:

Q. Proceed.

A. The method of loading the cars in Seatrain ships resembles the operation of a very large car elevator. The cars are spotted on the elevator platform located on the dock, and the four outside wheels are blocked on that platform. The platform is then lifted

by the crane, and after reaching the height of the bulwark of the ship, it is then transferred over the ship, and the platform lowered away into the elevator shaft, there being four of them located centrally in the ship. The platform being stopped at any one of the four decks by mechanical means and fastened there; thereupon, the wheel chocks are released and the car pulled by a car puller which is used to pull the cars either forward or aft as the case may be to the desired position in the vessel, where these cars are secured with mechanical devices.

So that they become integral part of the vessel, an integral part of the vessel. These mechanical devices consist of four screw jacks. The base of the jack rests on a rail laid on the deck of the ship and opposite the car rail so that the head of the jack,
544 which is a screw jack, as I said, has a footing to protect the sill of the car, rests on the sill of the car at the bolster. The screw is turned out by means of a lever until the tension or compression—the jack is under compression and the body of the car is slightly raised off of the truck. There are four jacks to each car, located on the ends of the two bolsters.

The next operation is to put a chain around the bolster or sill which will connect to a turnbuckle which, in turn, is fastened to the jack-rail, a special rail laid on the deck, and that turnbuckle is then tightened so you have the turnbuckle in tension pulling the bolster of the car down onto the jacks. Insofar as the frame of the car is concerned, those two devices result in forming a bridge structure with your deck as one horizontal part and the bolsters as the other horizontal part and the chains as the particular tension members and the jacks are the—the jacks, which are the braces, and are the compression parts which operate at an angle of 45 degrees.

As you know, the bolsters on the cars are the strength members of the cars so that in securing the frame in that way you have a rigid structure with the deck of the ship right straight up to the whole frame of the cars. To stop the cars from moving forward and aft we set the handbrakes. Of course, no weight is on the car, that is not borne by the members I have spoken
545 of. There is naturally, no air on these cars, either. We put special chocks after each of the four outside wheels of each individual car, and in rough weather there are long ringbolts in the deck to which chains are fastened, and by the use of a turnbuckle those chains are thrown around the axles of the car and the cars are chained so that they cannot move forward or aft, being chained down to the ringbolt in the deck. Each car is individually secured in that manner throughout the vessel except where extraordinary conditions of the loading make it desirable to put on top-slings. For instance, a gondola car heavily loaded

with coal we use slings and hoops at the tops of the gondola car to ease any strain that there may be in rough weather, on th sides of the car. On the top deck, which is 38 feet above the water, the cars—all the cars have top-slings if there is any heavy water—in fact, all of the cars have top-slings on the theory that in heavy weather, being so high above the water, the rolling action of the ship is accentuated and some strain might come into the body of the car from a load of, we will say, grain, which is pressing on the sides of the car.

Hence, we have perfected slings to go over the tops of the various types of cars. To begin with, we will take a boxcar; that sling is a wire cable fastened to the jack or chock rail of the deck and coming up over the top of the car at a 60 degree angle,

546 and at the point where it reaches the eaves, it runs over a special fitting and on across the car. That special fitting is made so that the eaves of the car will not be damaged by its going over them. Another sling is attached on the other side of the car and opposite the first sling.

The turnbuckles are then tightened so that the tops of the cars fore and aft are secured by means of these slings, and any weight that might come on the sides of the cars is then taken in the slings and not in the sides of the car itself where it is attached to the frame.

Q. What is the purpose of the Seatrain type of ship?

A. To provide through transportation of goods from and to interior points by rail and water, saving time at the ports in unloading the cars and time in handling of the individual packages in and out of the vessel and, as well, save damage to the goods in such handlings when interchanged.

Q. In other words, to enable the freight to move through the port by rail and water without breaking the bulk of the cars?

A. Yes; and in so doing, there are many other advantages which accrue to the shipper and to the rail lines and to the water lines while handling at the ports—if this handling at the ports can be eliminated.

Q. Can you state some of those?

A. Many commodities which move by ordinary vessel require special packing in order to stand the numerous handlings which those goods are subjected to, whereas if——

Q. That is, subjected to in transportation or loading?

547 A. In transport*at*ing the load of the railroad cars to the holds of a vessel and then vice versa out of the holds of a vessel back into the railroad car at the port of destination. There are some 13-odd operations involved which the shipper can avoid by use of the Seatrain service.

Q. Take an example, a shipment coming in over the Lackawanna and going out by American Line ships, say the Morgan Line. Can you state briefly what operations would be involved in getting that shipment from the rails of the railroad to a ship of the Morgan Line?

A. The railroad—the usual practice in New York Harbor is for railroads to spot cars containing freight for ocean-going vessels, at their lighterage piers. The cars are discharged and the goods placed on a lighter, on this side, on the lighter; the lighter is then towed to the steamship pier and the steamship is given the option of discharging the lighter into the holds of the vessel without cost to the railroad within 48 hours or accepting delivery of the goods from the railroad on their pier at the point where the particular hatch is located that will handle that particular cargo. This means that the railroad discharges to the lighter on the pier, and sets the pier—the goods on the pier for conveniently setting into the ships.

That completes the railroad delivery; the ship then breaks down the goods and places them into its ship's slings, takes
548 them to the dock, and places them in the holds of its vessels and the goods are placed in sacks or dumped in various parts of the hold, and the goods are stowed there. They are packed on top of each other, if cases, and they are braced and secured with dunnage, and so forth.

As I said before, in the first instance, the railroad discharges the lighter onto the pier, in one operation, and stows the goods on the pier for conveniently getting at for storage in the ship. That completes the railway delivery at that point. The stevedores then break down the goods, place the goods in ship slings, take these slings, swing them over the ship side and down into the hold, drop the sling or loosen the sling while inside of the holds of the vessel, and the goods are then placed on trucks and taken to various points in the hold where the goods are stowed away. If they are boxes or packing cases they are packed on top of one another, being braced or secured against the rolling of the ship by means of appropriate dunnage. When the ship arrives at its point of destination, in the discharging of the ship, the reverse operations are true, as I have described.

These are identical in nature. Therefore, for an ordinary movement, there are a great many handlings of each individual package in and out of the vessel, in the transfer from the rail line to a water line.

Q. These are avoided by the handling, if the freight goes
549 forward by Seatrain?

A. Yes. All of these operations are avoided if the car moves via Seatrain.

Q. Can you state other advantages to particular classes of freight which are forwarded by Seatrain?

A. The shipper saves in many cases in packing costs wherein commodities, such as grain, can be moved in bulk which can be moved without bags. Our records show that the loss and damage is at a minimum, and for that reason, insurance rates via Seatrain vessels are very low. As a matter of fact, we have not received a claim yet from a cargo underwriter, after transporting something like 5 billion tons—ton-miles of traffic.

Q. Is bulk freight and liquids which cannot be handled under the break-bulk service traffic that can be handled via Seatrain?

A. Yes; certain bulk freight can be handled by Seatrain that cannot be handled otherwise. For example, coke and coal moving to small dealers and in relative small quantities, can be handled on gondola cars, and the ordinary vessel cannot handle them unless there is a cargo. They must handle a cargo, which means that dealers must deal with local operators, and otherwise at a disadvantage to the small dealer, and to the consuming public.

In tank cars, the oil companies have found that, particularly in the Cuban trade, that it was more economical for
550 them to ship a tank car to Cuba rather than to pack their own products in containers and ship them over there in their own tankers to Cuba, hence we carry all the lubricating oils and greases and special gasolines and the like for the oil companies to Cuba, or the vast majority of that trade, in any event.

In return, we bring back molasses in these tank cars after they have been properly cleaned, so there is no idle movement of the car.

Q. These advantages would obviously be lost if the cars were not permitted to be handled—if the cars which the freight is contained in, were not permitted to be delivered to the Seatrain for further movement, from the port?

A. Yes.

Q. What have you to say with respect to the risk to railroad equipment which is involved in this movement by Seatrain ships?

A. We have had considerable experience and have found that there is practically no risk to the equipment on board Seatrain ships except from acts of God: Namely, fires, sinking, stranding, collision of the vessel. In that connection, realizing that there were these risks, we have always maintained full insurance to the full value of the cars carried, payable to the New Orleans & Lower Coast Railroad, and to the Hoboken Manufacturers Railroad, who are responsible to the cars' owners in the case the cars were lost.

551 Q. What advantages or savings to the railroads result from the delivery of the railroad cars to Seatrain ships?

A. Most of the rail rates in this country are made to ship side and obligate the railroad to unload the freight and place it alongside of the hatch that the ship owner designates and vice versa, to accept traffic from the ship side and transfer it to a car and load the car. Obviously, when Seatrain eliminates these handlings by certain devices, patented devices, the railroads have been given a certain portion of the saving by Seatrain from the elimination of their handling in and out of cars at the ports.

Q. Have you studied the other typs of vessels which are used in carrying cars and have you reached any conclusions, and, if so, will you state your conclusions as to the comparative risks to railroad equipment in the delivery of such equipment to a Seatrain vessel, and in the delivery of such equipment to other water carriers such as those which are listed on Exhibit 8?

A. You must realize that Seatrain ships are sea-going vessels. They can operate around the world, they can operate through any kind of weather. They have the highest classification in the American Bureau and in Lloyds, and we are told our insurance rates are the lowest of any vessel in the world. So that you can see, from a safety standpoint, a vessel with that sort of record is excellent.

Comparing our ships with the ordinary type of car ferry,
552 those vessels were not designed to go on ocean voyages. Their load is carried on top of the vessel, necessitating special construction in order to get stability and that special construction, in turn, involves certain hull design which does not make the car ferry an easy-riding vessel in a sea. For instance, their bottoms are round, the only vessels that are now built with round bottoms, but the bottoms are made round because if they were not, they would break to pieces. They have got to be permitted to roll to the greatest extent so the forces will not snap these vessels in two. They are built very low to the water, all the car ferries in this country are, and the main deck is only a few feet from the water; and, it would just be impossible to compare a car ferry in the usual trade route with a Seatrain vessel; the car ferry, in our opinion, would only run a short time before it would be lost, the same as a car float. As to a car float——

Q. Before you get away from that, do you think a car ferry of the ordinary type could be used in the usual trade route—ocean trade route, as the Seatrain vessels are operated in?

A. Absolutely not. They would only go a very short distance before it would be lost.

Q. Before you get to car floats, again; so far as car ferries are concerned, what have you to say in regard to car ferries operating upon the routes upon which they do operate, for
553 instance, car ferries operating across the Great Lakes?

A. The Great Lake car ferries have been in operation for some time. On the Great Lakes, the car ferries have storms and they have ice in the wintertime. The storms are not as severe as on the Atlantic Ocean, but the Great Lakes do have some fairly rough storms. The car ferries on the Great Lakes are fairly good, but not as good as the records via Seatrain. They do have accidents in storms on the Great Lakes. It is true that some of the accidents on the Great Lakes have been due to cars running right out of the ship, the ship being open at the stern. Such an accident happened, by the way, several years ago. That is not possible with the Seatrain ship. Their loading operations are more dangerous in that they handle a whole lot more cars down over a movable bridge onto a movable ship, from a fixed dock and they are handling so much greater weight, and they have to be on the job all the time; if they are off of the job momentarily something is likely to happen.

Thus, additional risks are involved in the operation than are in the operation of the Seatrain operation where we are handling one car at a time.

Q. Are the approaches on an incline, or likely to be?

A. The approaches are on an incline, and they have been known to break. There is considerable force going over that approach or bridge from the dock to the vessel,
554 and it is the universal practice of car ferries never to put a locomotive over that bridge. They all use idler cars to try to distribute the load. This bridge extends from the dock to the ship, and, of course, the ship is moving up and down somewhat with the action of the waves, the tide and so forth.

Q. Are the vessels of the Florida East Coast Car Ferry Company of the sort you have just described?

A. Yes.

Q. And also handled in the way you have just described?

A. Yes.

Q. And subject to the sea risks that you have just described and indicated that that type of vessel is subject to?

A. Yes.

Q. You were going to talk about car floats; what have you to say as to them?

A. The operation of railroad car floats is the same as the car ferries in certain cases. For instances, the operation of loading car floats is the same as the loading of car ferries, unless the car float is open at both ends. They are not sea-going ships. They are harbor units and are subjected to the risks of harbor operation, which we know, from experience, leads to the loss of cars once in a while.

Only a short time ago several cars were lost by a car float at New Orleans and I understand it happens occasionally at

New York. Of course, Seatrain ships could not lose
555 cars around the harbor. They might lose the ship, all of them go down, but the cars cannot roll around and roll off.

Q. Are the cars, whenever they are on the Seatrain ships, protected from the weather?

A. Yes. Except those upon the top deck, the so-called superstructure deck. They are all undercover just the same as they would be if they were in a building with the exception of those on the superstructure deck.

Q. What proportion of those cars are carried on the superstructure deck?

A. There are 18 cars carried on the superstructure deck. Incidentally, those cars—this might be interesting to note at this time—those cars on the superstructure deck cannot roll off the deck, they might roll into the hatch. The structure of the ship being open in front of them might do that.

By Mr. MUCKLEY:

Q. If they would roll into the hatch, they would go right down through the bottom?

A. No; if they rolled into the hatch they would roll right off and hit on top of another car, but actually, what could happen, the front truck would fall off or become jammed and the frame of the car would be caught on the deck. That, incidentally, happens to car ferries when they are in still water, the cars there do not roll off, they catch. If they are in rough water, they go off.

Q. I suppose that would be true of them going down the
556 hatch, if it were clear of cars, they might go right down the hatch and clear on through the bottom?

A. No; that is not possible because during the voyage the hatch is completely filled with cradles and cars, otherwise there would be no use in carrying cars on the superstructure deck.

Mr. MUCKLEY. That is all I have.

By Mr. MCCOLLESTER:

Q. What is your conclusion, based upon your experience, as to the relative risks of cars delivered to Seatrain for movement over Seatrain routes and cars delivered to car ferries for movements across the Great Lakes or cars going across Key West, or other straits?

A. It is my opinion that it is very much safer, and, I believe our records will so indicate.

Q. That the Seatrain movement is safer?

A. Yes.

Q. What is your conclusion comparing the delivery of cars to Seatrain and delivery of cars to car floats in New York and other harbors?

A. That the Seatrain service is much safer for the cars and their contents. That is also true in regard to comparison with the car ferries.

Q. You feel, if I sum up your testimony correctly, that the delivery of cars to, and the movement of cars by Seatrain is much safer to the car and to its contents than the movement of
557 such a car and its contents by either the car float ferry, or by the regular car ferries?

A. Correct.

Mr. McCollester. Do you wish to adjourn, Mr. Examiner? This would be a convenient time to break if it is agreeable to you, or we are prepared to go on.

Exam. Fleming. We will adjourn until 2 o'clock.

(Recessed at 1 p. m. until 2 p. m.)

AFTERNOON SESSION, 2 P. M.

Graham M. Brush testified further as follows:

Direct examination (continued) by Mr. McCollester:

Q. Mr. Brush, you have been in the shipping business, and also you have testified that you have studied different kinds of vessels designed for the transportation of railroad cars?

A. Yes.

Q. What would you define as the purpose of a ship anyway?

A. The purpose of a ship is to transport goods and/or passengers over a body of water.

Q. And the character of the ship proper would depend upon the body of water over which they were going to transport goods and/or passengers?

A. Yes.

Q. When it comes to the transportation of freight, is
558 there, from your side of the problem, and is it principally the purpose of a railroad car carried upon a ship dependent upon whether that ship be a ship of a Seatrain type or a car ferry or a car float?

A. No; not for the purpose of transporting the goods over the water, there is no difference.

Q. Coming now to the history of the development of Seatrain.

A. Yes.

Q. The corporation Overseas, Inc.—the full name, I believe, was Overseas Railways, Inc.?

A. Yes.

Q. The corporation, Seatrain, Inc., and its predecessor was the Overseas Railways, Inc., was it?

A. Yes.

Q. They began operations when?
A. In January 1929.
Q. With a ship of the so-called Seatrain type?
A. The first Seatrain type ship or vessel; yes.
Q. It began operations between Havana and New Orleans?
A. Yes.
Q. At the time or preceding the time that Overseas began operations between New Orleans and Havana was the American Railway Association advised of the intention to begin such operations and that the transportation of railroad cars on Seatrain ships would be involved?

559 A. Yes; they were.

Q. I show you a copy of a letter dated August 15, 1928, and purporting to be addressed to the American Railway Association, and ask you if that was a copy of a letter taken from your files, and if the original of that letter was sent?

A. Yes. This letter was signed by the vice president, Joseph Hodgson. I can identify this letter as having been written by that predecessor company, the Overseas Lines, Inc., to the American Railway Association.

Q. I show you a copy of another letter signed by H. J. Forster, secretary, on the letterhead of the American Railway Association, addressed to Mr. Joseph Hodgson, vice president Overseas Railways, Inc., 11 Broadway, New York, under the date of August 17, 1928, and ask you if that letter was received by Overseas, Inc?

A. It was.

Mr. McCollester. I offer these two letters in evidence, Mr. Examiner, as Exhibits Nos. 21 and 22.

Exam. Fleming. They will be received.

(Exhibits 21 and 22, Witness Brush, received in evidence.)

By Mr. McCollester:

Q. Following receipt of letter, Exhibit No. 22, did any negotiations take place between all the other officers of Overseas, Inc., or any of the other officers, and the officers of the American Railway Association?

A. Yes.

560 Q. What was the result?

A. With the result that we were informed that as we were a water carrier we were not eligible to membership in the American Railway Association and we were not eligible to become a subscriber to the Car Service Rules.

Q. What arrangement was then worked out with the American Railway Association for the interchange of cars between the railways and Overseas Railways, Inc.?

Mr. Lehman. I object to any testimony with respect to any negotiations or communications between Seatrain and the American

Railways Association for the purpose of attempting—or for the purposing of interchanging cars. The American Railways Association is not authorized, by the documents which have been placed in this record, to act as agent for the railroads owning the cars in a matter of this kind. Moreover, it is patent that the negotiations, even if they had been authorized by the rules under which the American Railways Association operated, were not finally consummated, and negotiations of that character which were not borne out to any successful conclusion are entirely immaterial and have no place in this record.

Mr. McCollester. Whether or not they were consummated depends upon what the witness is going to testify to. Mr. Examiner, let me ask Mr. Brush this question.

By Mr. McCollester:

561 Q. Did the representatives of the American Railway Association represent to you that they were speaking for the party railroads concerned in the matter of terms and arrangements for the interchange of railroad cars?

Mr. Lehman. I object to that question for the reason already stated. It is apparent from the examination of the articles of association and the Code of Per Diem Rules which have been received in this record, that the American Railway Association has no authority to act in any matters between the railroads owning the cars and Seatrain Lines, Inc.

Mr. McCollester. Mr. Examiner, do you want any argument on that point? If the American Railway Association has acted ult'a vires, that is just too bad for it, but certainly, we will show that they have purported to have that authority, and that the American Railway Association has assumed to act in all of these matters, and I think the witness, if you will hear him further, will indicate to you that it, the American Railway Association, has held itself out presumably with the authority of the railroad members, and obviously with their knowledge, as having authority to act in all of these matters.

Exam. Fleming. Without the necessity of discussing the matter further in connection with the objection I will state now that the Examiner's rulings in connection with admissibility of evidence in this proceeding—and that applies, of course, on both sides, will be with a view of erring to too great liberality rather than to
562 a narrow construction of the rules, owing to the nature of this case. The objections of counsel can be argued in their briefs. The objection in the present instance will be noted.

You may proceed.

Mr. McCollester. I have two unanswered questions. Will the reporter read the two questions.

(The two questions were read.)

The WITNESS. Answering the first of those two questions first: the American Railway Association officials advised us that as we would be a nonsubscriber to the Per Diem Car Rules of the railroads, and rules of that nature, we should handle our situation like other subscribe's—like other nonsubscribers, including the Florida East Coast Car Ferries and obtain a sponsor road who, in turn, would be responsible to the car owner for the settlement of per diem and all cost service matters.

The New Orleans & Lower Coast Railroad Company was elected as that sponsor road and it has been handling that matter for us, for Seatrain ever since at New Orleans.

In answer to the second question, I do not recall that the question ever came up as to whether or not the American Railway Association officials were speaking for the individual—the various individual roads. It was perfectly obvious, as they were in charge of the Car Service Rules, and so forth, that that was the or-
563 ganization to which any nonsubscriber would go to seek information as to how to properly handle the traffic in accordance with the American Railway Association rules.

Q. Have you had negotiations with the officers and employees of the American Railway Association from time to time?

A. We have.

Q. All with reference to the matter of cars?

A. All with reference to the manner of handling cars and settlement of per diem and M. C. B. Rules, and so forth.

Q. In any of these negotiations, have they said to you that they were not authorized to deal with you in that respect, or with respect to any of these matters?

Mr. LEHMAN. Mr. Examiner, may it be understood that my objection runs to all of this kind of testimony?

Exam. FLEMING. To this type of testimony; yes.

The WITNESS. They have in our conversations and in the letters which we have received from them, it was very evident that they were acting as agents for the railroads and so representing themselves to us at all times. It is my understanding that that is so—that that is true today; that they still are, in other words.

By Mr. MCCOLLESTER:

Q. Have you stated when you began operations between New Orleans and Havana?

A. Yes.

Q. And immediately thereafter did the American Rail-
564 way Association cause an investigation to be made of the methods of car handling involved in your operations between New Orleans and Havana?

A. Yes; a representative of the American Railway Association called upon us at New Orleans and represented himself as being interested in finding out whether we were complying with the rules of the American Railway Association, and we gave him every facility at New Orleans and Havana to make a complete investigation of our service.

Q. He went to Havana to investigate there?

A. He went to Havana to investigate there and to investigate the situation in Cuba.

Q. Did he furnish you with a copy of his report based upon that investigation?

A. Yes; he furnished me with a copy of a portion of his report.

Q. I will ask you if this is a copy of the document which he furnished you.

A. Yes.

Mr. McCollester. I offer that in evidence.

Exam. Fleming. It will be received.

(Exhibit 23, Witness Brush, received in evidence.)

By Mr. McCollester:

Q. This document, which I offer in evidence, is on the letterhead of the American Railway Association and is a letter signed
565 by Mr. R. W. Edwards, dated Birmingham, Alabama, March 22, 1929, and addressed to Mr. Claud DeVeze, secretary of Overseas Railways, Inc., 1325 Hibernia Bank Building, New Orleans, Louisiana; attached to it is a two-page memorandum headed "Excerpts from report of R. W. Edwards, district manager, to Mr. M. J. Gormley, chairman, Car Service Division of the American Railway Association, Washington, D. C., February 19, 1929. Is that a true copy of it?

A. So far as I have gone; yes.

Exam. Fleming. That has been received as Exhibit 23. Before you proceed further, I have something to ask.

Mr. McCollester. Yes, Mr. Examiner.

Exam. Fleming. For the purpose of clarification of the record, please look at Exhibit 21. Is it possible that there was an error in the second paragraph of that letter, a typographical error, and should read "as"?

Mr. McCollester. I guess there was an "as" left out. I do not know whether that is a mistake in copying or mistake in the original. I think it should read "will serve as an intermediate carrier" because it certainly will not serve an intermediate carrier.

Mr. Lehman. That is not the full report.

Mr. McCollester. That was all that was furnished to us. This is the entire document that was furnished to us. You are at liberty to put in the full report.

Exam. FLEMING. The letter was not clear to me as it was,
566 and I thought it would be well to straighten it out at this time.

Mr. MCCOLLESTER. Yes. Mr. Examiner, on that particular matter, I will have to investigate the file copy of that letter, in our files, from which the copies that have been submitted here were made, and ascertain what that shows if that should seem necessary, but I am willing to agree that that sentence shall be considered as reading "will serve as an intermediate car carrier between New Orleans & Lower Coast Railroad, on the one hand, and the United Railways of Havana, on the other hand."

If that is agreeable to your side, it will save me from having to make an investigation. Is it agreeable?

Exam. FLEMING. In the absence of objection that explanation will be accepted. If the parties desire, the witness will undertake, as I understand it, to file a supplementary explanation of the letter—I am referring now to Exhibit 21.

Mr. LEHMAN. I will not make any objection to this. Did you offer this?

Mr. MCCOLLESTER. Yes, that is Exhibit 23.

Mr. LEHMAN. I object to the receipt of Exhibit 23. The contents of that exhibit are entirely immaterial to any issue in this proceeding and, in the first place, should not be received on that ground; in the second place, they are concerned with the
567 handling of cars on the Overseas between New Orleans and Havana about 4 years ago. We are not concerned with conditions at that time, nor are we concerned with the handling of cars by Overseas, which is now a defunct carrier. The document also contains certain laudatory and other statements concerning the United Railways of Havana and Overseas and other matters with which we are not concerned in the slightest.

Mr. MCCOLLESTER. Which you do not like, in other words.

Mr. LEHMAN. The complaint here under consideration is that of the Hoboken Railroad Company. We certainly are not interested in the operation of Overseas and that of the United Railways of Havana, rather, at Havana.

Exam. FLEMING. Note the objection. Proceed.

Mr. MCCOLLESTER. Do you think because this is not the whole report, also?

Mr. LEHMAN. Well, I have stated my position.

Mr. MCCOLLESTER. It has been stipulated that during the period of the operation both by Overseas and Seatrain between New Orleans and Havana, no objection was made by the parties with reference to the delivery of their cars to the facilities of Overseas and Seatrain for that movement.

By Mr. McCollester:

Q. Can you state how many cars were handled, without objection, in that manner?

A. From January 1929 to December 3, 1931, Overseas Railways, Inc., handled 14,843 loaded freight cars of various
568 railroads between New Orleans and Havana.

From December 3, 1931, to October 5, 1932, which was the period of Seatrain Lines operated between New Orleans and Havana only, Seatrain Lines handled 3,316 loaded freight cars of various railroads on that route.

Q. Was per diem paid by Overseas and by Seatrain upon these cars in accordance with the American Railway Association per diem rules?

A. Overseas and Seatrain paid the New Orleans & Lower Coast per diem for these cars in accordance with the American Railway Association rules.

Mr. McCollester Mr. Examiner, you will observe from the report of the Commission, which has been stipulated into the record here, with certain exceptions, the statement of the circumstances concerning the construction of the two additional ships of Seatrain Lines. I am not asking the witness to repeat that history.

By Mr. McCollester:

Q. I will ask you, simply, Mr. Brush, when did or when were steps taken toward the construction of additional ships?

A. In the fall of 1929 we considered building another ship for the New Orleans-Havana route; later on we extended our studies and our ideas, to build two additional vessels and to extend our operations by the inclusion of the New York-Havana service.

The consideration for the New York-Havana service came
569 about in the spring of 1931.

Q. When you began to consider the service out of New York was the matter taken up with roads of the Eastern Trunk Lines railroads that came into New York?

A. Yes.

Q. Will you describe the negotiations?

A. Yes.

Q. With the representatives of those railroads?

By Mr. Lehman:

Q. What date?

By Mr. McCollester:

Q. Will you cover that?

A. Beginning in the spring of 1931, we discussed Seatrain service out of New York with the New York Central, Pennsylvania, Erie, Jersey Central, and the Delaware, Lackawanna & Western and

had earlier discussed it with the New York, New Haven & Hartford Railroad. Do you wish me to describe the negotiations?

Q. Yes.

A. They were——

Mr. LEHMAN. I made the same objection with respect to negotiations with the Trunk Lines, Mr. Examiner, as I made with respect to the negotiations with the American Railway Association; that is, I object to any testimony with respect to preliminary negotiations for the use of equipment on the ground that they were never consummated. We would have never had this proceeding
570 before you if the negotiations were successful so why take up the record and time in discussing what happened and did not happen about things which were never concluded.

Exam. FLEMING. Note the objection.

Proceed.

The WITNESS. The Erie and the Pennsylvania sent representatives to New Orleans and to Havana to look over our terminals and the operation of our ships. The Erie and the Pennsylvania and the Jersey Central, all of them suggested sites for terminals at New York.

By Mr. MCCOLLESTER:

Q. On their own property?

A. Yes; plans were drawn in that connection. A definite offer was made by the Pennsylvania for a site at Bay Ridge. Other sites on the Pennsylvania were looked over. Many discussions were held with representatives of the Eastern Trunk Lines, both the operating officials and the traffic officials.

Q. Did you make it clear to these representatives of the Trunk Lines that Seatrain's operations out of New York would involve the interchange of railroad cars with Seatrain vessels?

A. They were entirely familiar with our operations and a good deal of the discussions centered upon the reciprocal or rights of reciprocal switching in New York and then, on account of the muddled state of the whole situation in New York Harbor as applied to Seatrain operations, it was the consensus of
571 opinion of the Eastern Trunk Line carriers that Seatrain should interest itself and gain a terminal at Hoboken on the Hoboken Manufacturers Railroad, so as to be independent of any particular trunk line, but through which all of them could be free or could have free access to and from Seatrain ships.

Q. In the negotiations did any of the trunk lines indicate to you any objections to having their cars delivered to Seatrain ships?

A. No; none whatsoever, quite the contrary.

Q. You say they understood what would be involved in Seatrain operations?

A. Yes; we went further and it was recommended to us by the Pennsylvania Railroad that we locate other terminals; that is, that we look towards the future and possibly consider Philadelphia or Baltimore and Norfolk, and due to their encouragement along that line, we took steps in that direction and took trips to those cities, and interviewed railroad officials in those cities and the question of terminals, sites, and so forth were taken up and sites were picked out, and switching arrangements were discussed, and, in general, we received whole-hearted cooperation from the Eastern Trunk Lines up to within three or four weeks of the commencement of our service.

Q. Did those considerations of operations from and to other terminals at other points contemplate that terminals would
572 be terminals at which cars of railroads and cars of railroad ownership could be interchanged with Seatrain vessels?

A. Yes. The discussions usually centered upon the fact that each individual railroad would like to have us dock on their property so that they could get the majority of the traffic.

Q. Following these negotiations, did you conclude negotiations for a loan from the shipping board for the construction of these ships?

A. Yes. Based on past experience and our discussions with the railroads in general we borrowed $2,380,000 from the Shipping Board to build two additional vessels.

Q. Were the ships built?

A. Yes.

Q. Would you have built the ships had it been reported to you by the railroads that they would not permit the cars to be delivered to those ships?

A. We would not have built the ships, neither would we have built the terminals.

Q. Will you describe the negotiations leading to the acquisition of the Hoboken Manufacturers Railroad?

A. I have already stated on the record how that came about and the reason for locating on the Hoboken Manufacturers Railroad.

Our experience had shown at New Orleans, being on the New Orleans & Lower Coast that certain competitors—certain
573 competitors of the Missouri Pacific and the Texas Pacific felt that these two roads had certain advantages from us being on their short line, the New Orleans & Lower Coast Railroad, and it seemed quite evident that they would also hold to that view here in New York, particularly in view of the lack of reciprocal switching, so it seemed very desirable for us to locate

on an independent short line so that all the trunk line carriers could have equal access to the Seatrain ships.

We, therefore, approached the management of the Hoboken Shore Railroad as to locating on their tracks.

Q. Let me ask you right there: What railroads are there in New York harbor that offer these advantages which you have described of interchanging with all of the short line railroads and yet have facilities at which ships can dock?

A. To my knowledge, there is only one on the Jersey Shore and none on Manhattan Island, none on Staten Island, but there are two in Brooklyn; the two in Brooklyn are not suitable for adaptation to Seatrain service.

Q. Those two are what?

A. The New York Dock Company and the Bush Terminal Railroad.

Q. Proceed.

A. We started negotiations with the management of the Hoboken Shore Railroad and soon found that they were in a critical financial condition and unable to carry through any contract that they might enter into. That was the time
574 that they suggested that we might buy the road. The road was in default on its bond interests and the trustee was handling the affairs of the road, and we approached the bondholders' committee, and the trustee, and after certain negotiations they agreed to put up stock of the Hoboken Manufacturers Railroad, or the Hoboken Terminal Properties, Inc., the real estate company—those two companies, I should say, for sale at public auction. We purchased the stock of both of these companies at public auction. The stock of each company was pledged under a debenture bond arrangement.

Q. Do you mean that there were two corporations, the Hoboken Shore Railroad and the Hoboken Terminal Properties, Inc.?

A. Yes.

By Mr. MUCKLEY:

Q. What do you mean by "we": the Seatrain Lines, Inc.?

A. The Seatrain Lines. In that way we acquired the Hoboken Manufacturers Railroad Company.

Q. The Seatrain Lines acquired it?

A. Yes.

Mr. MCCOLLESTER. I will clear that up.

By Mr. MCCOLLESTER:

Q. So that the record may be accurate and complete on the point, the stock of the Hoboken Manufacturers Railroad is now or has now been sold by Seatrain to Hoboken Terminal Properties, Inc., a wholly owned subsidiary of Seatrain, Inc.?

575 A. Yes.

Mr. LEHMAN. That is shown in the decision of the Commission?

Mr. MCCOLLESTER. I believe so.

By Mr. MCCOLLESTER:

Q. At that time you became president of the Hoboken Manufacturers Railroad, the complainant here, did you not?

A. I became president at that time.

Q. Then, what did the Hoboken Manufacturers Railroad Company do to equip itself to handle interchange of traffic between those lines and Seatrain?

A. The Hoboken Manufacturers Railroad Company, realizing that its success of operation depended upon additional traffic outside, decided to revamp their facilities and build special facilities for handling Seatrain ships, which would materially increase the traffic flow over that route. Those facilities, which included the construction of a car-handling crane, which I have described briefly, and the photographs are in the record, as well as the figures, and a small modification of the berth for Seatrain vessels including the extending of the slip and installation of mooring facilities and the like, and also a small classification yard adjoining the trestle.

Q. Approximately, what was the investment made by Hoboken Manufacturers Railroad for these facilities?

A. About $160,000.

Mr. MCCOLLESTER. Mr. Examiner, application was made
576 by the Hoboken Manufacturers Railroad Company to the Interstate Commerce Commission for authority to negotiate a loan, the proceeds to be used for the purpose of the construction of this car elevator and the rearrangement of these facilities; that authority was granted by the Commission. I have been looking for a copy of the decision. It is one of the Commission's finance dockets.

I will supply the number. I have it here somewhere. The number is Finance Docket No. 9598.

Mr. LEHMAN. You can give the number later.

Mr. MCCOLLESTER. It will be inserted at this point in the record.

By Mr. MCCOLLESTER:

Q. Mr. Brush, this car elevator, which cost approximately $160,000; if cars of the defendant railroads cannot be interchanged between the tracks of the Hoboken and Seatrain vessels, would that car elevator be of any value?

A. The car elevator cannot be used, in my opinion, for any other purpose—the cost of the elevator, for the sake of the record, was not $160,000. It did constitute the major portion of the ex-

penditure by the Hoboken, the private enterprise of the Hoboken to provide proper facilities for Seatrain vessels.

By Mr. MUCKLEY:

Q. What was the total amount?

Mr. MCCOLLESTER. The finance docket shows.

577 The WITNESS. I think it was $160,000 altogether.

Mr. MUCKLEY. The finance docket shows all the details. We will give reference to that, Mr. Examiner.

By Mr. MCCOLLESTER:

Q. In the summer of 1932, Mr. Brush, when you contemplated operation out of New York, did you approach the American Railway Association officials on the subject of car hire and the terms of car interchange?

A. I did.

Q. What did you do?

A. I called upon Mr. Gormley in Washington and was referred to Mr. Kendall and certain correspondence and interviews took place with Mr. Kendall and several of his subordinates subsequent to that call.

Q. Will you describe the negotiations in more detail.

A. Mr. Kendall, with Mr. Stevenson, called upon me at New York.

Q. Who is Mr. Stevenson?

A. Mr. Stevenson is an American Railway Association car service man located at New York.

Q. Is it Stevens?

A. Yes, it is Stevens.

Q. Proceed.

A. This gentleman, or rather these gentlemen were interested in our contract with the Hoboken, when I say "we" I mean the Seatrain contract with the Hoboken. They called upon me to see whether or not the interchange of cars between the

578 Hoboken and Seatrain would be in accordance with the American Railway Association car service rules. After going over our arrangements that we had at New Orleans with the New Orleans & Lower Coast and we advised them that a similar arrangement was being made at New York, and, further, showing them how we protected the cars from total loss by means of insurance payable to the Hoboken Manufacturers Railroad and/or the New Orleans & Lower Coast Railroad. Mr. Kendall and Mr. Stevens were thoroughly satisfied with our arrangements that we had made and so advised us.

Q. Was that in the conversation in your office?

A. That was in an oral conversation in my office.

Q. Who was present?

A. Mr. Stevens, Mr. Kendall, Mr. McCollester and myself were present. I can recall Mr. Kendall taking one of these little blue books and reading a portion of it on how we interchanged cars with considerable interest and saying that gave him complete information and thoroughly satisfied him as to the interchange of cars at New York.

Q. You are referring to Exhibit 20?

A. Exhibit 20.

Q. That was about the 19th of September 1932, was it?

A. Yes.

Q. I show you a letter dated September 20, 1932, from Mr. Kendall to you and ask you if that was the letter which you
579 received from him following your conversation in your office?

A. This letter I received; yes.

Mr. McCollester. I offer that in evidence.

Exam. Fleming. It will be received.

(Exhibit 24, Witness Brush, received in evidence.)

Q. Following that conversation did you enter into or was an agreement entered into between the Hoboken Manufacturers Railroad Company and the Seatrain, Inc., governing the interchange of cars and the responsibility of Seatrain to the Hoboken Manufacturers Railroad Company?

A. We did.

Mr. Lehman. May I interrupt there to ask what the question was?

(Question read.)

By Mr. Lehman:

Q. I thought you stated that you discussed with Messrs. Gormley and Kendall that contract with Seatrain?

Mr. McCollester. No.

Mr. Lehman. Now, Mr. McCollester is asking you if following that you entered into the contract?

Mr. McCollester. You misunderstood, Mr. Lehman; you said that they advised that the arrangement would be entered into similar to that as the New Orleans, and Mr. Kendall said that it would be satisfactory.

The Witness. This arrangement was entered into.

By Mr. McCollester:

580 Q. All right, just proceed with your statement.

A. That contract and arrangement was entered into.

Q. Is this that contact?

A. Yes, this is the contract that was entered into in pursuance to our arrangements at that time.

Mr. McCollester. We offer this contract in evidence.

Exam. FLEMING. Received.

(Exhibit 25, witness Brush, received in evidence.)

Mr. MUCKLEY. This contract was entered into after Rule 4 was adopted?

Mr. McCOLLESTER. Yes, the contract will speak for itself as to its date and when it was entered into.

By Mr. McCOLLESTER:

Q. There was an oral contract made between Seatrain and the Hoboken Manufacturers' Railroad?

A. Yes.

Q. And later a written contract was entered into?

A. Yes.

Q. I show you Exhibit No. 19.

A. Yes, this is Mr. Lawrence's letter.

Q. I direct your attention to the letter from Mr. Lawrence to the Manufacturers Railroad—to the Hoboken Manufacturers Railroad Company, dated October 3, 1932.

A. October 3 or 5?

Q. October 3, 1932.

A. Yes.

581 Q. Was that the first advice you received from any trunk line that they would not deliver or permit their cars to be delivered to the Seatrain ships?

A. Yes.

Q. When was the first Seatrain ship ready to sail?

A. October 5.

Q. The ship had been built and was ready?

A. The ship had been completed and delivery taken. It was already in the slip.

By Exam. FLEMING:

Q. Exhibit 25 consists of how many pages?

A. Exhibit No. 25 consists of four pages.

Mr. McCOLLESTER. Four pages.

By Mr. McCOLLESTER:

Q. Following the commencing of your operations from New York, when did the first ship sail?

A. From New York?

Q. From New York.

A. October 5—midnight.

Q. What?

A. Midnight, to be exact.

Q. Did you have further negotiations with representatives of the railroads regarding the relations between Seatrain and the Trunk Lines—the Eastern Trunk Lines?

A. Yes.

Q. Was anything said to you in those negotiations about the delivery of cars owned by these trunk lines to Seatrain
582 ships and if so, what?

A. The apparent refusal of the railroads at the last minute to let us handle their equipment came as a great surprise to us, and we quite naturally went to see most of the roads and asked them why they had taken this action when, for several months, we had talked with the operating and traffic officials and presidents of the Eastern Trunk Line roads regarding this situation, which seemed so improper to us.

From the standpoint of cars we were advised by numerous railroad officials that they felt that, upon considering this whole Seatrain situation, that they did not want to have Seatrain take those cars and use those car to take traffic away from the railroads. That was made very plain to us and, in spite of our endeavors to persuade them that we were not a competitor of the railroads but quite the contrary, with the one type of ship that the railroads could afford to work with, that we were developing traffic for them far more than we would ever take it away, they, nevertheless, continued to oppose our operations and asked me whether we were going to desist from taking their cars. I told them we were not, and they made it very plain if we did not voluntarily, they would put in a few Car Service Rules to stop us from taking their cars because they were not going to lose the traffic to Seatrain.

Q. Their objection was to you taking their cars for the
583 purpose of taking traffic away from the railroads?

A. That is the only excuse the railroads have ever given to us.

Q. That excuse was given to you?

A. Yes; not by one line but by many.

Q. You stated that some of these railroads refused to let you have their cars and told you that they were going to have a change made in the car service rules to prevent the delivery of cars to Seatrain?

A. Yes, they did.

Q. Following this, after a certain period, was Car Service Rule No. 4 adopted?

A. It was proposed and we endeavored to stop its adoption but could not do it and it was finally adopted.

Q. I show you, Mr. Brush, a letter on the letterhead of the American Railway Association dated October 27, 1932, signed by Mr. Kendall and addressed to you. I will ask you if this was received by you?

A. It was.

Q. Mr. W. C. Kendall is manager of the Car Service Division of the American Railway Association?

A. He is to my knowledge.

Q. He was the same Mr. Kendall with whom you had your conferences that you previously described?

A. Yes.

584 Mr. McCollester. I offer this letter in evidence, consisting of three pages.

Exam. Fleming. It will be received.

(Exhibit 26, Witness Brush, received in evidence.)

By Mr. McCollester:

Q. Mr. Brush, has Seatrain since its commencement of its operation from New York paid per diem to the Hoboken and to the New Orleans & Lower Coast on cars received from them?

A. It has.

Q. In the amount required by the American Railway Association Per Diem Rules?

A. Yes.

Q. To whom did you say it was paid?

A. To the Hoboken—to the New Orleans & Lower Coast and the Hoboken Manufacturers Railroad.

Q. Has the Hoboken Manufacturers Railroad Company paid over to the owning railroads the per diem received from Seatrain Lines?

A. The Hoboken has; I do not know about the New Orleans & Lower Coast.

Mr. Muckley. He did not ask you about that.

By Mr. McCollester:

Q. Has any owning road refused to accept such payments for per diem?

A. No.

Q. Can you state how much per diem has been paid to the

585 car owners?

A. Assuming the New Orleans & Lower Coast has paid to the car owners all that Seatrain has paid to the New Orleans & Lower Coast for cars while on the Seatrain boats or in Seatrain possession——

Mr. Muckley. I think that is a violent assumption, Mr. Examiner.

Mr. Lehman. I would like to have the information separately, not as between the two roads.

Mr. McCollester. I do not think that we can give it to you that way right now. Let the witness give you the way he has it.

By Mr. McCollester:

Q. State it as you have it.

A. Well, we will split it for you. From October 6, 1932, the first time the Seatrain operation out of New York began up to June 1, 1933, the Seatrain Lines paid to Hoboken and to the New Orleans & Lower Coast per diem in the amount of $46,138.32 and all of the money received by the Hoboken was paid to the car owners.

Q. There has been, has there not, a controversy between the Hoboken Manufacturers Railroad and its connecting trunk lines with respect to switching reclaim while cars are on the Hoboken Manufacturers Railroad?

A. There has.

Q. What effect has that controversy had upon the per
586 diem settlements between the Hoboken and owning roads?

A. Several of the trunk lines, beginning on October 6, stopped paying reclaim, paying it to the Hoboken Manufacturers Railroad Company on cars to and from our Seatrain vessels.

By Mr. Muckley:

Q. What year was that October 6?

A. October 6, 1932.

Mr. McCollester. I assume your Honor understands what switching reclaim is, if not, I will ask the witness to explain it.

Exam. Fleming. Put in what you deem to be sufficient for the record.

The Witness. The Hoboken Manufacturers Railroad Company acts as agent for the Seatrain Lines in delivering traffic to consignees on their line. In originating traffic for the trunk lines and turning over to the trunk lines the Commission fixes various allowances and, in fact, fixed these allowances some several years ago as to compensation that the Hoboken should receive. In that compensation there was no allowance to Hoboken for the money which it expended to pay car owners' rental for cars found in the possession of Hoboken, there being an agreement with the trunk lines to reimburse Hoboken for its actual expenses for per diem. So that Hoboken, in general, receives to and from shipside $1.35 and if the car is on the Hoboken Manufacturers Railroad for three days the

Hoboken Manufacturers Railroad pays the car owner $3
587 and receives back through reclaim $3 which it paid out, thereby washing the per diem account out, the Hoboken Manufacturers Railroad allowance not being intended to cover any per diem expense. That is the ordinary practice of all switching roads.

When Seatrain started in October, 1932, the Pennsylvania, and I think the New York Central refused to reimburse Hoboken for

the per diem which it had paid out on Pennsylvania cars moving to and from Seatrain and also New York Central cars.

One by one the other roads have done likewise. We have sought during the past year to sit down with the roads and find out why they do not wish to allow the Hoboken any per diem on traffic moving to and from Seatrain. We have written them numerous letters and we have quite a volume of excuses, all of them different, I will say, and we have not yet succeeded in getting them to sit down with us and tell us why they stopped paying reclaim. We cannot find that it is in accordance with any rules so, last spring, I requested our auditor, in settling with these various railroads—

Q. (By Mr. McCollester) By "our auditor" you mean—

A. The Hoboken, in settling with the various railroads for per diem on cars on the lines of Hoboken, to deduct the amount of reclaim which the various roads owed to us. Through that means Hoboken has been reimbursed for these reclaims which those
588 roads owe us. They continually write us letters at the end of each month asking us when we are going to pay them the per diem and we write back and ask when they are going to pay us the reclaim and that is as far as it has gotten.

Q. So far as delivery of cars—the delivery by Hoboken to Seatrain from the time that car has been delivered to Seatrain, the only rate that is assessed and received is one dollar per day until that car was returned by the Hoboken or delivered to the New Orleans & Lower Coast; is that correct?

A. Yes.

Mr. McCollester. Mr. Examiner, with your permission, I should like to withdraw Mr. Brush from the stand at the present time. I have another witness, Colonel Ballantine, from Washington, who is anxious to get back to Washington tonight, and I would like to put him on so that I can be sure to accommodate him.

By Mr. Knowlton:

Q. May I ask one question of Mr. Brush: I did not understand his statement; he says he gets a letter every month from the trunk lines asking when he is going to pay these charges which he says have been paid or that he has been paying right along; is it merely just a bookkeeping entry or bookkeeping arrangement which you have under which you say "We will deduct these charges, therefore the account is paid"? Is that what you mean when you say you have paid the Pennsylvania their per diem?

A. Let us distinguish between per diem paid to the trunk
589 lines for cars while in Seatrain's possession and per diem which has been withheld from the trunk lines on cars while in the Hoboken's possession. In so far as per diem—payments of per diem to trunk lines and to all carriers while in Seatrain's pos-

session, all per diem has been paid. In so far as per diem on cars in Hoboken's possession, we have not settled that with the owning roads when the owning roads owe us reclaim. We have offset reclaim with per diem and paid the balance, if any, and called upon them to pay the balance if there was any due and owing to us.

Q. But all of these payments have been just bookkeeping arrangements in your own office because you claim you have an offset?

A. No: it is an economical arrangement to keep our cash where it should be. The accounts are all open on some roads back there for several months. In other words, we are simply equalizing, so far as Hoboken is concerned, the amount that is due to Hoboken, and the amount that Hoboken is due to pay.

Q. That means the same thing, you do not actually pay over any cash when you have a credit to offset it?

A. We credit the amount they owe us and then we offset the other by payment in cash. In other words, we deduct what they owe us and then we pay the difference, if any, to them. If they owe us some in addition we ask them to pay us, which they do not do.

590 Q. Just how was that paid—that is how you say you paid them?

A. No: I have not said that at all. You must separate the two. As far as Seatrain is concerned, we have paid them in cash for each day per diem was earned. As far as the Hoboken Manufacturers Railroad Company is concerned, we have offset what they owe us for switching reclaim before making any payments to them.

Mr. KNOWLTON. I want to get it clear here. I think it is clear on the record.

The WITNESS. Yes, it should be.

Mr. MCCOLLESTER. I think you misunderstood his testimony, or it would be clear to you.

Mr. LEHMAN. I think the matter is clear on the record now, anyhow.

(Witness excused.)

591 NOTEN D. BALLANTINE was sworn and examined as follows:

Direct examination by Mr. MCCOLLESTER:

Q. State briefly your name, residence, business, and transportation experience.

A. My name is Noten D. Ballantine. I have for the past six years or more been a transportation consultant in business for myself with offices in New York City. For four years prior thereto, I was assistant to the president of the Seaboard Air Line Railway,

during which time I was engaged primarily in research work having to do with transportation economics, both local and national. My earlier experience in the railroad service, leading up to the position just mentioned, was as telegraph operator, stenographer, electrician, secretary to a chief engineer and general manager, superintendent of telegraph for five years with the Kansas City Southern Railway, and later superintendent of transportation for two years; then superintendent of car service, Rock Island Lines, for six years, and later six years as assistant to the vice-president in charge of operation; Major Engineering Corps United States Army in charge 416th Railroad Telegraph Battalion, later Lt. Colonel Signal Corps and General Superintendent Transportation A. E. F. in France; then Assistant Manager Car Service Division U. S. R. R. Administration, in charge of the distribution of all box cars; then superintendent transportation
592 Union Pacific system.

I am at present engaged by the Federal Co-ordinator of Transportation as assistant manager, Section of Car Pooling, and am living, for the time being, in Washington, D. C.

Q. Prior to your engagement by the Federal Co-ordinator had you made studies and advised Seatrain Lines, Inc., with respect to some of their car and transportation problems?

A. I had.

Q. Have you the permission of the Co-ordinator to appear as a witness in this case?

A. I have been able to obtain it, for the reason that I had practically completed my study of this case prior to being engaged by the Co-ordinator. He has granted the permission with the understanding that the views expressed are my own.

Q. Are you familiar with the petition of Hoboken Manufacturers Railroad v. Abilene and Southern Railway et al., before the Commission arising out of a recent change in American Railway Association's Car Service Rule No. 4?

A. I am.

By Mr. MUCKLEY:

Q. May I interrupt you just a minute?

A. Yes.

Q. You are testifying now to your present official capacities—I mean, in your present official capacities?

A. Oh, no.

Q. Only to research that you made prior to what time?
593 A. Prior to the time I became connected with the Government in an official capacity. That is the only basis on which I could come.

Mr. McCollester. I want to keep that very clear in the record that Colonel Ballantine is in no way representing the Co-ordinator or appearing in any official capacity he may have pursuant to his connection with the Federal Co-ordinator but only because of his retention by Seatrain, Inc., and the Hoboken Manufacturers Railroad prior to the time he became affiliated with the Federal Co-ordinator.

By Mr. Muckley:

Q. I presume with Mr. McCarl's permission also?

A. And in writing, too.

By Mr. McCollester:

Q. Are you familiar with American Railway Association Car Service Rules?

A. Yes. I was a member of the American Railway Asociation Committee on Car Service for seven or eight years. That Committee primarily has most to do with the preparation, presentation, and recommendation of car service rules to a general committee whose approval must be obtained before they are submitted to the membership for consideration or a vote.

Q. What is the purpose of the Code of Per Diem Rules, and the Car Service Rules?

A. The Code of Per Diem Rules was designed to insure to car owners compensation to reimburse them for the cost of car
594 ownership when cars are away from the owners' rails, to make roads responsible for reimbursement in event they deliver cars to lines other than those who have signed the Code and are members of the agreement. It contemplated permitting member roads to deliver cars to the rails of any industry, switching line, logging line, or water line.

Mr. Muckley. Mr. Examiner, I move that this last answer be stricken. The rules should speak for themselves and indicate the purposes and the extent which they govern. As a matter of fact the rules themselves state that it is by and between steam railroads and that they can exchange the cars only between steam railroads.

Mr. McCollester. That is not my understanding by any means.

Mr. Lehman. I also move that the answer be stricken on the grounds that the rules speak for themselves, in addition to the grounds stated by Mr. Muckley.

Mr. McCollester. It is entirely proper that a man who has investigated this in the preparation of the rules should state what their intention is. Obviously, if he was engaged in the preparation of them, he would know what the basis behind them was and explain anything which is not apparent from the rules.

In any event, I think it is entirely proper that he should testify.

Mr. Thurtell. He did not state that he had been engaged

595 in the preparation of the rules; at least I did not notice that.

The WITNESS. I will say so now, if I did not previously: I was a member of the committee that helped to formulate the rules, for seven or eight years.

Exam. FLEMING. The rules will speak for themselves.

The WITNESS. Yes, necessarily.

Exam. FLEMING. But the objection will be noted. You may proceed.

Mr. MCCOLLESTER. Proceed.

The WITNESS. The code of Car Service Rules is coupled with the Code of Per Diem Rules, and is based upon what is known as "The Ownership Principle," and among other things provides for the prompt return to the owners either loaded or empty.

By Mr. MCCOLLESTER:

Q. Is it, in your opinion, based upon your experience in car service matters, a proper purpose of the Car Service Rules to enable one carrier to impede the handling of freight by a competing, or supposedly competing carrier?

Mr. LEHMAN. I object to that question for the reason already stated that it is highly improper for this witness to explain the purpose of the rules, as long as the rules have been placed in the record.

Mr. MCCOLLESTER. If the Examiner please, I am asking this witness what his opinion is as to the proper function of the rules; I think that is a perfectly legitimate question, an

596 opinion to be expressed by him.

Mr. LEHMAN. The witness is not entitled to express any opinion with respect to the purpose of the rules.

Exam. FLEMING. For the reasons previously explained by the Examiner, the objection will be noted and the witness may proceed.

By Mr. MCCOLLESTER:

Q. All right.

A. It is not. On the contrary, it is my concept that their function is just the reverse—that is, to insure the free and unrestricted interchange of traffic, keeping in mind always that the car owners' rights and interests were fully protected. The injection into the rules of any other principle would open the door for the New York Central, for example, to prohibit its cars from being loaded via the Pennsylvania Railroad, or any other railroad which it might for any reason desire to hamper.

Q. Have the Car Service Rules ever, to your knowledge, prior to present Car Service Rule No. 4, made the consent of the owning road a prerequisite to the right of one carrier to deliver a loaded car to a particular connection?

A. No, so far as I know it has never before been done, and it seems to me that if the rule is permitted to stand, it is likely to have repercussions which might endanger the entire structure of the present rules in general.

Q. From you knowledge of the car situation, was there a
597 surplus of railroad cars on or about November 1, 1932; and what is the situation now?

A. Yes. There has been a very large surplus of freight cars for a number of years. To properly interpret the American Railway reports of car surplus, shortages, and bad order situation, it is necessary to realize that in general their figures as to "shortages" are overstated, the "surpluses" are understated, and the "bad order" situation is affected more or less dependent upon the proportion of home cars on home roads.

Q. Will you just explain how it happens that car surpluses are underestimated under the rules of the American Railway Association and how car shortages are overstated under the American Railway Association rules, or, rather, I will say in both instances in the A. R. A. figures?

A. It is a customary practice, when a shipper wants a car, during a period of heavy demand, he inflates his order and doubles it in the hopes he will get what he really needs. That came about very early in the study of things of this sort. In fact, it became so prevalent during the Federal control that special rules and regulations had to be established and issued by the Interstate Commerce Commission to govern it.

By Mr. LEHMAN:

Q. Is that true during 1932?

A. Yes. Surpluses, understand, understate the situation,
598 because, as a general proposition, if I have an industry and sufficient cars are available for me to load I do not have to order the cars, I load them, and therefore these orders are not put in which created the situation formerly stated by me.

Q. Do surpluses, in your last remark, you mean the figures of the American Railway Association as to surpluses?

A. Yes, that is the only basis that the public has for ascertaining what the general car situation is.

As to the bad order situation, let us assume the Union Pacific, for example, has a Northeastern car on its rails, perfectly safe to run but unsuitable for the Union Pacific traffic. It calls that a serviceable car and not bad order, but immediately it passes over the interchange track to the next road, they pass it out as a bad order car because of the mere fact that it passes over this interchange track—not that it is really in physical bad order. There-

fore, as a system car on the same line it is not in the same status before and after interchange.

In other words, there is no physical change in the car, but the bad order records show an increase by one car the moment that car passes over the interchange tracks.

By Mr. McCOLLESTER:

Q. Will you continue your answer to my question, please.

A. Based upon the units reported and assuming the bad
599 order situation was reduced to 5 percent of cars on line——

Q. Is that the normal situation that 5 percent of the cars on the line are bad ordered?

A. That would be a very fair allowance during——

Q. Excuse me. You say that would be a very fair allowance——

A. Yes; I would say it was.

Q. And that it requires two active cars per car loaded; the surplus on November 1, 1932, was 617,642 cars; on July 1, 1933, it was 634,074; and on September 1, 1933, it was 666,652. Translating these surplus figures into terms of the percentage increase over the total cars loaded in the week nearest the dates selected, means that if the existing units were made serviceable and utilized in the same manner as those in active service at that time, there were sufficient freight cars to protect an increase in loading on November 1, 1932, of 57.2 percent——

By Mr. LEHMAN:

Q. Do you mean by that, that considering what we needed at that time, and the normal number of cars in bad order, in proportion to the number of cars that were owned, that the ownership as of November 1, 1932, was sufficient, without acquiring any more cars to handle 57.2 percent more traffic than was handled?

A. I think my answer is perfectly clear in that respect.

By Mr. MUCKLEY:

Q. How many days——

Mr. McCOLLESTER. Anything else?

600 Mr. MUCKLEY. I was just going to ask him a question. I will ask him this:

By Mr. MUCKLEY:

Q. How many times would those cars reach around the world if they were placed end to end?

A. That would be a matter of calculation, but I have never taken the time to do it. I do not know just what its relevancy would be to the present situation; perhaps you can explain.

Mr. MUCKLEY. No. I think that will be sufficient as to that.

By Mr. McCollester:

Q. Go ahead.

A. On July 1, 1933, of 52.6 per cent, and on September 1, 1933, of 45 per cent.

Q. Based upon your study of and familiarity with car service matters, what is your opinion of the relative return to car owners from cars handled in Seatrain and cars handled for a similar distance by rail carriers?

A. It has long been the custom of rail carriers, in their effort to earn net per diem revenue, to return foreign cars empty and load their own cars away from home. This involves an additional operating expense; the correct determination of the amount is an involved method of accounting and is generally not definitely known, while the Hire of Equipment Account debit or credt is a special item and is currently stated.

601 Under the American Railway Association Code of Rules governing the condition of, and repairs to, freight and passenger cars for the interchange of traffic, car owners are responsible for practically all the costs of repairs to their cars while away from home, the exception applying to unfair usage or accidents, hence the cost of repairs incident to car-mileage made on foreign lines must eventually be borne by the owner and is included in its operating expenses, I. C. C. Account 314.

Q. Let me be sure that I understand that. Is it your testimony that it is an accounting practice between roads that have—for example, suppose the New York Central car is on the lines of the Southern Railroad and is to be repaired, the cost of those repairs are billed back by the Southern Railroad to the New York Central Railroad and appear in the New York Central's I. C. C. account No. 314?

A. Yes: No. 314.

Q. And also if the car of the New York Central is upon the New York Central's own rails, and is repaired, the cost of that repair appears in the same account, I. C. C. 314?

A. Yes.

Q. So that account I. C. C. 314 represents the car's repair—the repairs to the car either on its own home rails or on the rails of other roads?

A. Right.

602 Q. Go ahead.

A. Practically all railroads have been computing their costs of repairs per freight car-mile on the basis of dividing I. C. C. Account 314, Freight Train Car Repairs, by the total car-miles made on their line. This, however, is an incorrect formula for the reason that such mileage includes the mileage made by private line cars,

the cost of which is not, except for the very small portion due to unfair usage and accidents, an operating expense, but is paid for in the Hire of Equipment Account as mileage payments. This formula leads to an understatement of the costs for Class I Roads as a whole by more than 30 per cent. That is to say, whatever the costs may be shown under the usual formula, it is actually 30 or more per cent higher because the increased use of private line cars has now reached the point where their aggregate mileage is more than 30 per cent of the total freight car mileage of Class I Roads.

Q. Will you explain just a little more fully about the inclusion of private cars distorting the figures.

A. Suppose a railroad did not own any of their own cars at all and used nothing but private line cars. It could not have any operating expense chargeable to freight train car repairs. On the other hand, if it had no repairs——

Q. Let me get this point here: That would be because it would bill the cost of repairs entirely to the private car
603 owner, and it would be a credit to account 314.

A. Yes.

Q. Proceed.

A. To the extent that it was repairing private line cars, it would be a credit because the prices made by the American Railway Association rules carried a very heavy overhead expense, 60 per cent—sixty-some-odd per cent of the labor and ten or fifteen per cent of the material.

Q. That is all. Proceed.

A. Adjusting the total car-miles by the elimination of private line car-miles, and dividing by I. C. C. Account 314 by the railroad-owned car-miles, it is found that the cost of repairs per car-mile in cents was for 1920, 2.81; 1923, 2.26; 1926, 1.69; 1929, 1.49; 1932, 1.02.

Q. Those are the average figures for the railroads of the country as a whole; are they not?

A. Class I, adjusted by the elimination of private line mileage.

Q. In other words, taking 1929 for an example, the average cost to a railroad for repairs—to the railroads of the country as a whole—for repairs of railroad-owned cars was 1.49 cents per car-mile?

A. Yes.

There are no data available which will definitely indicate
604 the extent to which the low cost in 1932 may be attributed to "deferred maintenance," nor is it safe to rely upon any one year's record as a criterion. An arithmetic average for the years 1926, 1929, and 1932 gives 1.4 cents, so that it would likely be con-

servative to use 1.25 cents per car-mile as representing the movement expense.

Using these figures as illustrative, because they are believed to be fairly representative, when a road earns a dollar net per diem during which time its car makes 40 miles on another railroad, its operating expense would be increased forty times 1.25 cents or 50 cents, whether the repairs are made at home or abroad.

As the American Railway Association prices for repairs carry a very heavy charge for "overhead expense" the preceding statements needs to be qualified. Unless the amount of repair bills rendered equals the amount of repair bills paid, there will be an actual debit or credit to Account 314 as the case may be, and this may vitally affect a given road's final cost figures. The practical effect is that it actually pays a road to so maintain its cars offered in interchange that foreign roads will have little or no occasion to do other than give them only minor repairs.

It is the view of a large number of mechanical experts that most of the damage to freight cars occurs in yard switching, though a portion of the damage does not develop until the
605 cars are in road service. It is also well known that the interchange of cars between carriers involves additional switching and delay.

Q. That is, generally, rail carriers?

A. Yes. Present American Railway Association Car Service Rule No. 5 provides a reciprocal rate of 6 cents per car-mile for short-routing empty cars. I was a member of the subcommittee that proposed the formula for the determination of the out-of-pocket expenses involved in the movement of empty cars. The fact that it has remained unchanged for a number of years justifies the conclusion that it has stood the test. It was not expected to represent what it would cost any particular road, but rather the general average costs. Included in this cost is 2 cents per mile to cover the per diem that would need to be paid by the road performing the service and is predicated upon the movement of empty cars at the rate of fifty miles per day and the per diem rate being one dollar per day. This leaves four cents per mile to cover costs of repairs, fuel, and other operating expenses that vary with the traffic movement.

It is not generally recognized among railroad men that the resistance to the drawbar pull of the average empty car on a level tangent track is approximately 80 per cent as much as it was to the average 1932 loaded car under similar condi-
606 tions. This means that per ton, the fuel consumption for the movement of an empty car is greater per ton than that required per ton of a loaded car. It is therefore reasonable to use

the rate of four cents per empty car-mile as the average out-of-pocket expense for the movement of cars exclusive of per diem.

Q. Now, just let me ask you there this question——

A. I beg your pardon. Oh, go ahead.

Q. The result of your figures and calculations indicate, do they not, that the average cost to railroads for car repairs, for cars owned by them, is 1.25 cents per car-mile as a conservative figure?

A. Yes; it is a conservative figure.

Q. Is that included in the average cost of hauling an empty car—it is in the 4 cents per car-mile?

A. Yes; that includes the 1.25.

Q. Includes the 1.25 cents which is the repair basis?

A. Yes.

By Mr. LEHMAN:

Q. What is that last figure?

A. 1.25.

Mr. MCCOLLESTER. 1.25.

Mr. LEHMAN. All right. I just wanted to get that.

Mr. MCCOLLESTER. Do you have that?

By Mr. MCCOLLESTER:

607 Q. Applying this result to the Seatrain Lines, what is your conclusion?

A. Seatrain Lines, Inc., not yet having provided any cars for use in through service, has to assume the per diem on all its traffic, whereas on business interchanged between two rail carriers involves the expense of cross-hauling empty cars previously referred to. Therefore, when roads deliver a car to Seatrain they are going to be paid per diem and Seatrain is not going to load any of its cars to them, necessitating special effort on their part to avoid payment for their use.

Q. In other words, there is no reciprocal feature attached to it?

A. No. There is no reciprocal feature. If, then, it is considered in its practical results that whatever per diem they earn from Seatrain Lines, Inc., will net them substantially more than a corresponding amount earned from any railroad.

Q. By "them" you mean the railroads?

A. I mean the railroads. This is brought about through the fact that while these cars are earning a dollar per day en route via Seatrain Lines, Inc., they do not turn a wheel, are not subjected to the various yard switching damages, nor to the stresses and strains of heavy tonnage trains. In addition to all this, when the ship is loaded to capacity, practically 80 per cent of the

608 cars while in transit via Seatrain Lines, Inc., are protected from the elements, being stored below deck, and the cars on deck are so high up and so far aft that no green water can reach

them. When not loaded to capacity, a still larger percentage is protected from the elements.

Q. You mean when the Seatrain ship is not loaded to capacity?

A. Yes. Under the Interchange Rules, for the nearly ten thousand loaded and empty cars handled by Seatrain Lines, Inc., since beginning their New York operation, their expense for repairs to freight cars, involving the equivalent of over 13 million car-miles, has been a total of $58.07.

Q. Can you give a specific illustration of how these savings in car repair costs and other benefits obtain between the cars handled by Seatrain and the cars handled by the rail routes?

A. Yes; as between railroads there is a reciprocal feature in per diem payments; as a whole the payments equal the receipts. Seatrain only pays per diem as it has no cars to rent. Its average payments for per diem on the New York-New Orleans service has been $16 per round trip of 2,744 equivalent all-rail miles.

By Mr. MUCKLEY:

Q. How do you base any such statement as that?

A. The distance from here to New Orleans and back again is 2,744 short-line distance miles.

Q. You said the Seatrain was what?

609 A. The Seatrain makes the round trip in 16 days, including the per diem. That is what I said. I said nothing about miles.

Q. You said something about the equivalent.

A. They make it a great deal more distance by water—of course, the distance by water is much greater than the distance via the short-line all-rail. They make that longer distance, but in making the comparison I have used only the all-rail distance.

By Exam. FLEMING:

Q. You mean the short-line distance all-rail from New York to New Orleans?

A. Yes.

By Mr. MCCOLLESTER:

Q. Go ahead.

A. At 1.25 cents per car-mile for repairs this would cost the owner $34.30 more if moved by rail than if via Seatrain. The reciprocal rate for the movement of empty cars of 6 cents per mile used in Car Service Rule No. 5 is based upon an average movement of 50 miles per car per day. At this rate it would take 27 days to return the empty car.

Q. And, returning it from New Orleans to New York?

A. Yes. And returning it from New Orleans to New York.

Q. I just wanted to be certain that that was clear.

A. It is.

Q. Proceed.

A. Seatrain makes as many miles per car per day with empties as with loads and only requires 16 days for the round trip.

610 It is, therefore, safe to assume a saving of from ten to fifteen days on a round trip, New York to New Orleans; during periods of heavy demand this will result in increased revenues or decreased capital investment.

Q. Let me see if I understand your testimony, Colonel Ballantine.

A. What is it?

Q. Assuming that a New York, New Haven & Hartford car is at New York to go to New Orleans——

A. Yes.

Q. If that car went all rail, under load, moving back empty the time of the round trip, based upon the average empty and averaged loaded mileage per car per day would, by rail, be 37 days, is that right?

A. Well, if you take in the lay-over for unloading and loading and terminal handling, I think that makes an allowance of four days for terminal unloading and switching, it would be 37 days. That includes the terminal unloading time.

Q. That car, being on the lines of the railroads foreign to the New York, New Haven & Hartford, would pay the New Haven Railroad $37 for the use of the car during that round trip?

A. Yes.

Q. Then, out of that $37, however, the New Haven would have to pay the costs of the repairs incident to the movement of the car 2,744 miles by rail?

611 A. Yes.

Q. Would you figure at 1.25 cents per car-mile or a total of $34.30 for the repairs which the New Haven would have to stand on that round trip movement?

A. Yes; that is the general average. I have not the specific figures—generally, the average cost would be $34.30.

Q. On the basis of the general figures, the New York, New Haven & Hartford—the per diem of the New York, New Haven & Hartford Railroad would net from the owning of that car, for that movement, would be the difference between $37 that it would receive and $34.30 repairs, leaving a net difference of $2.70; is that right?

A. Yes; $2.70.

Q. If, instead of going by the all-rail route, that car would go by Seatrain the round trip would consume 16 days.

A. Yes; 16 days.

Q. So that the New York, New Haven & Hartford Railroad would receive for Seatrain movement $16 for per diem?

A. Yes.

Q. And it would have the car 11 more days by which the car could earn per diem also?

A. Yes.

Q. The car would be transported to New Orleans without turning a wheel, practically?

A. Yes.

612 Q. And it would not be the subject of wear and tear of the rail movement and of going through yard operations?

A. Yes.

Q. Is that right?

A. Yes.

Q. And unless it was one of these small percentage of cars carried on the superstructure of the Seatrain ships, it would be protected from the weather during the entire voyage both down and back via Seatrain?

A. Yes.

Exam. FLEMING. Mr. McCollester, does not the question you have just asked assume that the loaded car moving from New York to New Orleans would be unloaded and brought back as an unloaded car on the return trip of the Seatrain from New Orleans to New York?

Mr. MCCOLLESTER. That was assumed in the question I asked.

Exam. FLEMING. Is there any testimony to support that or anything like that to be shown in the testimony or has it been shown?

Mr. MCCOLLESTER. We will show the practice of the railroads, and the way that they actually operate, by competent testimony. Your question is whether the car would come back empty or loaded?

Exam. FLEMING. I do not understand you to mean a loaded car would be returned. I understood your question to assume

613 that this car would necessarily be taken back empty to the Seatrain on the return trip.

Mr. MCCOLLESTER. Yes; the return empty movement being assumed in both instances both via the rail movement and via the Seatrain movement so as to make it an equitable comparison.

Exam. FLEMING. What I wanted the record clear about in that connection was whether or not this was just to cover a hypothetical situation, or whether it is the practice: Namely, to have a loaded car to be taken back as an empty on the return trip. I wanted to know if that will be brought out in the testimony or whether it has been.

Mr. MCCOLLESTER. The general situation—we do not have any exact figures, Mr. Examiner.

Exam. FLEMING. You may proceed.

Mr. MCCOLLESTER. Mr. Examiner, might I point out that as far as—if I am correct in my understanding of Colonel Ballantine's testimony—it is immaterial for the purposes of the computation whether the car comes back by Seatrain under load or empty, the same per diem is paid on the empty car as on the loaded car.

By Mr. MCCOLLESTER:

Q. Is that correct?

A. Yes.

Q. The time in transit by the Seatrain would be the same whether loaded or empty?

614 A. Yes; and the same amount of cost of repairs by all rail would apply whether the car is loaded or empty.

By Exam. FLEMING:

Q. Nevertheless, I do not know whether the record would be clear in the event that your car was not taken back either empty or loaded on the return trip as to what the situation would be as to the per diem, distinguished in either case, that is.

A. The per diem in either case would be the same—and it so happens that we have so used an illustration, and it so happens that there is an unequal movement of cars empty from New Orleans of 2.50 cars loaded coming back east from the west to those going west from the east. That necessitates a greater number of empty cars west than east.

By Mr. MCCOLLESTER:

Q. That is true for the country as a whole?

A. Yes.

Exam. FLEMING. I presume that will be developed in the testimony?

Mr. MCCOLLESTER. Mr. Examiner, I think I can perhaps clear up one question which I gather you have in your mind: Colonel Ballantine has talked about the return movement and the going and return movement rail and the going and return movement Seatrain, as though the cars came back immediately all-rail and immediately back from Seatrain. That may not happen of

615 all cars set down in the Southwest at various points, but we can say that when it does come to the return movement if it returns empty all rail then the figures for the return movement by all rail would be what Colonel Ballantine has stated as being the figures on return movement by Seatrain, supposing they come back in the manner he stated, would be what he testified to.

Mr. MUCKLEY. He does not explain that the time it takes the car to go there all rail is based on a general average of cars over the country, and not the actual situation, when he compares what

he says the Seatrain has actually done in the transporting of the particular movement involved. I do not think that has been brought out clearly.

Mr. McCollester. That is correct except it may not be that the car coming back by the immediate connecting steamer.

Mr. Muckley. I am assuming that.

By Mr. Smith:

Q. Colonel Ballantine, if railroads or—have railroads up until the Seatrain operation refused to permit the delivery of their cars to other water carriers?

A. No.

By Mr. McCollester:

Q. Will you proceed, Colonel Ballantine?

A. Will you state your question?

Q. Have the railroads ever refused to permit the delivery of their cars to other water carriers than Seatrain?

By Mr. Smith:

Q. Colonel Ballantine, I asked you a few moments ago
616 whether railroads up until the operation of the Seatrain ships have refused to permit the delivery of their cars to other water carriers, and I believe you said they had not.

A. That is right.

By Mr. Lehman:

Q. You mean so far as you know, do you not?

A. Yes.

By Mr. McCollester:

Q. So far as your experience goes?

A. Yes. That would be all I could testify to, what I know.

Q. Proceed.

A. This is the first instance that has come to my attention. For years the rail carriers have permitted their cars, without restrictions, to move via ferries or barges across the Great Lakes, the Chesapeake Bay, from Key West, Florida, to Havana, Cuba, and the Seatrain itself has been handling cars between New Orleans and Havana for nearly four years prior to their entry into the New York field. At all times the owners' interest was protected through the Per Diem Code, the Car Service Rules, and the Interchange Rules, and will continue to be protected in the same manner when their cars move via Seatrain.

Q. What has your study disclosed with respect to terminal detention and transit time of cars delivered to and handled by Seatrain Lines, Inc.?

A. Considering only the railroad-owned cars handled by Seatrain from the inauguration of their New York service on
617 October 6, 1932, to July 31, 1933, there were 5,006 loaded and empty cars into and out of New York, with an average detention of 1.06 days. On 5,802 loaded and empty cars into and out of New Orleans, the average detention was .6 days. At Havana, where there is necessarily much delay due to custom formalities, the average detention on 4,400 loads and empties, in and out, was 4.06 days. The average for the three ports was 1.5 days.

Tables prepared by the Hydrographic Office of the United States Navy indicate that the short-line water distances in terms of equivalent land miles are 1,366 miles between New York and Havana, 1,970 between New York and New Orleans, and 694 miles between New Orleans and Havana.

By Mr. MUCKLEY:

Q. What was that figure?

A. 1,366.

By Mr. THURTELL:

Q. Are these sea miles or land miles?

A. They are the equivalent of land miles.

By Mr. McCOLLESTER:

Q. Proceed.

A. From this it will be noted that ships moving from New York to New Orleans that touch at Havana make 90 miles more than if they moved direct.

The speed of the ships average 330 miles per day between ports, and that is the equivalent miles per car per day between terminals whether loaded or empty.

Considering only the Seatrain's handling, a round trip
618 would consume 12 days in transit, 3.32 days terminal detentions, or a total of 15.32 days for 2,744 miles, equivalent to 178 miles per day per car.

During the period October 6, 1932, to July 31, 1933, the Hoboken Manufacturers Railroad, acting as agent for the Trunk Lines, handled to Seatrain Lines, Inc., 1,118 cars for out-bound and 402 cars for in-bound movement, a total of 1,520 cars; the average detention was 1.61 days. This is about 30 per cent of the total traffic handled by Seatrain Lines, Inc.

Q. Well——

Mr. LEHMAN. I move that the words "acting as agent for the Trunk Lines" be stricken from the answer of the witness. Many of the cars with respect to which he has testified were taken in

violation of Car Service Rule No. 4, and were certainly not delivered by the Hoboken Manufacturers Railroad to Seatrain, Inc., as agent for the trunk line carriers.

Mr. McCollester. I am willing to have it stricken if I may ask the witness if it is a fact that in these cars that you have talked about they were cars that were delivered by the trunk lines to the Hoboken for delivery for its Seatrain or were delivered by the Seatrain to the Hoboken for delivery by the Hoboken to the trunk lines?

Mr. Muckley. That is objected to as leading and suggestive and an incorrect statement of the facts.

Mr. McCollester. I do not see that.

619 Mr. Muckley. That is objected to because they were not delivered to the trunk lines or, rather, were not delivered by the trunk lines to the Hoboken Manufacturers Railroad for delivery to the Seatrain.

Mr. McCollester. That is your contention.

Mr. Muckley. Yes. In fact, it was expressly understand, according to the rules, that they would not be delivered to the Seatrain.

The Witness. That was my understanding, if I understood your question.

Mr. Lehman. I think it is clear now.

By Mr. Lehman:

Q. That that would be a violation of Car Service Rule?

A. For delivery by the trunk lines to the Seatrain and vice versa.

Mr. McCollester. I am still trying to satisfy my most meticulous opponents. Perhaps I can do so in this manner:

Mr. Muckley. You cannot do it at all on this question. Do not try.

Mr. McCollester. Oh. I have been able to satisfy some very difficult people sometimes.

By Mr. McCollester:

Q. Were these cars which the Hoboken Manufacturers Railroad handled between Seatrain and its interchange with the trunk lines or between its interchange with the Seatrain and—between

620 the Seatrain and trunk lines containing freight either for movement via Seatrain or freight that had moved via Seatrain and was movement beyond Hoboken?

A. I do not believe I clearly understand your question.

Mr. Muckley. I think you tangle that up a little bit, Mr. McCollester.

Mr. McCollester. I will be glad to restate it.

By Mr. McCollester:

Q. Were these cars which the Hoboken Manufacturers Railroad handled between the Seatrain, Inc., and its interchange with these trunk lines, or between its interchange between the trunk lines and Seatrain containing freight either for movement by Seatrain, or freight that had been moved by Seatrain and was for movement beyond Hoboken for ultimate delivery?

A. That is my understanding, that the Hoboken acted as an intermediate.

Mr. McCollester. Does that satisfy you, Mr. Lehman, and you, Mr. Muckley?

Mr. Muckley. No. I am not satisfied yet. I want to know where the witness is getting his understanding that we authorized the delivery of cars to Seatrain.

The Witness. I did not say that I had that particular understanding. They were handled in the interchange service of the Hoboken Manufacturers Railroad.

By Mr. McCollester:

Q. Go ahead.

621 A. By reason of increased speed in the movement of cars via Seatrain, the investment required in railroad-owned equipment is greatly decreased. To this very important factor should be added the elimination of practically any expense for freight car repairs while in transit.

Q. What have you to say as to the relative efficiency of Seatrain operation as compared with railroad operation from the standpoint of the economical use of cars?

A. Considering the Seatrain's entire operation, railroad-owned and private line cars from the time they began operating from New York, aggregated 13,251,098 car-miles, of which 20 per cent were private line miles.

Between New York and New Orleans 52 per cent of the total car-mileage was made with a ratio of only 23.8 per cent empty to loaded; between New York and Havana 28.6 per cent of the total car-mileage was made with a ratio of 71.2 empty to loaded; between New Orleans and Havana 19.4 per cent of the car-mileage was made with the ratio of empty to loaded 54.5 per cent.

The ratio of "empty" to "loaded" car-miles was 32.7 for railroad-owned cars, 82.2 for private line cars; combined it was 40.4. This compares with 65 per cent for Class I Railways for 1932, which is equivalent to saying that the railways made 60 per cent more empty car miles per loaded car-mile than did the Seatrain.

622 By Mr. LEHMAN:

Q. Do you have the same statistics with respect to the loading and—loaded and empty movements as related to the cars which were taken in violation of Rule 4?

A. No. The only information I have is taken from the files of the interested parties to which I had access or were taken from the car service rules. I mean by that, that I examined the files to which I had proper and ethical access, and none others.

By Mr. McCOLLESTER:

Q. In your opinion, based upon your experience in car service matters, and upon your general experience in railroad matters also, as a railroad executive and otherwise, over a great number of years, is Car Service Rule No. 4 a just and reasonable rule?

A. No. It would not so seem to me.

Mr. McCOLLESTER. You may cross-examine.

(There was a discussion off the record.)

Cross-examination by Mr. LEHMAN:

Q. Colonel Ballantine, I believe you stated at some length your reasons for expressing your opinion that the handling of cars via Seatrain is cheaper than the usual railroad movement. In considering that question did you mean—did you pay any attention to the effect on train of the railroads of the Seatrain service and movement?

A. No, I have not gone into the traffic feature. I have gone into the difference and, in my opinion, the advantages which
623 it would be to the railroads to use Seatrains from New Orleans to New York and from New York to New Orleans in so far as that applied to the per-car revenues only from the standpoints I have indicated in my testimony. I think I have set forth those advantages to the railroads as far as that movement is concerned, very clearly and I believe effectually.

For example, in the return of empty cars from this territory to New Orleans, which there are many, I think they could move to such an advantage that they could probably save money by hiring the Sea Train to move them.

Q. I will get to that later. The answers that you have heretofore given, have they given any consideration to anything except the physical movements, and have ignored the traffic conditions entirely in stating your savings?

A. No.

Mr. McCOLLESTER. He is considering proper car service matters, of course.

By Mr. LEHMAN:

Q. Do you know of any instances in which the Car Service Rules of the American Railway Association have ever been interpreted to deal with the handling of cars in interchange, or to apply to such interchange of cars?

A. To deal with the interchanging of cars; is that your question?

Q. Yes. I will ask you that.

A. Absolutely. The American Railway Association Car
624 Service Rules are predicated upon the free interchange of traffic; that is what we have made them for.

Q. Do you know of any instance in which the American Railway Association Car Service Rules have been interpreted to provide for the cumpulsory interchange of cars between the members of the A. R. A.?

A. We have the rules themselves that show very clearly.

Q. Were not the rules formulated as the basis of compensation in the event that cars were freely interchanged as opposed to the establishment of such interchange?

A. Certainly not. They were established to perfect a system whereby they could prevent such roads as the Northern Pacific putting up a virtual embargo and necessitating the transfer of traffic so as to keep their own cars at home, and it was to avoid just such things as that that the rules were evolved.

Q. Can you point to any statement or paragraph in the rules of the American Railway Association Car Service Rules which would prove your statement in that connection, or support your statement in that connection?

A. The rules provide and are perfectly clear that they provide for the free interchange of cars.

Q. Will you show me where it is in the rules anything that you find that will permit you to express opinions concerning that which you have or the express—and I would like to know where in the rules you find such a statement because I have not been
625 able to find it.

A. I can read the rules to you if that is what you would like to have me do. Do you wish me to read them?

Q. No, I won't—I only want you to read that portion which provides that cars must be interchanged between members.

A. I do not think I have made any such statement that they must be interchanged between members. I do not think there is anything in the rules that requires that. I said that it permitted the free interchange of cars between members.

Q. Do you know of any instance in which the railroad freight cars have ever been exchanged with a water carrier other than the usual type of car ferry?

A. I do not know that cars have ever been taken on any other types of ships, such ships not being suitable for their handling. I know, so far as the Florida East Coast Car Ferry Company and the Pennsylvania Car Ferry Company, who operate a car ferry service over the Chesapeake Bay, that the cars of various lines have been *lines have been* transferred over these car ferries, and that they have never been refused permission to take the cars of other railroads over these car ferries of the Pennsylvania or the Florida East Coast Company. I know that they have been exchanging with other railroad companies for many years.

Q. I take it,—I will ask you this: I asked you if you knew of any other instance in which freight cars had been ex-
626 changed with water carriers other than the customary type of car ferries such as I mentioned.

A. No.

Q. Was any such device or instrumentality as Seatrain in existence or contemplated at the time that the American Railway Association Car Service Rules were formulated and established?

A. Not to my knowledge.

Q. You gave various statistics relating to the expenses per car-mile and the delay to cars and also the daily mileage, I believe, of railroads cars throughout the United States in the years 1926, 1929, and 1932——

A. Well, I would——

Q. Those figures were related by you to comparative statistics for the Seatrain lines each?

A. I said——

Q. Have you made any study of the expenses per car-mile of hauling railroad equipment from movement comparable to that via the Seatrain itself?

A. I would like to correct one or two statements you have made. I have not given any testimony with respect to miles per car per day in 1926, 1927, or any other year. I referred to the cost for the freight car repairs during certain periods beginning with 1923, by 3-year periods, and that applied to Class I roads as a whole.

Q. Have you any statistics with respects to repairs per
627 car-mile for movements comparable to the distance involved for the Seatrain movement itself?

A. I have only the general average, no specific information, and I do not know that any of the railroads have any further information so far as I know that goes into such detail as you mentioned.

Q. If you made no study of the relative empty and loaded movements of cars that moved via Seatrain and those which moved in disregard of Rule 4—first, did you make such a study?

A. Would you repeat such—your last question?

Q. Have you made any study of the relative empty and loaded movement of cars which moved via Seatrain Lines, Inc., and which moved in disregard of the American Railway Association Car Service Rule No. 4?

A. I have made no study as to the movement of cars contrary to Car Service Rules as I thought I had specifically said. I know that the violation of Car Service Rules is quite general among all railroads, is not confined to Rule 4 by any means. It is quite general.

Q. That has nothing to do with the violation by Seatrain of Car Service Rule No. 4, has it? That would be quite a different situation?

A. No. If there is any crime in violating one of the Car Service Rules then it is just as much a crime if you do that
628 as if you violate any other car service rules. It has been my experience, and it is my opinion that car service rules are observed in the breach quite generally.

Q. Do you know whether or not the Seatrain returns as many trunk line cars for example to the point at which it had received it as it did the cars of such lines as the Missouri Pacific and the Texas Pacific and any other of these benefited cars or lines?

A. No, I would not know that; I do not know that it would be worth while to make a check of that kind. In my opinion, it would be just a waste of time.

Q. Do you happen to know the basis of compensation in the case of Private Car Lines which have moved by Seatrain?

A. No, I was not interested in that situation.

Q. The usual basis of compensation is the payment of so much allowance per mile of travel, is it not?

A. Yes.

Q. Do you know whether or not, as a matter of fact, the amount paid to Seatrain, or by Seatrain, rather, to these private car lines is, or on what basis is it computed, rather?

A. You mean whether it is per diem or per car-mile?

Q. Yes. Whether or not the amount paid by Seatrain for the use of these private car line cars is in any amount or in any case the amount ordinarily paid for such mileage on such cars?

629 A. No, I do not. I do not think it would have any bearing on the per diem feature at all. In other words, it would not make any difference in that connection whether or not these cars were compensated on the basis of the mileage or upon the per diem feature.

By Exam. FLEMING:

Q. In that connection, if you did use the term "private line cars" in your testimony, you used that as synonomous with "private car lines"?

A. Yes, in the common language of transportation circles we refer to what we call a "private line car" as those cars which, technically, they are privately owned—as distinguished from railroad ownership—although they may be owned by subsidiaries of railroads, for example, the Pacific Fruit Express is the largest private car line, as we term it, which is owned primarily by the Union Pacific and the Southern Pacific and also the Fruit Growers Express, which is owned by eight or ten of the eastern district roads.

Q. If you, in your testimony, have used one or other of the terms I mentioned in your cross-examination or in your direct examination, the use of either term is used without distinction; in other words, there is no distinction between the two in your mind?

A. No, sir. There is no distinction whatever. No, sir.

By Mr. MUCKLEY:

Q. Do you consider railroad cars public cars?

630 A. For the public use.

Q. You said as distinguished from other cars privately owned?

A. Privately owned.

Q. Are not railroad cars privately owned?

A. I think I am clear and that I made clear in the record some of the oil—or, in fact, most of the oil transported or offered for transportation is offered in what is termed "Private line cars," and that other cars in such a category are operated and owned by companies which are subsidiaries of a railroad or railroad companies, for example; the Pacific Fruit Express, which I mentioned a moment ago, is one of them.

Mr. MCCOLLESTER. I think I can make it clear to Mr. Muckley.

By Mr. MCCOLLESTER:

Q. By the use of the term "privately owned," you mean by that owned by other than a railroad company?

A. I do, directly or indirectly; yes.

By Mr. LEHMAN:

Q. Does not the compensation for the use of the car require consideration of such ownership factors as interest and depreciation and taxes and insurance, and matters of that kind as well as the cost of repair?

A. Yes.

Q. Have you made any comparative study of the ownership expense including the factors which I have enumerated for

631 movement via Seatrain lines and movement via the ordinary railroad movement?

A. The ownership would not make any difference whether it moved by Seatrain or railroad in regard to such factors that you have enumerated. Every freight car requires repairs to a variable

extent, depending upon the two primary factors, one the elements; that goes to the weather, and, second, the wear and tear on the cars in mileage, that is what I had reference to. Now, as to the first factor which I mentioned, freight car repairs are variable, depending upon the two primary factors, one the elements—as I mentioned heretofore, and that goes on whether the car makes any mileage or not. The rest is dependent——

Q. Have you——

A. I would like to finish.

Q. Go ahead.

A. The rest depends upon the freight car repairs, I. C. C. Account No. 314, which includes that part of the ownership due to the elements, plus that part due to usability.

Q. Have you made any study to determine the investment which would have to be made by Seatrain, rolling stock equipment if they were required to transport traffic in its own cars?

A. No, I would not think it would be necessary with the surplus available. I think it would be somewhat foolish and decidedly improper and uneconomic for them to furnish their own
632 equipment on a pro rata proportion with the enormous number of freight cars that have been standing idle, and in view of the great number of cars that have been standing idle since 1929. In fact, I should doubt very seriously if the Interstate Commerce Commission would permit Seatrain to build and place upon the lines of carriers today their pro rata proportion in view of the enormous number of idle freight cars now congesting the storage tracks of our railroads all over the United States.

Q. Who pays the expense of ownership on these idle cars?

A. The owners.

Q. Seatrain pays only for the use of these cars when they are actually in its vessels?

A. The same as on any other railroad, yes.

Q. Do you not consider it a little unfair to require a carrier to stand the expense of ownership of cars considering all of the idle time and require Seatrain to only bear the expense during the time when the car is not in use?

A. If you can hold Seatrain responsible for the railroads buying more cars than they needed, yes; otherwise, no.

Q. Are cars always in use?

A. No.

Q. Were they always in use in 1929?

A. No.

Q. About 50 per cent of them have been idle, in your opinion?

A. A substantial number.

633 Q. Has there not always been some idle time?

A. Yes; the justification for the purchase of new equipment is the utilization of it during two months of the year. If you can earn enough to pay the carrying charges for twelve months, it is an economic parity, but if you cannot earn enough to pay for the carrying charges during the year it is an economic loss.

Q. As a matter of fact, Seatrain expects the carriers to maintain the cars for its use at every railroad station in the United States, does it not?

A. No; I wouldn't say that. In amplifying my statements that I have made in the last few moments, I do recall that Seatrain has stated that they stood ready, whenever it is necessary, and they are willing at that time to furnish their proportion of the equipment.

Q. Has it not been such a time within the past few months?

A. No.

Q. Is there any point in the United States from which Seatrain would not accept a shipment loaded in a freight car if it were tended to them?

A. No more than any other railroad that would not accept a shipment from Seatrain if they could get it for movement over their lines. They are transportation entities, and as such they would take the shipments.

Exam. FLEMING. Is there anything in this record corresponding—or to be put into this record corresponding to certain of the statements which you have made, Mr. McCollester, as to, and I understand the witness to say also that the Seatrain has expressed or is expressing a willingness to pay a certain portion of the cost of cars or pay its proportion of cost of cars or the physical cars themselves? I am afraid the record may be left hazy with that reference to such a matter unless it is predicated upon testimony that is to be offered.

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Mr. MCCOLLESTER. That is to be offered. I understand that Mr. Brush's testimony is to cover that, also.

Exam. FLEMING. Proceed.

By Mr. LEHMAN:

Q. Will you please explain, Colonel Ballantine, the statement that you made to the effect that the use, via Seatrain, decreases the capital investment necessary by the railroads?

A. Yes. I predicated that statement upon the theory that there was a demand for cars, and if there is a demand for cars by using Seatrain in traffic between New Orleans and New York, you can save 15 days if you run between those two points on the round trip. This will enable the carriers to have less equipment and consequently a lower capital investment to earn 15 days' revenue on cars that would otherwise be in transportation service for all-rail movement.

Q. The use of cars by Seatrain decreases the investment
635 made necessary in cars by the carriers?

A. Yes.

Q. That is on the assumption that the round trip between New Orleans and New York or New York to New Orleans takes 16 days by Seatrain and round trip via railroad service takes 37 days?

A. Due to the difference in speed.

Q. You do not know actually how much time is required for the trip between New York and New Orleans?

A. No; all I know is what the general average movement is of rail cars all over the country. I do not believe that any one would be able to pick out any certain group of cars and give that information without extremely intensive study.

Q. What is the scheduled time of freight trains between New York City and New Orleans, Louisiana?

A. I mentioned, or at least I understand that it is a sixth morning delivery.

Q. You understand it is a sixth morning delivery?

A. Yes.

Q. My understanding is about the same. That is a lot different from the 37 days that you mentioned?

A. Oh, but what about the return of empties on the return movement? The car service division are using a formula on which
636 they estimate 50 miles per day and no one as yet has been successful in challenging that figure so I think we may accept it as correct.

Q. Does not the 37-day average include the time the connection with stored cars?

A. No.

Q. What?

A. It does not; no.

Q. Does it not include the time of storing due to shippers' delays?

A. No. The 37 days I used was made up on the following basis: six days from New York to New Orleans; six days for that transit; four days at terminal which is ten days plus the American Railway Association basis for the movement of empty cars on reciprocal lines of 50 miles per day. That did not take any storage time into consideration at all. In fact, this return trip of 37 days figures 75 miles per day. The railroad cars of the country today are making about 15 miles per day.

By Mr. MUCKLEY:

Q. Suppose this car was put off at Hoboken to the Seatrain, what would happen to your computation?

A. Hoboken?

Q. Havana.

A. You mean supposing this car was put off at Havana by the Seatrain ship, what would that have to do with my computation?

Q. Exactly.

637 A. I really do not quite get your question yet.

Q. The question is very plain. Suppose a car was put off at Havana by a vessel of the Seatrain lines. What would happen to your computation?

A. I would have to make another computation on the New York to Havana run if you want me to, and I can clear up that situation. I have not taken that into consideration yet.

Q. You are figuring on a straight movement between New York to New Orleans and back?

A. Yes.

Q. On your rail comparison you have taken the movement, on the average, all over the United States of empty cars, have you not?

A. Yes. The empty cars moving via reciprocal lines and not by storage. I left out the storage question.

Q. In coming back, you have not taken it coming back directly to the point of origin?

A. It is exactly the same situation.

Q. What is the schedule from New Orleans to New York?

A. On empty cars?

Q. On freight trains.

A. I said that the movement of high class scheduled freight is sixth morning delivery, and I added to that four days which makes ten days. I then assumed that you are going to have these

638 cars handled back to the East in exactly the same way that they are handled generally all over the United States, on the basis of 50 miles per day—and I have used 75 miles per day which is the figure which I stated.

Q. Do you know what the schedule is northbound?

A. No. I assume approximately the same.

Q. That car might have been put in that train and it would have gotten back much quicker?

A. Yes; it could have been, but evidently did not, based upon the figures for the country as a whole.

Q. This case is hypothetical entirely so far as what was done?

A. No; those are the actual figures.

Q. How do you know that the Seatrain is handling empty cars right straight back on the next ship?

A. I did not say that.

Q. What do you mean?

A. I have assumed average conditions. My testimony was to the effect that under the average conditions the movement between

here and New Orleans would take 15.23 days including the terminal time.

Q. This shipment with a load that would go down to New Orleans and it would have four days terminal time there?

A. Yes.

Q. Let us assume that a loaded car goes down to New Orleans and that it would take more than four days terminal time.

A. It would not make any difference if that particular car
639 came back. I do not care so long as some other car came back.

Q. Empty?

A. Or loaded, I do not care.

Q. You do not know whether the Seatrain has hauled down loads and the railroads have hauled back the empty cars?

A. I do not think they have done much of that.

Q. You do not know about that situation, do you?

A. No.

Q. You made a study of that?

A. No; but I do show the relative relationship as it exists today on loads and empties as between the Seatrain and Class I railroads for 1932.

Q. You made some statement about no water damage; you said there would be no green water damage.

A. Yes.

Q. Would green water damage the cars if they were exposed to it?

A. Well, I do not know as it would be very serious; it would depend on how soon that particular car was exposed to rain. It would depend on how soon you could get that car out of the salt water area and even some salt would not hurt the car much, in my opinion. It is quite evident that salt water is thrown on these cars on the car ferries between the terminals of the Pennsylvania on the Chesapeake Car Ferry Route and also around New York harbor,
640 and I have never heard of any particular damage being done to those cars.

Q. Why do you mention the green water?

A. Well, because it was what I thought was an important point.

Q. You thought it was an important point?

A. Yes.

Q. Now, you think it is not; that is right?

A. I say it is important; it is just important as a matter of information only.

Q. You now say it is important as a matter of information only?

A. I have never said it was otherwise.

Q. Is it not true that some of the cars that have been loaded on the superstructure have been subject to green water?

A. I understand not. I have not been on all of the ships. I have no knowledge of my own personal knowledge as to that. I have taken the information from the president of the company.

Q. If there had been, there would be the possibility of damage on account of that, would there not?

A. Damage to what?

Q. You mentioned it; I do not know; you are the expert.

A. I would not go so far as to say that getting a little green water on a car would damage it any. As far as that is concerned, there have been thousands of cars moved across the trestle over the Great Salt Lake, and I have never heard of anyone refusing to ship
641 cars that way. I know that in stormy weather those cars do get a considerable amount of salt. That is a great deal more salty than the ocean water.

Q. Suppose there was a hurricane and these cars did get pretty wet, would that not cause some damage?

A. It would depend. I would say ordinarily no.

Q. You would say no?

A. Ordinarily.

Q. Is there any special strain on account of a storm at sea on a car on the boat of the Seatrain Lines, wherein such a boat where it happened to cross the path of a hurricane?

A. I do not have any information on that. The president has testified with respect to the precautions that were taken with regard to that.

Q. Will you say that a boat of the Seatrain loaded with cars would not have any stress on the cars under such a circumstance?

A. I am not qualified to state.

Q. Do you know as to that, or not?

A. I am not qualified to state as to that matter.

Q. Do you know how the stress and strain that these cars would be subjected to on the Seatrain Lines while the boat was in operation would compare to the stress and strain for the movement via all-rail?

A. I beg your pardon; I did not compare that.

Q. Did you not go on the record and state that there was
642 less stress and strain to these cars on the Seatrain than there was for the stress and strain of movement via all-rail routes?

A. I did not compare that.

Q. I beg your pardon; you did.

A. No; no; you are mistaken. The stress and strain I referred to were due to the moving of the cars backwards and forwards in yard service and in road service, and not by Seatrain.

Q. Just by all-rail?

A. Yes.

Q. I am talking about the stress and strain while on the Seatrain.

A. I am not in a position to testify in regard to that. The president of the company has given testimony to that.

Q. You have made no statement as to that?

A. Not that I recall. I did not intend to.

By Mr. LEHMAN:

Q. Did you ever make a trip on the Seatrain?

A. No.

Q. Did you ever observe the loading operations of the Seatrain?

A. Yes; of the first one that was ever loaded.

Q. Would you say if a Seatrain vessel were in a storm that, due to the roll of the vessel, there would be some stress and strain to the loaded or empty cars?

A. I am not an expert on that.

Q. You have no information on that?

A. I have stated my position.

643 Q. Do you know the distance from New York to New Orleans via the Seatrain compared with the distance from New York to New Orleans via the all-rail route?

A. No; I have not checked it.

Q. Is it longer or shorter, the distance in connection with the Seatrain movement?

A. It would appear to be shorter.

Q. Considerably shorter?

A. I would say so; the all-rail route should be shorter.

Mr. MCCOLLESTER. Admitted.

By Mr. MUCKLEY:

Q. You made a comparison of the Seatrain service with other water service with cars that moved—is there any such service where cars are permitted to be put in vessels, either a car ferry or otherwise, which compares in length of haul to that of the Seatrain?

A. I have not familiar with it.

Q. You do not know anything about it?

A. No.

Q. What ferries are you familiar with?

A. With the Great Lakes and the Pennsylvania over the Chesapeake Bay.

Q. You have seen the Pennsylvania haul over Chesapeake Bay?

A. I know about it.

Q. How long is the Pennsylvania haul over that particular bay, the Chesapeake Bay?

644 A. At least 25 or 30 miles. I do not know exactly the distance. I have prepared no information about it. It is

a matter that readily can be obtained from the tariff publications or others.

Q. You testified about it.

A. I do not think I testified as to the distance.

Q. I am asking you on what you based your comparison.

A. Well——

Q. What is the distance across the Great Lakes?

A. I have not studied those distances, but I have seen that type of transportation.

Q. They are much shorter than the Seatrain distance from New York to Havana?

A. Positively; obviously.

Q. Do you know of any car ferries that go outside of the United States on which cars are permitted to be handled?

A. I do not recall.

Q. Outside of the Seatrain?

A. I do not recall.

By Mr. McCollester:

Q. How about the car ferries across Lake Ontario?

A. I am not personally familiar with them, Mr. McCollester.

Q. How about the Key West Car Ferry of the Florida East Coast.

A. I know that it is in existence, but I am not familiar with it as I might be.

645 By Mr. Muckley:

Q. Let the witness answer—you can ask him later—I want to see how familiar you are with this matter.

A. Go ahead.

Q. You do not know of any such situation?

A. No; I do not.

Q. Do you know of any car ferry where it takes six days to go from one point to another point by boat?

A. I do not.

Q. What, in your opinion, Colonel Ballantine, is the use of the freight car; the proper use of the freight car?

A. They are generally built to earn revenue.

Q. To move on rails?

A. I do not think it makes any difference how they move; their primary and fundamental use is to earn revenue.

Q. Just what do you think they are built to move on?

A. A rail car is built to move on rails. Those rails are not necessarily confined to rails on the ground. That might be rails on bridges, in boats——

Q. The Seatrain boats——

A. The Seatrain boats where they have rails—on car ferries, or wherever the rails may be placed to enable the easy and convenient moving of the car.

Q. This is a freight car that we are talking about here, is it not?

A. Yes.

646 Q. A freight car was supposed to be used on a railroad?

A. Yes; on rails.

Q. It is designed to be used on rails to transfer freight from one point to another?

A. I never designed one. I do not know.

Q. How is that?

A. I say, I never designed one.

Q. What would you say it was designed for?

A. I would say it is designed to take a lot of strains and stresses, and that the strains and stresses be absorbed by the body, both from the movement of the car itself by whatever means it is moved, and both—also, from the stresses due to the lading within this container. That is just my view offhand; if you want to go into a technical consideration of the box car it would be better to have the box-car builder.

Q. You would not know?

A. I would say that the strains and stresses be equally set on the body.

Q. Do you know that these weights would set equally on the body, if this car were in the Seatrain?

A. I have heard the president say that the weights were taken care of properly when the car is in the Seatrain.

Q. You are assuming that?

A. I have seen them anchored, and they looked pretty substantially anchored to me.

647 Q. Freight cars were not built to be used as containers, were they?

A. I would say that they were containers of freight; yes. I cannot see any distinction between a freight car and any other container of freight except its mobile feature.

Q. You say that is the reason they were built, to be used as containers and not to be moved on wheels?

A. I do not think there is any limitation that we can do with a freight car.

Q. Absolutely not.

A. If I can move it by an airplane and save money, that is what I would want to do.

By Mr. McGehee:

Q. Colonel Ballantine, I am talking to you about car service. You were speaking about the New York, New Haven & Hartford

car from New York to New Orleans. Suppose that car was for delivery to the Belt Line in New Orleans. Would the time it was in terminal service be any different if it came in over the Seatrain or Southern Railway at New Orleans?

A. I am not personally familiar with it or with the time it takes to switch, but judging from your first—I will put it this way, judging from the figures which I have put in here I would say that the Seatrain Terminal reaches the Belt Line and the Belt Line would reach, I presume, the Southern Railways Terminal.

648 Q. How many industries are there on this line that connect with Seatrain?

A. I could not tell you, sir, how many were on their tracks.

Q. Do you not know that there is not one shipper who receives freight by Seatrain, freight for delivery at any industry at New Orleans by Seatrain, until we get to the Belt Line or the Southern Railway, Illinois Central, or some other line?

A. I presume by that question you mean that the freight has to be taken to some of the lines of some of the railroads you mentioned before delivery can be made to any shipper?

Q. Yes.

A. I understand it would have to be delivered at some other line.

Q. Did you have in mind, in making your estimate of the time of your terminal delivery in New Orleans, if it came in by Seatrain or otherwise?

A. I just used that time at New Orleans of six days to arrive in New Orleans.

Q. Upon the delivery?

A. Yes; and four days for the terminal operation.

Q. Yes.

A. Assuming that it took so much time to switch it into the industry and out of the industry to start it back again.

Q. How much did you take when it came in on the New Orleans and Lower Coast Railway and delivered at the Belt Line
649 or at some other point for delivery at some industry?

A. I did not make any distinction.

Q. You did not take any into consideration at all?

A. I did not make any distinction.

By Mr. McCOLLESTER:

Q. Your statement was?

A. Four days for terminal service.

By Mr. McGEHEE:

Q. Did you allow four days?

A. Yes.

Q. When it came in by Seatrain?

A. Yes.

Q. And by railroad?

A. By railroad.

Q. How many days did you allow when it came in by Seatrain, did you say?

A. Four days either way. If you want to use the exact figures I can give them to you.

Q. No; we will use your figure of seven days and then you take four days for terminal delivery?

A. I stated six days en route and four days for terminal delivery. I have stated that several times, but I will be glad to state it again.

Q. Did you not use the figure of seven times, that it would come in and out of yard service—you did not use the figure of four times?

A. Not that I recall.

650 Q. You said on these cars the greatest damage to the cars comes in switching or terminal movements, rather?

A. I said that is the opinion among expert mechanical men.

Q. Let us take a carload of furniture loaded at Martinsville, Virginia, on the Southern Railway to Potomac yard over the Southern Railway Lines—over the Pennsylvania Railroad to New York, switched by the Hoboken Manufacturers Railroad Company to the Seatrain, loaded on the Seatrain and carried to New Orleans, unloaded at New Orleans on the New Orleans and Lower Coast Railway, switched back to the Southern Railway and made another trip on the Southern Railway to Meridian, Mississippi, to final destination. This would involve a total movement of 1,714 miles all rail as compared with or in addition to the Seatrain as compared with the total rail haul from origin to destination of the Southern Railway; will you point out to me the great economy in that?

A. I would not undertake to do it.

Q. There is no economy?

A. I do not know. I would have to study the thing more before I could come to any conclusion about that. I do not want to give you any horseback opinion.

Q. Would you figure that out and furnish it to us on the same basis that the others would figure?

A. You want that done?

Q. I do; yes.

651 A. Well, will you give us just a little more exactly what you want? I would like to have just exactly what you want, and I will undertake to give it to you if you will give me all of the facts and circumstances, rates junctions, and so forth, of each haul so that I may have the situation clearly in front of me.

Q. I would like to have it under any kind of conditions at all.

A. I would not be able to undertake it unless I had the facts. Under any kind of conditions I do not think would be representative of anything.

Exam. FLEMING. Are you asking anything to be filed as a supplemental report?

Mr. MCGEHEE. Yes; I want to have a memorandum from him. I think we should have that.

Exam. FLEMING. If you do you may bring the question up later on and state exactly what you want.

Mr. MCGEHEE. I will.

Exam. FLEMING. So that the record will be clear as to what leave is accorded. It may then be accorded.

Mr. MCCOLLESTER. I do not think there is sufficient information on the record right now to enable the witness to know just what is wanted.

The WITNESS. I would have to have additional information.

Exam. FLEMING. If you bring it up again later on you
652 may state fully what you desire.

Proceed.

By Mr. MCGEHEE:

Q. You were speaking of being on a committee at one time that worked on these Car Service Rules; how long ago is that, do you recall?

A. I left the Seaboard Air Line Railway in 1927.

Q. 1927?

A. Yes.

Q. How long were you with the Seaboard?

A. I was with the Seaboard around four years.

Q. Were you on the committee at that time?

A. Yes; I was on the committee when I was with the Seaboard Air Line. I was on the committee when I was with the Union Pacific Railroad three years before that.

Q. Three years before that?

A. Yes.

Q. You spoke about the delivery of cars to connections?

A. Yes.

Q. At the time you were on that committee was there in existence anywhere in this country a situation where a railroad car with a load could be loaded and carried—on board a vessel—to a foreign country, not an adjacent foreign country, but to a point where it did not touch the United States?

A. On a steamship, you say?

Q. Yes.

653 A. No; there was none in existence as far as I know; if you do not consider Cuba an adjacent country.

Q. As far as you know?

A. There was none extant.

Q. The only one that you know of was the Florida East Coast Car Ferry Company to Tampa?

A. You mean Havana.

Q. Yes; to Havana.

A. Yes; Havana.

Q. Do you think it was all right, if these rules were designed before the Seatrain was even contemplated, to attempt to justify the operation of the Seatrain, and to usurp the power of the owners of these cars over them, and to, without their permission, and against their expressed desire, to take them over into another and foreign country, on board a steamship, by means of these rules, keeping these cars in this other country or on board these steamships, so long as the Hoboken Manufacturers Railroad pays per diem on them; do you think it is fair or just or right to attempt to justify anything of that sort?

A. The Car Service Rules were designed to permit, as I say, the free interchange of cars; that is my concept of the situation, and it contemplates the proper reimbursement of the owners for the absence of that car from their lines, and for the expense of all kinds incident to that ownership.

654 Q. Is it not your idea that they were designed to take care of the interchange between railroads alone because such rules were made before such concerns as the Seatrain; they had never been thought of at that time?

A. I think that is probable; that is probable that it may have been.

By Mr. THURTELL:

Q. I heard your remarks in regard to this economy of the Seatrain: is it not true that none of your studies were based upon actual performances as between New York and New Orleans and as between Hoboken and New Orleans, and it was not with a record of the cars as to their movements that took place in connection with the Seatrain; you did not, for instance, check all of the cars that had been handled for a year by the Seatrain from New York to New Orleans, and follow those cars to see when they got back, and if they got back to the Seatrain, to see how long they stayed away and how much per diem accrued under that situation?

A. No; I did not.

Mr. THURTELL. I thought so. That is all.

Exam. FLEMING. Any other questions?

Mr. MCCOLLESTER. Just a few.

Redirect examination by Mr. McCollester:

Q. On this comparison that you made of the movement by Seatrain with the movement by all-rail to New Orleans you al-
655 lowed 16 days for Seatrain time, did you not, round trip?

A. Yes.

Q. The Seatrain voyage each way is six days?

A. Yes.

Q. That would be six—that is, it would be twelve days plus four days for terminal handling at New Orleans?

A. Yes; and 3.23 is the fraction of the terminal detention at both ends.

Q. Would you say, Colonel Ballantine, that a freight car is intended to handle freight?

A. Yes; I would.

Q. Would you say that it is intended to handle freight wherever good, efficient, and economic handling in a freight car can result?

A. Yes.

Mr. McCollester. That is all.

By Exam. Fleming:

Q. Colonel Ballantine, your answers to certain questions on cross-examination were apparently limited to a situation where there is a surplus of cars; you made no explanation or gave any explanation of your views in a similar situation where there would be a shortage of cars.

A. No.

Q. Was that overlooked, or have you any explanation to make as to that situation?

A. Well, I would not want to comment on that in this
656 case, in view of the present circumstances where such an abnormal surplus I know exists, it seems rather remote and beyond a reasonable conception that there will be a shortage, but I will say that if such a thing should come about and the railroads should urge upon Seatrain that it furnish its pro rata proportion, if such an emergency did exist, I would say, if there was a shortage, I would say that that was the Seatrain's proper move to furnish its proportion of the cars and bear the cost of ownership.

Mr. McCollester. May I recall to you, Mr. Examiner, that Colonel Ballantine, I believe, did say that in the event of a car shortage he would consider that the movements of cars by Seatrain would reduce the necessary railroad investment in equipment.

By Mr. McCollester:

Q. Is that correct?

A. Yes.

By Mr. MUCKLEY:

Q. Based on a haphazard movement?

A. Based on the testimony that I have given.

By Exam. FLEMING:

Q. By giving of testimony or in answer to questions that you did give, in a situation where there is a surplus of cars you have, as I recall it, made no particular reference at that time or in that immediate connection, to a corresponding situation. It was with a view of clarifying the record that I asked that question.

Now, you also stated, if I understand you correctly,
657 speaking of the rules, that there have been numerous breaches of the rules, and you have expressed yourself to this effect: That the rules are observed in the breach?

A. Yes.

Q. Will you explain a little more fully what you mean by that?

A. Well, I will be very glad to. Car Service Rules provide—I suppose I had better just read the Car Service Rules themselves. Car Service Rule No. 2 says—I will read Car Service Rule No. 1 first. It says: "Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable."

Rule No. 2 says: "Foreign cars at home on a direct connection must be forwarded to the home road loaded or empty."

That is the portion of the Car Service Rules that I referred to when I said that they are observed in the breach for the reason that the record shows that substantial increases in the proportion of empties to loaded car-miles throughout the country as a whole exist; there has been a very substantial increase in that since 1920.

A study made by the section with which I am connected, for the Federal Coordinator, for the first week in August of this year, showed that for every 100 loaded boxcars moving in the direction of traffic there were 20 empty cars moving in that direction.
658 That is brought about by reason of the fact that they are returning the foreign cars empty and loading their own cars contrary to Sections No. 1 and 2 for the purpose of making a change in their net per diem balance.

Q. Otherwise expressed, your explanation of the statement that in your opinion the rules are observed in the breach would be that the rules are more generally broken than they are observed.

A. Yes; I would say that is the situation.

Q. Now, with respect to this last statement that you have made; am I correct in understanding that under the rules, if a carrier has a demand for a car of a specific character and type and if there is available at a contiguous point both one of its own cars and one of a foreign car, if it is its duty under the rules to send or furnish

the foreign car for that movement, they will take it in a car of their own ownership?

A. To the home line; yes.

Q. Under those circumstances, if the empty car is loaded that would cause the home car to remain idle?

A. If the foreign empty were returned loaded, it would. For that reason they load their own empty on their own lines and sending it *o*wn, sending the foreign car home empty.

Q. If there were a demand only for one car and the foreign car is furnished and loaded and the car—the home car stays unloaded, that would be that that much of the investment in the car of
658½ that railroad would, to that extent, remain idle; would it not?

A. Yes.

Q. There would be no return to that line for the investment in that car to the extent that the car remained idle?

A. That is correct.

Q. The question presents itself to my mind as to whether, with respect to the Seatrain, there would be any existing handicap, it not owning any cars; is there anything to be said on that subject?

A. Well, I would say that the Seatrain, if the Seatrain applied to the Interstate Commerce Commission for authority to purchase equipment, I would think that the Commission would turn it down because there is no justification for the increasing of the capital investment in freight cars at this particular time.

By Mr. MUCKLEY:

Q. General Johnson would turn it down?

A. I do not think—I do not know what General Johnson would do.

Q. Do you know what the Commission would do?

A. I think I do.

Mr. MUCKLEY. I object to that answer. I——

The WITNESS. I would not undertake to say what the Commission would do. You would have to ask the Commission itself as to that.

Mr. MUCKLEY. Now, I do indeed object to that answer, he admits he does not know anything about it.

659 The WITNESS. I admit I do not know what the Commission would do, but I feel very strongly what they should do. Suppose we take a specific case which I have in mind; Road A has a car on its tracks belonging to Road B, and that is the only car available to the shipper, and the shipper comes along and says, "I would like to load a certain class of traffic in this car." And the agent says, "No, I cannot let you have that car because I am

going to send that back home empty; you must wait until I get one of my own cars."

To supply that involves additional switching and additional empty mileage and is the breach to which I referred to, and which is quite general.

Exam. FLEMING. That is all I have. You have concluded?

The WITNESS. Yes.

Exam. FLEMING. And you, Mr. Muckley?

Mr. MUCKLEY. Yes.

By Mr. MCCOLLESTER:

Q. Colonel Ballantine, is there anything in the car service rules by which railroads prohibit the delivery of their cars to other railroads, short line railroads or industrial railroads because the latter own no railroad equipment?

A. I do not know of any such rule.

Q. Do railroads customarily and have they for years customarily permitted the delivery of their cars to carriers that
660 owned no equipment?

A. I understand so; yes.

Mr. MCCOLLESTER. That is all.

Re-cross-examination by Mr. KNOWLTON:

Q. Colonel Ballantine, in the figure that you gave with respect to the question by the Examiner, were you dealing with suitable cars; do your statistics show, or go into the situation of furnishing any car for a certain purpose? In other words, do your statistics show that a certain type of car was ordered and that a different type of car was available; did you take into consideration whether these particular empties were suitable for the traffic?

A. No; but I think I know what you have in mind.

Q. You did not take that into consideration?

A. Just a minute. I would like to amplify that, please. May I?

Q. Well, go ahead.

A. May I qualify that a little further from my general knowledge of the condition of the equipment of the country, I know that there is a certain amount of empty car mileage which I referred to, which is being made in the direction of the loaded movement which is due to the physical condition of the car. There is no question about that.

Q. You mean that a lot of these cars were foreign cars, and they were bad orders, and would be returned without repairs;
661 in other words, that they were returned because they were in condition to move, but were not in condition to be loaded, and would, therefore, be returned empty to their home lines for repair?

A. A small number of them would be subject to that classification.

Q. There is another situation that I had in mind where a shipper asked for a car to load a commodity that would be damaged from rain and a car that was available had a leaky roof, that car would not be suitable?

A. No.

Q. Your figures would not reflect that situation?

A. No; but the specific I cited was with respect to potatoes and if it had been a leaky roof or a stock car it would have sufficed.

Q. But, if it had a defect in the undergear which did not prohibit it moving, it would go back as an empty, and it would have not been advisable to load that car with potatoes under those circumstances?

A. But the agent did not know that in this particular case.

Q. Do you just have one case?

A. I used that as an illustration. It is commonly known, however, that such a practice exists generally throughout the United States.

662 Q. There is one other thought that I would like to follow up a little further. You made some reference to or do you know that there was a car surplus during the years 1931 and 1932?

A. The figures show so; yes.

Q. The figures so show?

A. Yes.

Q. The capacity of the railroads was sufficient so that they could have handled the traffic that was offered them?

A. I would not say that, but they could have handled a substantially increased volume.

Q. Do you know anything about the condition of the boat lines; was the same condition generally true there?

A. I do not know anything about the boat line condition.

Q. If that were so, would you see any justification for the Commission permitting an enterprise such as the Seatrain coming in when there was no surplus of capacity both by rail and by boat; upon what theory do you think they would have a right to enter into this already overcrowded field, if there is a surplus of capacity, both water and rail?

A. That seems to be true as to the tracks laid in the United States at this time. Would you let me go ahead and make myself clear in that regard?

Q. Do so.

A. In the final analysis it has proven to be more economical and indirectly helpful to the railroads—this is another problem, an involved one, upon which I do not propose to pass.

663 Q. Taking that out, you come to the conclusion that the Seatrain should have been classed as an improper enterprise and should have been refused permission to operate, as not in the public interest or otherwise?

A. No; not at all when it has very properly shown its value. If the Seatrain had not shown itself to be of value, that would be something that I would have to look into before passing an opinion upon it. In view of the fact that it has shown itself to be of value, I think it has fully justified its existence.

Mr. KNOWLTON. That is all right; I will get to that later on.

By Mr. MUCKLEY:

Q. Would you say, Colonel Ballantine, that all of the increases in empty car mileage were due to violations of Rules 1 and 2?

A. No: I think that would be a difficult question to estimate because no one knows about all of the violations of Car Service Rules.

Q. What makes you think that the increases in the care mileage has been due to an increase in the violation of Rules 1 and 2 of the Car Service Rules?

A. Because I have personal knowledge of the facts in my various professional studies.

Q. When was your last experience or knowledge of such a situation?

664 A. We have got records in our office that we have been receiving since the first of August 1931—I meant to say that we have records in our office which we have been receiving since the the first of August of this year and, in 1931 I made a very extensive study one of the western trunk lines.

Q. Those studies that you have in your files indicate a sufficient number of violations to account for the increase in empty car mileage?

A. No; it is just an indication.

Q. How many have you in your compilation?

A. I do not know how many there are.

Q. You do not know the number?

A. I do not have the exact number.

Q. You say that rules are observed more by breaking than by obedience?

A. That is a general term.

Q. You still stand by it?

A. Yes. It is common knowledge among transportation men that these are the facts as I have stated them. It is common knowledge.

Q. You say that the car service officials—would you say that the car service officials would take the same view that you do?

A. Between us yes, they might not in public.

Q. Have you discussed the matter with them?

665 A. Yes.

Q. Did they admit that to you?

A. I did not ask them; I did not need to.

Q. Did you discuss it with Mr. Kendall?

A. I have.

Q. Have you discussed it with Mr. Gormley?

A. I would not say that I discussed this particular phase of it with him.

Mr. McCollester. They are not all in the car service division, are they?

Mr. Muckley. They are responsible for the enforcement of the rules which Colonel Ballantine says are more observed by the violation than by the observation.

The Witness. That was a mere figure of speech.

By Mr. Muckley:

Q. A very poor figure.

A. You can take it or leave it, just as you wish.

By Mr. Thurtell:

Q. Do you not think that was an exag'eration, Colonel Ballantine?

A. I do not. Positively not. I have studied this thing, and I have had this thing in my mind, both, sir, for a great many years. I have distributed cars for a number of years specifically, and I am very personally acquainted with a great many car service men who are today distributing cars and my immediate superior, the Director of the Section on——

Q. What did you say?

666 A. My immediate superior, the Director of the Section, has just come from a position on the Southern Pacific where he has been distributing cars and his views and mine coincide with respect to that feature.

Q. After all that you have stated, now, then, it is really just a very small few, out of all the people and all the roads in the country, engaged in this particular matter, and it is not the totality that have come to the conclusion and would say that this rule is more honored in the breach than in its observance; you do not mean to imply that it is the general opinion throughout the country, among those engaged in a study and handling of this matter, that such is the situation that prevails and has prevailed in this regard?

A. We have just had a lot of records representing over 70 percent of the total ownership of the cars in this country, and we

have had a special study made upon certain records which were gotten out by Mr. Kendall or in connection with Mr. Kendall. That is the study upon which I have referred to about the 20 percent of the cars in the direction of traffic, and a very much larger percentage of cars to foreign lines than applies to local lines.

By Mr. MUCKLEY:

Q. Do you know what kind of cars that made up this empty mileage?

A. I could not say exactly.

Q. Were they box cars or freight cars?

667 A. Oh, I thought you meant the names of the individual roads; they were box cars.

Q. All box cars?

A. Yes; they were box cars.

Q. These points where you say there was a load and there was available an empty box car situated at that point and suitable for loading at that time and at that point; is that situation what you refer to where there was a box car of a foreign line and a box car of the home line with a movement in the direction of the foreign line?

A. I will tell you in this way: If, for example, 100 loads moved out of Chicago, and 50 loaded box cars moved into Chicago as a general thing, and the records show at that time that you take 20 foreign cars out of Chicago, empty, and move them in the direction of the 100 loaded cars, would it not seem reasonable to you that they are running the foreign cars home empty?

Q. No; I do not think you can take averages and apply them to individual conditions, and that is what you have done.

A. I am sure that my analysis is correct and justify my statements.

Mr. MUCKLEY. That is all I have.

Exam. FLEMING. Gentlemen, is there any other examination for this witness? I thought the cross-examination of this witness had been concluded. If there are any other questions,

668 however, you may ask them at this time.

Have you any further questions?

Mr. MCCOLLESTER. No.

Mr. MUCKLEY. No.

Exam. FLEMING. The witness is excused.

(Witness excused.)

Mr. THURTELL. I have a witness that came all the way from St. Augustine, Florida, and I would like to have him testify at this time. He wants to go back tonight. I do not think it is right for him to be delayed at this time, because he has important matters to attend to at home and he cannot stay around here.

Exam. FLEMING. It is now 5:30 and besides, Mr. Thurtell, we have not finished the complainant's case. Mr. McCollester, do you expect to finish tomorrow?

Mr. MCCOLLESTER. I expect to finish tomorrow morning.

Exam. FLEMING. You may call your witness, if you desire, after the complainant has completed its evidence. We do not want to have the record mixed with defendants' witnesses scattered throughout the complainant's case.

Mr. THURTELL. I want to put him on now.

Exam. FLEMING. Can you wait until tomorrow?

Mr. THURTELL. Yes; I suppose so.

Exam. FLEMING. Very well. We will adjourn until 10 o'clock tomorrow morning.

(At 5:30 o'clock p. m., November 2, 1933, the hearing was adjourned until tomorrow, November 3, 1933.)

670 ASSEMBLYROOM, MERCHANTS ASSOCIATION,
322 BROADWAY, NEW YORK CITY, N. Y.,
November 3, 1933.

Before HARRIS FLEMING, Examiner.

Met pursuant to adjournment at 10 a. m.

Appearances: The same as heretofore noted.

671–672 PROCEEDINGS

Exam. FLEMING. Proceed.

Mr. MCCOLLESTER: I will call Mr. Brush.

GRAHAM M. BRUSH, previously sworn, testified as follows:

Direct examination by Mr. MCCOLLESTER:

Q. Mr. Brush, what has been Seatrain's position with respect to furnishing cars of its own?

A. Seatrain has informed the railroads on various occasions that when it appeared necessary or desirable Seatrain would, if it were, as I said, necessary or desirable for Seatrain to have cars of its own, to add to the car supply that Seatrain would take such steps to acquire cars either by purchase or rental, or some other means to provide equipment for Seatrain service if such was necessary.

Q. At the present time, when there is a surplus of idle cars, can you see any advantage to the railroads in refusing to have their cars moved by Seatrain?

A. I can see no advantage. I can see disadvantages in Seatrain having to supply cars, in addition to the large surplus of the rail lines.

Q. Will you amplify that?

A. With large surpluses of cars on the rail lines Seatrain's services offer a means whereby railroads can receive revenue from otherwise idle cars by utilizing those cars in Seatrain
673 service, carrying products which would otherwise move by the ordinary water lines, thus receiving one dollar per day for the use of the cars which could not otherwise be used. That one dollar per day would show a substantial profit to the railroads because in Seatrain service the cars are idle and protected from the elements in most of the cases and therefore they are not subject to any wear and tear items, the expense to be deducted from the one dollar per diem revenue.

In other words, the one dollar per diem revenue is net.

Q. If at the present time Seatrain should purchase its own cars would the railroads to that extent lose the revenue from the movement of cars by Seatrain?

A. Yes, they would.

Q. Will you state, generally, what joint rates rail and water are in effect by Seatrain?

A. The joint rates in effect by Seatrain are those with the Texas & Pacific and Missouri Pacific and the short line connections.

Q. Those are filed with the Interstate Commerce Commission?

A. Those are filed with the Interstate Commerce Commission.

Q. Has Seatrain also filed with the Interstate Commerce Commission its port-to-port rates for movement between Hoboken and New Orleans?

A. Yes.

Q. So that the traffic handled by Seatrain between the
674 North, on the one hand, and the South or Southwest, on the other hand, moves under rates filed with the Commission?

A. That is correct.

Q. Does the Seatrain have arrangements or does Hoboken Manufacturers Railroad have arrangements with Seatrain for the through movement of traffic as between those two carriers?

A. Yes.

Q. Are there similar arrangements for similar movements between Seatrain and the New Orleans & Lower Coast?

A. Yes.

Q. So that with respect to any car or any freight on the Hoboken, there are in effect arrangements for through routes between Hoboken and New Orleans; is that correct?

A. Yes.

Q. Since their adoption of Car Service Rule 4, how have the railroads operated under that rule with respect to furnishing cars?

A. We have seen no change since the adoption of Car Service Rule 4 from that when Seatrain Service started out in New York. The railroads continued to load their own cars via Seatrain in

spite of the fact that we have pointed out to them repeatedly that if the northern roads would load cars of the southern and southwestern roads—that we seek via Seatrain—that that would
675 be a saving on the cost of the empty haul back to the South and Southwest on those cars, and the per diem during the empty haul, and would save the car owner the wear and tear during the empty haul. It is well known and well recognized that there is a large surplus of southern and southwestern cars in and around this territory that can be so utilized.

Mr. LEHMAN. I ask that that statement be stricken, as the witness has not been shown to be qualified to testify with respect to surpluses of cars of the Missouri Pacific and Texas Pacific in this territory, described by him.

The WITNESS. With respect to that I would like to say that we have some records that we can insert in the record to prove this statement, and also I would like to testify that I have had it up with the various roads who have admitted that they had not only the cars of southern and southwestern roads other than the Texas Pacific and Missouri Pacific that we have brought up, and also other cars—and I will say that the same thing is true in New Orleans. This last week 28 eastern cars were delivered to us at New Orleans under load which we had not brought South, hence working those cars back into the north under load which otherwise would have gone empty.

Mr. MUCKLEY. I object to the last statement "otherwise would have gone empty." It is a conclusion of the witness.

The WITNESS. It is not a conclusion, it is the record of an investigation with the roads that loaded those cars.

In addition to that, I will say that from February 1, 1933,
676 as an example, to September 30, 1933, Seatrain handled 359 Missouri Pacific cars which were delivered to the Seatrain.

By Mr. MCCULLESTER:

Q. The Missouri Pacific has given its consent to the movement of cars via Seatrain?

A. Yes, therefore, if Car Service Rule 4 was to be used in such a way that roads not consenting to movement via Seatrain would restrict the movement to Missouri Pacific cars, and the eastern trunk lines wished to use Missouri Pacific cars, it would seem to follow that those 359 cars which we had distributed to them in this territory during that period would have been used to load traffic back by Seatrain.

Q. What is the fact?

A. The fact is that two cars out of the 359 were loaded back, in spite of our continued efforts to get them loaded back altogether.

Q. Did you get some of these cars back empty?

A. Yes. 225 of them to date.

Q. They are coming back empty?

A. Yes.

Q. During the time these 225 Missouri Pacific cars were turned back to you empty by the trunk lines have you received shipments under load, loaded in cars of the New York Central and other trunk line railroads?

A. We have. In fact, it is the universal practice for the roads here to load their own cars and, incidentally, return
677 to us cars which we have brought to the North under load of roads not permitting movement via Seatrain, and coming back to Seatrain empty. In other words, the Car Service Rule 4 only works one way. In other words, we must not carry them empty, but it is perfectly all right if they come loaded with the traffic.

Q. When you bring them up loaded, the railroads do not object?

A. Certain of the roads do not seem to object to them coming to them loaded for a haul. But, the rule does not seem to work both ways.

By Mr. LEHMAN:

Q. You do not want to take them back empty?

Mr. MCCOLLESTER. Please do not interrupt. I will let you cross-examine him as much as you wish later on.

The WITNESS. I will answer that question: We are very willing to take them back empty but not when there is a load to go back, not only is the traffic lost right there—it seems to be an improper movement. In other words, if there is a load to go back and we have one of the trunk line roads load their cars knowing it is going to go Seatrain when they have one of these cars to go back to home empty. It is false economy.

By Mr. MCCOLLESTER:

Q. Have you taken this matter up from time to time with the representatives of the trunk lines and have they admitted to you that they were doing just what you have stated?

678 A. Yes.

Mr. MCCOLLESTER. Mr. Examiner, I refer to Exhibit No. 14, which is in the record, being a letter to Mr. Gormley which will indicate the situation was brought to the attention of Mr. Gormley of the American Railway Association.

By Mr. MCCOLLESTER:

Q. What is the fact, Mr. Brush, as to water lines——

(There was a discussion off the record.)

By Mr. McCOLLESTER:

Q. I will ask you this, Mr. Brush: What is the situation as to whether the bills-of-lading on which shipments are consigned to Hoboken; do they indicate that these shipments are for movements beyond by Seatrain?

A. On a very substantial number of them the bills of lading indicate that the movement will be via Seatrain.

Q. Does Hoboken, itself, in any way control the cars that the New York Central or the Pennsylvania or any other trunk line may place for loading on the rails of that trunk line?

A. We do not. We have tried to, but we cannot get the trunk lines to load cars as we have indicated heretofore, in my own testimony.

Q. Although you have requested it?

A. Although we have repeatedly requested them to do so for specific traffic which we knew was going to move and they knew was going to move.

679 Q. For the loading of freight to be moved locally on the Hoboken Manufacturers Railroad, and for movement via Seatrain, what cars—first, what course have and do the Hoboken and its successor the Hoboken Manufacturers Railroad place for loading?

A. We spot the cars for loading locally on our line to move south via Seatrain of southern or southwestern ownership, Missouri Pacific, Texas Pacific, in particular, as we are handling most of their cars.

Q. You do not use cars belonging to the northern trunk lines?

A. Although we have on the Hoboken, cars of the northern trunk lines, we do not use those cars for Havana traffic or New Orleans traffic.

Q. Then, is it a correct statement that when cars of the northern roads, eastern trunk lines or New England roads, have been delivered by the Hoboken to Seatrain those are cars which have been loaded on the lines of those northern railroads and that Hoboken has had no control over the placement of those cars for loading?

A. That is correct.

Q. Has the Hoboken ever transferred the loading of any car from one car to another for movement via Seatrain?

A. Yes, on several occasions.

Q. What were the reasons for that?

A. On one occasion, I recall, there was a bad order car when it was necessary to transfer the lading. When the lading was transferred the cost of unloading the car was charged to the

680 trunk line. We delivered the car and it was paid for without question by them.

On another occasion, I recall, we had some private line cars that we wanted to work back and, with the permission of the shipper, that lading was transferred and the cost of unloading the car was charged, in accordance with the tariff of the Hoboken, to the line delivering the car, and was paid without question. That, of course, increases the expense to those carriers originating the traffic.

Q. On the Hoboken Railroad, can that road, with its present facilities, transfer the lading of all cars offered to them by the trunk lines for movement via Seatrain?

A. No. The facilities would have to be materially enlarged in order to transfer ladings from one car to another, or into the ship via truck.

Q. Has the Hoboken sufficient storage facilities to store sufficient cars for the transferring of lading?

A. No, there are not sufficient storage tracks in order to do so, nor are there proper terminal and warehouse facilities to make such transfer.

Q. If this transfer were made on the cars that you have indicated, the shippers would lose the benefit of a non-break bulk character of the service; is that correct?

A. That is correct. It would increase our costs and increase railroad costs as well as deprive the shipper of the more
681 economical and direct service.

Q. Is Seatrain in competition with the Florida East Coast Railroad and the Florida East Coast Car Ferry on business to and from Cuba?

A. Yes.

Q. Is the route of the Hoboken and the Seatrain, on traffic between the East and Cuba in competition with the route of the north and south rail carriers and the Florida East Coast Car Ferry service from and to Cuba?

A. On a small, very small percentage of traffic that moves within the territory; that is correct. We are in competition. The most of the traffic from this territory, our competitors are the ordinary water lines, but a very small competition by the Florida East Coast and Florida East Coast car ferries.

Q. How has the action of the defendants and the position which the defendants have taken with respect to the delivery of their cars to Seatrain affected the business of the Hoboken Railway?

A. The action of the defendants caused the Hoboken to lose a certain amount of traffic. The shippers have been advised that the cars would not go to and were not going to Seatrain, and obviously the shippers and other consignors of non-break-bulk traffic is not going to ship by a break-bulk service.

Q. Do you keep in active touch with the traffic and solicitation affairs and forces of the Hoboken and Seatrain?

A. I do, in this regard in particular.

682 Q. Do you keep yourself informed of possible traffic to move via Seatrain and traffic which had been lost to the Seatrain route?

A. Many cases have come to my attention or have been brought to my attention and we occasionally receive letters from shippers advising us that traffic had been routed via other ways, frequently by other steamship lines, because of actions of the defendants persuading the shippers not to send their goods via Seatrain for the reason that they claimed their cars would not move there all the way through.

Q. They claimed their cars would not move through?

A. That is right.

Q. Have you also a list of such shippers?

A. I have prepared some information in regard to that.

Q. Do you also have information in regard to shipments that went all rail?

A. Yes.

Q. Have you lost, also, shipments to all rail routes, particularly on Cuba business?

A. The great majority of them are shipments which have been diverted to the water routes and have not gone back to the railroads. I do not remember, offhand, a single case where the shipper has been advised by the defendants that his cars would not move through, and the railroads have gotten the traffic; on the

683 other hand, I do now of several cases where we would have had the traffic if it had gone Seatrain and they would have had it also, and it went by truck to the pier, and it was lost to both of us.

Q. Do you care to give some examples of loss of traffic?

A. I have various letters that can be put into the record indicating what has been happening in connection with the diversion of traffic on account of Car Service Rule 4.

Q. I show you a file of letters; the first one on the file bearing the letterhead of the Oswego Falls corporation. I ask you if those are copies of letters taken from you files?

A. They are.

Q. Those were letters there to Seatrain Lines direct or to Seatrain agents and representatives?

A. That is correct.

Mr. McCollester. We offer those letters in evidence, Mr. Examiner, as an exhibit.

By Mr. McCOLLESTER:

Q. I ask you now are these all the letters in your files on the subject, or are they typical?

A. They are typical.

Exam. FLEMING. This is an exhibit consisting of how many sheets?

Mr. McCOLLESTER. This exhibit consists of seven sheets.

Mr. LEHMAN. I object to the receipt of Complainants' Exhibit
27 as it is apparent from a superficial examination of that that the contents consist wholly of hearsay testimony. So
684 far as I have been able to examine, the entire file of correspondence consists of letters from shippers who are not here for cross-examination.

Mr. McCOLLESTER. It is offered for the purpose of showing what the shippers have represented to Seatrain as the reason why they have not sent their shipments via Seatrain. Of course, we cannot go back of that. So far as we are concerned, it is what the shippers tell us, which are the representations which are made to us.

Exam. FLEMING. Does your objection still stand?

Mr. LEHMAN. Pardon me.

Exam. FLEMING. Does your objection still stand in the light of that explanation?

Mr. LEHMAN. Yes; absolutely. It may just be an easy way that the shippers have to let down Seatrain and give them some reason for not shipping in accordance with the splendid inducements that Seatrain may have offered them. I do not know anything about what their other and different reasons may have been that actuated the shippers, and cannot unless we are able to cross-examine them. I think, Mr. Examiner, it is also objectionable because only a part of the correspondence has been offered, for example, you will note the first letter refers to inquiries made by Seatrain under date of December 27.

However, my objection is more fundamental on that, and is based on the ground that the letters are entirely hearsay and
685 that the authors thereof have not been presented for cross-examination.

Mr. McCOLLESTER. Mr. Examiner, our one point is this: Whether the Car Service Rule and the attitude of the railroads in advising shippers that they would not let their cars go by Seatrain was the real reason that the shippers did not send their cars by Seatrain or not is relatively immaterial. The important point is that the railroads, by having taken that position and having advised shippers that they would not let their cars go by Seatrain, have put it in the power of shippers to refuse to send their shipments by Seatrain, and to represent to Seatrain that that was the ground that the Seatrain has lost the traffic.

Mr. MUCKLEY. Do you expect to develop your request for damage and reparation in this manner?

Mr. MCCOLLESTER. I am going to say as to that, now, that the question has been raised we contend that the complainants in this proceeding have been damaged and that they have suffered substantial damage. We are confronted, however, with the practical difficulty, in proving the precise amount of that damage sufficient to sustain a judgment for that amount. To endeavor to do so, and bring in all the shippers from all over the country who might have shipped Seatrain and have not would probably be more than the amount of damages that might be recovered. It might
686 not, but at any rate, it is not a proceeding here in which we are primarily seeking damage. We are seeking something beyond damages; we are seeking the establishment of reasonable car service rules for the future.

Under those circumstances we ask the Commission, and the record may show it now, on the record made, to find that the complainant has suffered damage, but that the amount of the damage cannot be determined; that is, that it cannot be determined as to the precise amount, and we will not press our prayer upon that matter further than that.

Mr. MUCKLEY. Then you do not withdraw it?

Mr. MCCOLLESTER. We ask damage both in the nature of sustaining our rights in the premises, like an award of one dollar damages.

Exam. FLEMING. Would you state that last a little more clearly?

Mr. MCCOLLESTER. And also we ask for a finding of substantial damage, although the amount cannot be determined with sufficient exactness to sustain an award of reparation, but we do ask the Commission to find substantial damage, because of this car service rule, because of its bearing upon the claim of undue prejudice and unfairness and the Commission might have to determine that there has been substantial damage in order to make a determination of undue prejudice, and therefore we ask them to find that damage.

Mr. MUCKLEY. You withdraw your request for a repara-
687 tion award?

Mr. MCCOLLESTER. Yes.

Mr. MUCKLEY. Is that true of the New Orleans & Lower Coast?

Mr. SPENCE. At least we will ask an award of one dollar reparation.

Mr. MUCKLEY. We will give that to you now.

Mr. LEHMAN. This is all going in the record, you know.

Exam. FLEMING. Of course.

To make the record quite clear as to your position in that respect, Mr. McCollester, it is your statement to this effect as to the

matter of damage or alleged damage; that the complainants in both proceedings withdraw any prayer that the Commission award damages to the complainants or either of them, though they, merely as a basis for a finding that there is undue prejudice, they ask that the Commission find, as a matter of fact, that complainants have been damaged?

Mr. MUCKLEY. Can we call that injured, if you prefer?

Exam. FLEMING. You may do so.

Mr. MCCOLLESTER. As a matter of fact, complainants have been injured.

Mr. MUCKLEY. You are not asking for specific reparation or the award of specific reparation?

Exam. FLEMING. In other words, it would follow from what you have said that even if your present request in that connection was granted that you, in no sense contemplate that
688 the cases be later sent back for further hearing or require any further hearing in connection with the matter of damage or reparation?

Mr. MCCOLLESTER. I think that is clear.

Mr. LEHMAN. Mr. Examiner, I do not withdraw my objection to the letters. I submit that the receipt in evidence of those letters is improper as the basis for any finding by the Commission whether it be a finding with respect to undue prejudice, or a finding in connection with reparation, or whether it is really a moral victory that is desired by the complainants.

Mr. MCCOLLESTER. Of course, on that, if the Commission is to sustain my opponents, it would preclude the railroads from ever testifying as to what has ever been represented to them by shippers which is just what we are doing here. It is a common practice before the Commission, and it is the job of the railroad traffic departments to find out what is the attitude of the shippers and what they represent as the reasons for their actions.

Such testimony, as far as I have observed, generally has been accepted, and I think it is proper.

Exam. FLEMING. Is this the extent of the letters on this subject that you desire or intend to offer?

Mr. MCCOLLESTER. Yes, Mr. Examiner. You will recall I
689 asked Mr. Bush if these were all of the letters and he said no.

Exam. FLEMING. Under the circumstances, the record will show the nature of the objections, and they will be received subject to those objections.

You may proceed.

Mr. LEHMAN. May I have my exception noted?

Exam. FLEMING. Your exception is noted.

The exhibit will be received as Exhibit No. 27.

(Exhibit 27, Witness Brush, received in evidence.)

By Mr. McCollester:

Q. Mr. Brush, yesterday, in the examination of Colonel Ballantine—you heard his examination?

A. Yes.

Q. There some question was raised as to the possibility of green water or salt water damaging the cars on Seatrain ships; what have you to say as to that?

Mr. Muckley. Is this rebuttal?

Mr. McCollester. No; I am opening him up for examination by you on this point. We have nothing to conceal.

By Mr. McCollester:

Q. Will you answer the question, please?

A. On the superstructure deck we carry the cars in the open. It may be a fair question to ask whether these cars might be damaged by green water. Green water, in shipping circles, means a salt solid wave; that is, a solid wave of salt water. It does not mean salt spray. It is my conclusion, from studies made in
690 the design of these vessels and upon examination of the results of the operation that if green water in any volume ever reaches the top deck of these vessels where the cars are standing, it will be because the vessel is foundering and in a sinking condition. We have passed through centers of a very severe hurricane—in fact, in recent weeks we did pass through a center of a very, very severe hurricane with one of our ships.

Mr. Muckley. In September?

The Witness. Yes; I think it was in October or the last part of September.

Mr. Muckley. September.

By Mr. McCollester:

Q. September 18.

A. I think so.

Mr. Muckley. I know about that.

By Mr. McCollester:

Q. Will you proceed.

A. We have passed through several other hurricanes during our past operations but not directly through the center of one where the storm is most severe. We have, however, passed through some very severe portions of those hurricanes. Therefore, we have now the actual case of seeing how these vessels stood up during these storms as compared with vessels of our competitors which were in the region of the hurricane.

There was no green water that reached the superstructure back where the cars were stored. If it should, except as the ship were in a sinking condition, and the ship and cargo were

691 lost, such green water would not materially damage the cars. Almost any stormy day in New York Harbor you can see the harbor barges sticking their noses in and shipping green water all over the cars, and particularly the Pennsylvania car floats operating cars across the Chesapeake Bay. So that I think we cannot see any close comparison between the two; I think we can safely say that when we are comparing the safety of the car itself on Seatrain vessels with other car ferrying or car carrying vessels, that Seatrain is a safer position and location for the moving and handling of cars, from the standpoint of the safety of the cars.

I would like to say that in my remarks yesterday on this subject I mentioned several cases where cars had been lost off of car ferries. Some of those cases are common knowledge, particularly on the Great Lakes. I mentioned, also, a case of the Florida East Coast Cary Ferry, but I want to say that I did not witness it; I was told about it by one of the officers of their vessels but I have since been informed that it is questionable whether that was true. So, I should like to withdraw my testimony of yesterday in so far as any remarks about such accident on the Florida East Coast Car Ferry are concerned because I am not absolutely sure it was true, although it was told me by one of the officers of that organization.

Q. The Florida East Coast Car Ferry is loaded how?

692 A. It is loaded over the stern by means of a ramp.

Q. The cars are shoved on by locomotives, by the use of a removable or movable ramp?

A. That is correct. There was also some question about my testimony yesterday about cars on Seatrain vessels falling through the hatch. I have not examined my testimony but I doubt if I said anything about them falling through the hatch. We are or were trying to compare them with the safety of a car in Seatrain vessel and a car on some other car-carrying vessel, and the question was raised as to the superstructure.

Mr. MUCKLEY. I object to the witness being allowed to occupy the record by asking the opportunity or taking the opportunity to argue about his former testimony. It is not responsive to any question and I do not think we ought to take up time with that.

Mr. MCCOLLESTER. I think he is entitled to clarify his testimony, Mr. Examiner, if there is any question in his mind about it needing clarification. I am sure the Examiner wants a clear record.

Exam. FLEMING. I will ask you to make it as brief as possible.

The WITNESS. I wish to clarify my testimony if it was not specific to this incident referred to: That is, to the extent

693 that should a car get loose on the superstructure deck while at sea, that was adjacent to the opening in the superstruc-

ture deck no material damage would result to the vessel. There might be considerable damage to the undercarriage of the car and possibly the lading.

By Mr. McCollester:

Q. Is it, in your opinion, likely that a car would get loose?

A. No; it is my opinion unlikely that a car would get loose. We have been through the test and there has been no evidence of cars getting loose in such a way.

Q. That was true in the hurricane?

A. That was true in the hurricane, no such damage was caused.

Q. How many cars does the Seatrain ship carry?

A. Our two new ships carry 100 cars each and our old ship carries 95.

Q. How much time is required to load and discharge the ships, in port?

A. We figure that normal turn around of discharging 100 cars and loading 100 cars is 12 hours. However, the vessel that came in last night docked about 4:15 and went through her inspections and was pulled away this morning at 6 o'clock, a little less than 14 hours. She handled over 190 cars.

That is not particularly good time, but it was in the nighttime and operations are slowed down to some extent at night, but it indicates the volume of traffic that can be handled in a short time, by one of our ships.

694 Q. From your experience in the shipping business, what is the normal turn around of carriers of similar capacity?

A. Assuming the Seatrain had 180 loaded cars on board and that the average loading was 30 tons, that would be 2,400 tons. To discharge 2,400 tons and also load 2,400 tons takes us about 12 hours, a total 4,800 tons being handled. It is considered good practice in New York to handle 100, no, to handle 1,000 to 1,200 tons per day with an ordinary vessel.

Q. From 1,000 to 1,200 tons per day with an ordinary vessel?

A. That is right.

Mr. McCollester. I think that is all. You may cross-examine.

Mr. Spence. I have some questions.

By Mr. Spence:

Q. You spoke of instances of traffic which had been lost to the Seatrain route because of the allegation that roads made that they would have to transfer the lading at New York on traffic originating in the Southwest or South?

A. Yes.

Q. There have been such instances?

A. Yes, many.

Q. You do know of cases where the statement was made by the roads that we would have to or that the Seatrain would have to transfer the loads. Do you know of any such instances on traffic originating in the Southwest or South, generally, as well as on the Missouri Pacific and Texas Pacific?

695 A. I do.

Q. And have there been many or few of such instances?

A. There have been many of them.

Mr. SPENCE. That is all.

Exam. FLEMING. You may cross-examine.

Cross-examination by Mr. LEHMAN:

Q. What were the actual dates of the negotiations with the trunk lines which you stated were held in the spring of 1930 or 1931; do you remember which year?

A. I think about 1931.

Q. I am in error about the year; can you tell me in what particular month of the year 1931?

A. I can from the records and correspondence, and the time of the trips to Havana by the Pennsylvania Road people and trips to New Orleans by the Erie people, to investigate our facilities; a good many of those are already in the record in the previous hearing on Seatrain matters.

Q. In the previous hearing you explained that correspondence with Trunk Line officials began, as I recall it, in 1925 or 1926. I do not recall that there was anything about 1931. Could you tell me offhand from your recollection in about what period of the year it was?

A. Well, in June, 1931, Mr. Hodgson and Mr. Perkins called upon Mr. Eisman and—he was of the Pennsylvania; and Mr. Gray, of the Erie, and an appointment was made with Mr. Brister,

696 and Mr. Hodgson saw Mr. Brister but not Mr. Perkins. That was in June 1931. These were really the first efforts we made or serious discussion on this matter although we had been discussing this matter with the Trunk Line officials away back as far as 1925.

Q. Did you have any correspondence showing the final approval of your service between New York and New Orleans on the part of the Eastern Trunk Line carriers?

A. I do not recall any; no.

Q. Do you have any similar correspondence showing final approval of the use of equipment on the part of the Eastern Trunk Line carriers?

A. Not that I recall.

Q. You mentioned the efforts of various Eastern Trunk Line carriers to have Seatrain locate at various sites on their roads including Bay Ridge, New Jersey, by the Pennsylvania?

A. Yes.

Q. It is evident that these arrangements all fell through; is it not?

A. Yes, for the reason I gave yesterday, fell through about the switching arrangement; they fell through due to the Seatrain wishing to be arranged so that all railroads could have the benefit of Seatrain service and not one road.

Q. After the Hoboken had been acquired was not the floating bridge by which all railroads would have had access to it
697 abandoned?

A. It certainly was; it was because it was costing the railroads about twice as much as it should, to use it.

Q. Do any of the railroads except the Erie now have direct access to the Hoboken or Seatrain?

A. Access to the Seatrain over the so-called Belt Line 13, all railroads have access, and we have repeatedly asked the railroads to straighten out their own problems on the Belt Line 13 and, in connection with the Seatrain traffic, so that local Hoboken traffic would go to the railroads and they would get it themselves, business that is being lost to the trucks.

Q. Is the petition for application to operate over Belt Line 13 still up before the Commission?

A. It has been withdrawn.

Mr. McCollester. It has been withdrawn without prejudice.

By Mr. Lehman:

Q. Who was that petition filed by?

A. Hoboken.

Q. It has now been withdrawn?

A. Yes.

Q. Where, in the negotiations with Eastern Trunk Line carriers, did you say anything about the New York service; were not the negotiations with Eastern Trunk Line carriers granted and predicated upon the proposal for foreign service between New York and Havana, rather than New York and New Orleans?

A. The original discussion we had was about Havana,
698 but always with the understanding that Seatrain would start a program of handling Coastwise traffic on the Atlantic Seaboard in the Gulf and between the Atlantic and the Gulf; for example, there would have been no need of any Norfolk site if such had not been discussed.

Q. You mentioned the Pennsylvania specifically, so I will refer particularly to that road.

A. Yes.

Q. Do you know if they dispute, the Pennsylvania, as to whether or not those negotiations had been restricted to the New York, New Haven & Hartford Railroad?

A. I have heard two Pennsylvania men get up and state, in open meeting, that they had not.

Q. Did you not receive a letter from Mr. Eisman, from the Pennsylvania Railroad, stating that your negotiations with the Pennsylvania had looked toward the establishment of a route only between New York and Havana—New York and Cuba—and did not include New York to New Orleans, and did you reply to that letter?

A. I certainly did. I think, possibly to avoid embarrassment, we had better not call Mr. Eisman to the stand and have him testify that that was correct, under oath. Or, some of the other Pennsylvania people, because they might have a different view under oath.

Q. Why do you not call Mr. Eisman?

699 A. Well, if we are pressed, we will, and a few other people. There is nothing to prevent your calling him.

Q. You attempted to convey the impression that construction loans were obtained from the Shipping Board before the vessels were constructed, and various terminal arrangements were completed, and certain contracts accepted in reliance upon the negotiations with the Trunk Line carriers; am I mistaken in that view of your testimony?

A. No. That was quite correct.

Q. What was the date of your application to the Shipping Board for a construction loan?

A. August 19, 1931.

Q. It was subsequent to the conversation which you said you had on June—1931, June 1931?

A. Yes.

Q. It was, then, subsequent to the conversation which you said you had in June of 1931 with the Eastern Trunk Line carriers, was it not?

A. That is correct.

Q. Was the—or did not the loan agreement consummated with the Shipping Board restrict the use of the vessels to foreign service between New Orleans and Havana?

A. It did not.

Q. Did not Section 38—by the way, can you tell me the date of that agreement in connection with the construction loan?

700 A. December 3, 1931.

Q. Did not Section 38 of that agreement provide as follows:

"Section 38. The vessel will be operated in maintaining service on lines between New Orleans, Louisiana, and Havana, Cuba, and in other exclusive foreign service between Atlantic and/or Gulf

ports and Cuba, or in such other service or services as the Board may by resolution hereafter authorize, and not otherwise."

A. That sounds correct to me.

Q. Did you file an application with the United States Shipping Board under date of September 23, 1932, in which the following statement was contained and made by Seatrain Lines, Inc.:

"*To the United States Shipping Board:*

"Seatrain Lines, Inc., respectfully petition the Board as follows:

"Whereas, due to the large decrease in commerce moving between New York, New Orleans, and Havana, as shown by the statistics forwarded with our letter to the Board of September 21, 1932, it has become necessary to advise the Board that, despite the fact that Seatrain Lines, Inc., has in the past carried in one vessel ("Seatrain New Orleans") more than half of the tonnage moving from New Orleans to Havana and expects in a short time to succeed as well in the New York-Havana trade, the volume of United States-Cuban commerce has dropped to a point where Sea-
701 train Lines, Inc., would be operating at less than 20 per cent of capacity with its two new vessels ("Seatrain New York" and "Seatrain Havana") now nearing completion, providing such vessels do proportionately as well as its present vessel, which is being laid up; and

"Whereas, this decrease has taken place mostly in the past year during the period of construction of the new vessels, there having been sufficient tonnage for many years past to more than keep both new vessels operating to capacity in that trade on the basis of our records of tonnage carried as compared with our competitor; and

"Whereas, a sudden and unexpected increase in Cuban business must take place or Seatrain Lines, Inc., must seek other traffic to avoid financial difficulties, which would jeopardize the investments of the Board and our stockholders and deprive the shipping public of the benefits of this new type of water transportation; and * * *"

A. Yes. Why do you not read the rest of it?

Q. I will if you want, but I do not think it is necessary.

A. Well, I wish you would.

Q. Answer the question first.

A. What was the question?

Mr. LEHMAN. Read the question.

(Question read.)

The WITNESS. In answer to your question whether we made an application to the United States Shipping Board containing
702 those words, I will say that we did not make any application to the United States Shipping Board; we addressed a communication to them asking their approval of what we were going to do; quite different from making an application to it.

Mr. LEHMAN. I submit that that is merely stating the matter in reverse, including the meaning of it in that that you attach to it. In order that you may have the situation clearly before you, I will put the petition in evidence. It is not very long, and I only have one copy, so, with your permission, Mr. Examiner, I will simply give it to the reporter to transcribe in the record.

Exam. FLEMING. Are you referring to the paper which you have just read?

Mr. LEHMAN. Yes.

Mr. MCCOLLESTER. I will be glad to have counsel explain the relevancy of the matter as to the issues which are here before the Commission.

Mr. THURTELL. As I understand it, Mr. Brush expects us to believe that if the Shipping Board withheld their permission that he was going to do that anyhow.

The WITNESS. I think so; yes.

Mr. THURTELL. Then this was just a farce, this petition?

The WITNESS. I think it was just a procedure which we considered to be proper at the time, and I still think that it was proper.

703 Exam. FLEMING. Mr. Lehman, that may be done.

Mr. MCCOLLESTER. Mr. Examiner, I have said that, before that is to be copied in the record, in the event it is, I would like to have counsel explain its relevancy upon the record.

Mr. LEHMAN. The point is, Mr. Examiner, that complainant argues that it made certain investments in facilities and in the construction of terminal arrangements because of representations or inducements made by the Eastern Trunk Line carriers when, as a matter of fact, it appears that the complainant clearly knew and was advised subsequent to conversations with the Eastern Trunk Line carriers, that it would not be permitted to use vessels in Coastwise service between New York and New Orleans without permission of the United States Shipping Board, which permission it did not even seek until September 23, 1932.

Mr. MCCOLLESTER. What has that got to do with the taking of cars?

Mr. LEHMAN. I think it is clearly relevant, and I do not think we need to discuss that any further here.

The WITNESS. I should like to state for the record that, in the first place, the terminal at New York was built for Havana traffic as well as for any future Coastwise traffic; that Car Service Rule

4 applies to Havana traffic, and whether we had ever carried

704 any Coastwise traffic or not the negotiations would have been held and, in fact, were held with the Havana traffic being of primary consideration. With respect to your statement that we knew we could not carry Coastwise traffic, I should like to state

on the record that the officials of the Shipping Board on December 3, 1931, advised us that the clause which you read, No. 38, in our construction load agreement, permitted us to operate our vessels in foreign trade and also in all domestic traffic that we wished to carry.

I want to say that we have been operating our vessels clearing for a foreign port and returning to American ports since the beginning of our operations, and that there is no objection to that practice on the part of the Shipping Board so far, and we do not anticipate any.

Mr. MUCKLEY. I ask that this statement as to what the statement of the member of the Shipping Board, or whatever person the witness said it was, be considered as purely hearsay testimony.

The WITNESS. If necessary, I will bring the official of the Shipping Board in here and have him testify as to what I have just said.

Mr. MUCKLEY. I do not want to argue with you that question, Mr. Brush. I want to direct my remarks to the Examiner, and have a ruling.

Mr. MCCOLLESTER. Well——

705 The WITNESS. I can bring this member of the Shipping Board in here and he will tell you what he said to me.

Mr. LEHMAN. The witness is volunteering testimony wholly uncalled for while we are waiting for a ruling in regard to the receipt of the petition; and as I understand it, that has not been ruled upon yet. I do not think the witness should volunteer such information under those circumstances.

Exam. FLEMING. Is there any objection to which there has not been a ruling as yet?

Mr. LEHMAN. No; there is not.

Mr. MUCKLEY. Yes; there is an objection that I made to the testimony of this witness.

Mr. MCCOLLESTER. I have an objection. I objected, Mr. Examiner, to the inclusion of what Mr. Lehman wants copied into the record on the ground that it is irrelevant to the issues here.

Exam. FLEMING. We will note that objection.

Proceed.

Mr. Muckley, have you something to say?

Mr. MUCKLEY. My objection is or my motion is that you strike from the record what this witness says a member of the Shipping Board told him.

Exam. FLEMING. We will note that objection, and if there is other testimony of the right character, Mr. Muckley, the present ruling is without prejudice to a ruling that will be

706 made in accordance with those circumstances as they may exist.

(Discussion off the record.)

Exam. FLEMING. That may be included in the record at this point. It is not the policy of the Commission to permit the copying of documents into the record, but under the circumstances, it would appear to make the record clearer.

Mr. MUCKLEY. I see.

Mr. LEHMAN. I believe it would be well to put it in in view of the fact that part of it is already in.

"Whereas said new vessels will provide an improved means of water transportation with which the public interest can be served by reducing the costs and necessity of boxing, crating, or bagging of cargo or of providing other suitable containers; by lessening damage by breakage and soiling of packages of contents; by reducing the opportunity for theft and pilferage; by reducing the cost of cargo insurance; by quicker dispatch of cargo through the elimination of delays in loading, discharging, handling and re-handling of cargo at loading and discharging ports; by eliminating present icing methods and reducing the costs of refrigerating perishable products shipped in refrigerator cars; by producing a cheaper and better means of transporting products shipped in carload lots by making possible the shipment by water from producer to consumer in ordinary box, gondola, refrigerator, and tank cars of many commodities in bulk which cannot now be
707 moved by water; by opening up new markets to agricultural and manufacturing industries through the foregoing and other advantages; and

"Whereas one of the primary purposes of the Shipping Act, the Merchant Marine Acts, and especially the Construction Loan Fund, is the fostering of new and improved means of water transportation with vessels of the best and most efficient type which will aid in the development of commerce; and

"Whereas the new type of transportation which will be afforded by the Seatrain vessels has only been made possible through the aid which the Board has accorded to Seatrain Lines, Inc., by its construction loans, and in so doing the Board has carried out the purposes of said Acts; and

"Whereas such new and improved means of transportation can now be made also to serve American shippers by the carriage of other cargo in the spaces in said vessels which cannot at the present time be utilized in the transportation of cargo of Cuban origin or of Cuban final destination; and

"Whereas but one company has for many years maintained and now maintains the only water service between New York and New Orleans and has enjoyed and now enjoys a monopoly of water transportation between these two principal ports of the United States because no other steamship service has been able to meet

the competition of this railway owned and operated water line; and

"Whereas said operation is only possible under the terms
708 of the Panama Canal Act by the temporary permission of the Interstate Commerce Commission, which can continue only so long as the trade is not adequately served by independent water lines; and

"Whereas similar control of commerce and the absence of competitive water service does not exist between any other of the major ports of the United States; and

"Whereas said railway and water line also operates to Texas ports in competition with independent water lines, all of which lines are competitive only in a minor degree with the line to New Orleans and then only in respect of interior business tributary to any Gulf port; and

"Whereas, if only United States-Cuban commerce was carried by these new vessels, such vessels, if operated most economically, would leave New York and New Orleans simultaneously for Havana and continue beyond Havana to New Orleans and New York respectively; and

"Whereas, without diversion from said routes and while providing for United States-Cuban commerce the maximum service which will be required under existing conditions of this type of transportation, said vessels can at the same time give the advantages of this new and improved service to the American shipping public between two of the greatest ports of the United States and replace the one line control therein with a fair and stimulating competition; and

709 "Whereas the shippers are best able to judge from the point of view of public interests as to which means of transportation best serves their individual interests by being given opportunity to choose the service best suited to his interests; and

"Whereas it seems but fair and proper that the American public without discrimination of one citizen against another should be entitled to enjoy so far as is possible the many advantages of this improved type of service; and

"Whereas the encouragement of fair and stimulating competition, especially in the field of transportation, has been the fixed policy of Congress and the United States, and has been the main spring of improvement and development of transportation and trade; and

"Whereas question has arisen as to the meaning and effect of Section 38 of the Construction Loan Agreement;

"Now, therefore, Seatrain Lines, Inc., without prejudice to the rights of the parties to said agreement, respectfully requests that

the Board approve of Seatrain Lines, Inc., transporting in said two new vessels other cargo than that of Cuban origin or Cuban final destination at freight rates not lower than those collected by competing water carriers on the same commodities for the same service, on the condition that Seatrain Lines, Inc., shall at all times
give preferential consideration and service to commerce
710 between United States and Cuba, and that under no circumstances shall any cargo of Cuban origin or destination be excluded by or deferred to such other cargo.

"SEATRAIN LINES, INCORPORATED,
"(Sgd.) GRAHAM M. BRUSH, *President.*"

"147038 Sep 23 '32

"Seatrain Lines, Inc., 39 Broadway, New York, N. Y. Cable Address: Searails. September 21, 1932.

"Honorable T. V. O'CONNOR,
"*Chairman, United States Shipping Board,*
"*Washington, D. C.*

"DEAR MR. CHAIRMAN: For the information of the Board, I enclose herewith statistics showing movement of cargo from New Orleans to Havana and from New York to Havana by the various lines for the past four months, together with a summary which shows that the total traffic moved by all lines from New Orleans to Havana averaged 62 carloads per week for the period, and from New York the total traffic of all lines averaged 41 carloads per week for the period. For the month of August, the total traffic of all lines was 34 carloads per week from New Orleans and 27 carloads per week from New York. The company statistics of Seatrain Lines indicate that September shows no improvement
over August, so that we are faced with starting service with
711 our new vessels, after laying up the "Seatrain New Orleans,"
in a trade where the volume of tonnage is so small that our ships would run only 50 per cent full if our seven competing lines should withdraw and turn over their entire tonage to us. If such an event was possible, Seatrain Lines could about break even from the standpoint of financial operation, assuming that we could obtain 50 per cent loading north-bound. Unfortunately, however, the north-bound traffic is worse than the South-bound. We are running 20 per cent less north-bound this year than south-bound for the first eight months.

"For the information of the Board, on the detailed chart enclosed there is also shown the movement from Key West to Havana.

"To give the Board another viewpoint of the situation, we have taken the statistics of the Bureau of Research for the years 1927, 1928, and 1929, which were subnormal years for Cuba in spite of

these years being boom years for other nations. These statistics are as follows:

Exports—Long Tons (2,240 lbs.)

Year	New York to Havana	New Orleans to Havana	Key West to Havana
1927	272, 739	206, 774	264, 945
1928	231, 479	146, 527	236, 993
1929	212, 387	159, 717	227, 029

"Taking the figures as shown on the statistics compiled from the records of the Cuban Customs House for the past
712 four months and computing them to the basis of twelve months, the exports in long tons (2,240 pounds) for 1932 would be as follows:

"New York to Havana, 62,085; New Orleans to Havana, 91,491; Key West to Havana, 36,270.

"I wish to call attention of the Board to the fact that up to a year ago the tonnage being handled by Seatrain Lines had shown a steady increase from the beginning of its service in each and every quarter, in spite of the falling off in the total tonnage moving to Cuba. Since that time, however, the decrease in total tonnage moving to Cuba has become much more severe, as is shown by the enclosed statistics.

"The statistics enclosed herewith show that the Seatrain Lines has carried 22.1 percent of the total tonnage moving to Cuba from New York, Key West, and New Orleans, with one ship operating out of New Orleans. If our two new ships do as well as the present "Seatrain New Orleans," which will be laid up, we would carry 44.2 per cent of the total. Taking the years 1927, 1928, and 1929 as average years for Cuban business, there is an average movement of 25,698 carloads per annum moving to Cuba from New York, Key West, and New Orleans (other United States ports are insignificant). If Seatrain Lines should carry its proportion of this tonnage with its two new ships, these ships would carry 11,350 carloads per annum, which is, of course, far beyond their
713 capacity. We estimate that 80 carloads is the maximum average load which we can obtain with this type of vessel, due to the ever-present necessity of returning empty equipment such as tank cars, brine cars, etc. On this basis, with 50 trips a year from New York to Havana and 50 trips a year from New Orleans to Havana, the maximum capacity of the two new vessels will be 8,000 carloads. It is readily seen that in anything like normal times the two new vessels can operate to their maximum capacity carrying the normal Cuban tonnage.

"Yours very truly,

"(Sgd.) GRAHAM H. BRUSH,

"GMB:HMB.

"Copy to:

"Vice Chairman Samuel S. Sandberg, United States Shipping Board, Washington, D. C.

"Commission H. I. Cone, United States Shipping Board, Washington, D. C."

United States Shipping Board, Washington, D. C."

By. Mr. LEHMAN:

Q. When was the contract for the use of the equipment actually consummated between Hoboken and Seatrain?

A. I do not recall, Mr. Lehman, when the official document was signed.

Q. The contract itself.

A. The contract itself was consummated upon the commencement of operations.

Q. The contract which has been received in evidence as Exhibit 25 was dated as of November 15, 1932?

A. Yes.

Q. Do you have the correspondence to indicate when the
714 negotiations were actually concluded which looked toward the consummation of the contract which was not consummated until November 15, 1932?

A. I do not recall; I do not recall at all.

Q. When was the pamphlet, which has been received in evidence as Exhibit No. 20, prepared?

A. There have been several editions of this, so I do not know which issue of this it is. They are all substantially the same.

Q. When was the first edition prepared?

A. After the first edition of this pamphlet, Exhibit 20, was prepared—it was prepared at the time of the launching of the first vessel, September 13, 1932; the first new vessel.

Q. Did the first edition contain the statement with respect to interchange tracks and practice which is shown on page 18 of Exhibit 20?

A. Yes; I believe it did. If I am wrong about it, I will correct the record upon examination of the first edition.

Q. So, in your opinion, the first edition is the same as this one in that respect?

A. I believe it is.

Q. Was that reference to the interchange practice indicative of an arrangement which had actually been concluded prior to your discussions with Messrs. Gormley and Kendall?

A. With the Hoboken?

715 Q. Yes.

A. Yes.

Q. You stated that your knowledge of the opposition to the Seatrain service was known to you about three weeks prior to the date of the first sailing which was October 6, 1932; as a matter of fact, did you not advise, in your letter addressed under date of October 1, that the opposition of the Trunk Line carriers was conveyed to you about three weeks prior to the date?

A. It was somewhere right along just prior to the beginning of the service.

Q. It was three weeks prior to October 1, as indicated in your letter to Mr. Lawrence?

A. Oh, is that the letter you are talking about?

Q. Yes. The letter dated October 1.

A. I cannot recall back that far but if there is such a letter and it says three weeks, that is so.

Q. Did you inform the Shipping Board on October 5 that equipment of the carriers opposed to Seatrain service would not be used?

A. I do not recall any such statement.

Q. Do you recall this statement which was made at the hearing before the Shipping Board on October 5, 1932:

"I have heard some remarks about our using the railroads' cars. That is a very technical subject; but we have some
716 cars rented, and we have not asked any railroad that does not want to give us the car to take it. We do not intend to do any such thing. If there are railroads that do not want us to use their cars, we are not going to take them."

A. Again, your record is so incomplete, that you do not get the true picture. I do not recall the exact question that was put to me, but as I recall the situation generally, that was about cars in connection with port-to-port traffic, and not other traffic.

Q. That statement was made.

A. Quite so, I believe such a statement as that, and I will repeat it right now, and put it all in the record but it was on port-to-port traffic that we do not use cars of railroads that do not get the line haul on them.

Q. Was that prompted by the receipt of the letter addressed to you by Mr. Lawrence on October 3, just previously?

A. I do not recall.

By Mr. THURTELL:

Q. Mr. Brush, do you think you stated that quite correctly? Do you recall that the hearing before the Shipping Board had to do solely with the right to run these Seatrain Vessels and carry business between New York and New Orleans and that was the whole matter of the hearing at that time, and it was not that hearing—or, rather, it was in that hearing at that time that you made the statement that has been read here? How would

717 we understand that except in connection with the business which you were handling?

A. Mr. Thurtell, that statement which I made before the Shipping Board was in connection with port-to-port traffic. We have made it repeatedly and it was not misunderstood, I am sure. As to the hearing before the Shipping Board—well, I will let it go at that.

By Mr. LEHMAN:

Q. Did Seatrain ever made applicable for membership in the American Railway Association?

A. No. It is not eligible.

By Mr. MCCOLLESTER:

Q. You recall that Overseas did.

A. Yes.

By Mr. LEHMAN:

Q. I understand that.

A. I think that clears it up. Overseas did Seatrain did not.

Q. Are all of these Seatrain vessels similar to any other type of vessel operating——

A. I beg your pardon?

Q. I will state it this way: Are Seatrain vessels similar to any other type of vessel operating or operated by the water carriers of which you have any knowledge?

A. With respect to design; no they are not.

Q. Are they with respect to loading?

A. Their method of loading is different also.

Q. Do you publish any rates for port-to-port traffic which are in excess of those published by the break-bulk lines?

A. I could not tell you.

718 Q. You can answer generally, in any event, Mr. Brush, that you do not?

A. Our rate policy is to quote rates of our water competitors, if we know what they are. Most of them do not file tariffs actually.

Mr. MCCOLLESTER. I think there are some actual rates on traffic that is not competitive that are higher than paper rates carried by water lines.

By Mr. LEHMAN:

Q. They are in the minority?

A. It is our traffic policy to quote the same rates as our water lines quote.

Q. You stated that the amount of $46,138.32 per diem was paid by Seatrain to Hoboken and New Orleans & Lower Coast?

A. Yes.

Q. Between October 26, 1932, and—no, 1930.

A. 1930.

Q. Between October 26, 1931, would it not be?

A. As I recall it, October 26, 1931, to June 1, 1932.

Q. Will you please state separately the amount paid to the Hoboken and the amount paid to the New Orleans & Lower Coast.

A. We can do it for you. I do not have it here.

Q. I would like to have information, Mr. Brush, showing the amount paid separately to those two carriers and, also, showing the amount paid by the Hoboken to the individual trunk lines, the carriers, and the dates of such payments.

719 A. I will try to do so.

Mr. McCollester. We will furnish that.

By Mr. Lehman:

Q. You think you can furnish that?

A. Yes. We will try to get that for you in a couple of weeks.

Mr. Lehman. Mr. Examiner, in view of the fact that the statement of Mr. Brush with reference to the interpretation placed upon Section 38 of the Loan Agreement being permitted to remain in the record, I would like to offer for the record the interpretation of that section of the Loan Agreement which was made by the Shipping Board in its letter dated October 3, 1932, which was sent to Mr. Lawrence, chairman of the Trunk Line Association.

Mr. McCollester. May I see that?

Exam. Fleming. Is your object in offering that at this time to be used in connection with the cross-examination?

Mr. Lehman. I desire to ask no further questions concerning it. I merely wanted it to complete the record on that point.

Exam. Fleming. Is it not the proper course to reserve that and use it in rebuttal, if you so desire?

Mr. Lehman. I thought it might be well if it were to go in where this reference to it occurs.

Exam. Fleming. Is there any objection?

Mr. McCollester. No objection, Mr. Examiner, except as to its relevancy, and I do object to it on the ground it is not relevant.

720 Exam. Fleming. The furnishing of copies of this is waived, is it?

Mr. McCollester. No; I have no copy of it.

The Witness. We have never, to my knowledge, seen it.

Mr. Lehman. I ask that it be copied into the record, Mr. Examiner, immediately after the petition to which this refers, and for which permission has already been granted to have it copied in the record.

Exam. FLEMING. The Commission objects to the record being extended in that way. You may offer it as an exhibit.

Mr. MCCOLLESTER. I object to its being offered as an exhibit, Mr. Examiner; I wish to note my objection on the ground it is entirely irrelevant and immaterial and incompetent as to any issue in this case.

Exam. FLEMING. It will be received and the objection may be noted.

(Exhibit 28, no witness, received in evidence.)

By Mr. LEHMAN:

Q. You stated that the use of the Hoboken Manufacturers Railroad was prompted by a desire to give the Trunk Line carriers equal access to the Hoboken?

A. To the Seatrain via the Hoboken.

Q. That governed your choice for that railroad for that use?

A. Yes.

Q. Was that solution of the matter one which originated with Hoboken or which was suggested by the Trunk Line carriers?

721 A. I do not recall who first thought of the Hoboken to give free access to all carriers, but it was discussed at considerable length with the officials of the Pennsylvania Railroad in particular.

Q. When was the Hoboken acquired?

A. April 1932.

Q. Can you state to us the date that the switching reclaims were first withdrawn?

A. What switching reclaims?

Q. Switching reclaims to which the complainants contend are payable to it on cars moved via Seatrain?

A. I do not recall the date that they first deducted the reclaims to us from our per diem settlements; that is, speaking for the Hoboken-Shore Railroad and for cars while in possession of the Hoboken-Shore. I will be glad to get the complete information as to the amounts we claim due the Hoboken and the amounts with which these claims have been involved; that is, the amount withheld from each individual railroad as near as I can secure all of this data, we will be glad to give it to you.

Q. I would like to have it, Mr. Brush.

A. I will be glad to get it for you.

Q. You stated——

Exam. FLEMING. Just a moment. Are you asking for leave to file a supplemental matter of any kind?

722 Mr. LEHMAN. Yes; that is already covered by the request which I made a few moments ago.

Exam. FLEMING. Then your question does not anticipate that anything be furnished to the Commission in this connection?

Mr. LEHMAN. I am quite confident that my previous request will cover this one also.

Exam. FLEMING. Leave has been accorded to furnish that, has it?

Mr. LEHMAN. Yes.

By Mr. LEHMAN:

Q. You stated that Seatrain stood ready to furnish its own proportion of the equipment; I do not believe that this record shows that equipment is actually owned by Seatrain. Will you please state.

A. Seatrain owns six flat cars and one ice car.

Q. Have you made any study to determine what investment would be required by Seatrain if it were called upon to furnish equipment for the traffic which now moves on its vessels?

A. No; because I cannot conceive of there ever being a situation where Seatrain could properly, or should properly supply sufficient cars for its total carrying capacity.

Q. Have you made any study to determine what investment would be required for the proportion which you contemplate may be required in the event of a car shortage?

A. No, Mr. Lehman, because we feel that Seatrain is helping the railroads with respect to car supply and not hurting
723 them, and, therefore, if that is true, we will never be required to supply equipment. We believe, for the reasons stated previously, that it enables the railroads to give better service in that it enables the railroads to get empty equipment from one part of the country to another part of the country, via Seatrain vessels under load with traffic which would otherwise be carried by the water lines.

Exam. FLEMING. I may be mistaken, but I had the impression from your previous testimony that you indicated that if conditions changed there was a car shortage or very different conditions on that account, Seatrain, for that reason, would be willing to furnish cars?

The WITNESS. Yes.

By Exam. FLEMING:

Q. To furnish its quota, or a proper quota of such cars?

A. That is correct.

Q. Is that wholly consistent with your present statement?

A. No, sir; it is not inconsistent with our present statement.

Q. I asked if it were consistent.

A. It is consistent.

Exam. FLEMING. Proceed.

By Mr. LEHMAN:

Q. You stated that empty Missouri Pacific and Texas Pacific cars were returned by the trunk lines—the trunk line carriers to Seatrain for hauling back to New Orleans or the Southwest?

724 A. Yes.

Q. Is that not required by the rules of the American Railway Association?

A. If the trunk lines do not have a load in the vicinity of those cars where they were unloaded, they have the right to return them via Seatrain.

Q. If they do not have a shipment available for loading?

A. That is correct. Incidentally, those cars I mentioned were all Missouri Pacific.

Q. Were what?

A. Were Missouri Pacific cars, not Texas & Pacific. No Texas & Pacific cars were included in the statement which I gave you.

Q. Have you made any study which would indicate whether or not the shipment was ready for loading at the time and placed—or at the same time and place that the empty Missouri Pacific car was located?

A. Yes.

Q. In how many instances, of the instances cited by you of Missouri Pacific cars, was there a shipment available and ready at the same time and place?

A. When we know of a volume movement involving three or four or ten to twenty or thirty cars we take it up with the rail carrier who originates the traffic to endeavor to persuade that carrier to use Missouri Pacific or Texas Pacific or some other southern or southwestern line cars permitting movement

725 via Seatrain, so that there have been numerous instances where we have specifically asked and inquired about the situation from the rail lines, and several times we have gotten their expression of cooperation, and their actual cooperation, and other times they have told us they would much rather supply their own cars so as to earn per diem on their own cars.

Q. Your answer is rather general. Do you, as a matter of fact, know whether or not the empty Missouri Pacific cars which were available at any particular time on the road of a trunk line carrier and may have been right where a shipment going via Seatrain without causing that road to haul the Missouri Pacific cars which were then at another point, to the point where the load actually existed?

A. Yes. Shipments of machinery from New England points to Mexico, you asked me for an example, and that particular case is an example.

Q. When was that shipment made?

A. Several months ago.

Q. It was a point upon what road?

A. I think it was the New Haven, in fact I am sure it was New Haven Railroad that originated that traffic.

Q. It was a point on the New Haven; at what point on the New Haven Railroad did that shipment originate?

A. I do not recall.

726 Q. Was it your information with respect to whether or not empty Missouri Pacific cars were available at that exact point?

A. Yes; and I think they eventually supplied some of them and loaded them with those cars right in that vicinity.

Q. They had to haul these empty Missouri Pacific cars up to this point in order to load them?

A. No; they had them right in the vicinity.

Q. How many cars of machinery were involved in that shipment?

A. About twenty.

Q. Is that the first boat that moved to New Orleans?

A. No; that was a different lot of machinery which was all loaded in New Haven, over our protest, cars, and we got the answer that they were going to load it in the New Haven cars because the New Haven wanted to earn per diem on their own equipment which otherwise would be idle.

Q. How many of the empty cars cited by you could have been loaded for the shipment via Seatrain without hauling the car from some other point on the line of the Trunk Line carrier?

A. I do not know, Mr. Lehman, but it seems, and our information is that the Trunk Lines do not wish to load these cars. They have never said that they did not have one available when we took it up with them. So, I judge that there is no effort to use them. In fact, we know there is no effort to use them and

727 that is the reason why we have them returned empty.

Q. Do you know whether or not any of the empty Missouri Pacific cars available on the roads of the trunk line carriers would be suitable for the class of traffic which moved at the same time from those roads via Seatrain?

A. We do. Most of the Missouri Pacific cars are class A which we are handling. Those are only box-cars and you can judge for yourself whether they were suitable.

Q. The question who decides whether or not the car is suitable, is it the carrier or the shipper?

A. Both.

Q. Do you know of any instances where empty Missouri Pacific cars were available to a shipper which was suitable for shipments which may have gone via Seatrain?

A. Yes; in the instances that I have named, as a matter of fact, where shippers insist upon loading Missouri Pacific cars, and the New Haven supplied them with their own cars in those instances.

Q. Do you know of any other instances?

A. Not such a clear case of a shipper demanding the use of a particular car where the shipper felt it was necessary for his goods and the railroads refused to permit him to use that, as that case that I have just cited. I do not know of any such clear-cut case where the railroads have permitted the shipper to use
728 that particular car, Missouri Pacific car, for such traffic.

Q. You will admit, will you not, Mr. Brush, that most of the equipment which is moved via Seatrain is moved on local bills of lading to Hoboken?

A. Yes; I think that is correct.

Q. You also admit, do you not, that most of the shipments via Seatrain which have originated on the lines of the Eastern Trunk Line carriers have not moved on joint or through rates but have moved on local rates to Hoboken?

A. That is correct.

Q. You stated that a substantial number of bills of lading indicated that the movements would be via Seatrain?

A. Yes.

Q. In those particular cases what was the destination indicated in the space provided in the bill of lading?

A. Where shipments via Seatrain were indicated it usually showed final destination somewhere in Cuba or the Southwest.

Q. Is there any instance where the information stated in that particular bill of lading which is provided for showing destination, indicated anything in connection with Seatrain?

A. I could not say. I have to look it up. I really do not know.

Q. It is true, is it not, that on all shipments the bills of lading to Hoboken—that is, where the bills of lading showed the shipments to Hoboken—that the shipper had a perfect
729 right to reconsign that car or reship it under a new bill of lading to Allentown, Pennsylvania, or anywhere else in addition to shipping it via Seatrain?

A. Hoboken has a reconsignment tariff and the shippers can reconsign in accordance with that tariff.

By Mr. MUCKLEY:

Q. How far is it from Key West to Havana?

A. Ninety nautical miles.

Q. How many land miles is that?

A. Oh, it is about six to five.

Q. 1.5, is it, the ratio?

A. Something like that.

Q. You are familiar with the operation of the water carriers or car ferries named in Exhibit 8?

A. Yes, most of them.

Q. Let us find out to where they operate.

Mr. McCollester. It is shown there, is it not?

Mr. Muckley. It shows the points between which they operate, but not the body of water.

By Mr. Muckley:

Q. Take the first one there, the Canadian Pacific Car & Passenger Transfer Company. Do you know what body of water that crosses?

A. That crosses Ontario.

Q. Lake Ontario?

A. Yes.

Q. Do you know the distance there?

730 A. No.

Q. That is from Ogdensburg, New York, to Prescott, Ontario?

A. Yes.

Q. Take the second one, Drummond Lighterage Company from Seattle, Washington, to Port Gamble, Washington. Do you know what body of water that crosses?

A. Yes; that is Puget Sound.

Q. The third one, Florida East Coast Car Ferry Company—that is, U. S., and you have given us that?

A. Yes.

Q. The fourth one, Foss Tug & Barge Company, from Seattle, Washington, to Richmond Beach, Washington: that is Puget Sound also?

A. I think so.

Q. Take the fifth one, Grand Trunk-Milwaukee Car Ferry Company, from Milwaukee, Wisconsin, to Grand Haven, Michigan.

A. That crosses the lake.

Q. Take the next one, Mackinac Transportation Company from Mackinaw City, Michigan, to St. Ignace, Michigan.

A. That crosses the port there.

Q. That crosses the straits of Lake Superior?

A. Yes.

Q. Take the seventh one, Ontario Car Ferry Company, Ltd., from Coburg, Ontario, to Genessee Docket, Charlotte, New York.

731 A. That crosses Lake Ontario.

Q. Take the eighth one, Pennsylvania-Ontario Transportation Company from Port Burwell, Ontario, to Ashtabula, Ohio.

A. Yes.

Q. Is that Lake Erie?

A. Lake Erie; yes.

Q. The ninth, Puget Sound Navigation Company from Seattle, Washington, to Bremerton, Washington; I assume that is Puget Sound?

A. Yes.

Q. The Seatrain Lines, I suppose you have given us all of that?

A. Yes.

Q. The eleventh one, Toronto, Hamilton & Buffalo Navigation Company from Port Maitland, Ontario, to Ashtabula, Ohio.

A. Yes.

Q. That is Lake Erie, is it not?

A. Yes.

Q. The twelfth one, Yorke & Sons Barge Company, from Vancouver, British Columbia, to Vancouver Island points.

A. Yes, that is Puget Sound.

Q. Puget Sound?

A. Yes.

Q. Do you know of any other service of that character in the United States—car ferry service?

A. No, not independently owned. There are quite a num-
732 ber of other services, car floats or car ferries operations.

Q. These are by the railroads themselves?

A. Yes, those are by the railroads themselves, as far as I know.

Mr. LEHMAN. May we have an understanding, Mr. McCollester, that for each of these shown on exhibits, we may refer to the distances shown in the Railway Guide; that is, for these companies shown on Exhibit No. 8?

Mr. MCCOLLESTER. You mean these you have just named?

Mr. LEHMAN. Yes.

Mr. MCCOLLESTER. You mean by "Guide" the Official Railway guide?

Mr. LEHMAN. The Official Guide, yes.

Mr. MCCOLLESTER. All right.

By Mr. LEHMAN:

Q. Is there any similarity, Mr. Brush, between the operations of the carriers' car ferries shown on Exhibit 8, page 3, and the Seatrain?

A. Similarity with respect to service, did you say?

Q. Service and operation.

A. Yes; I would say they are all performing the same service.

Q. In what respect?

A. Transporting passengers and goods over a body of water.

Q. Does Seatrain compete with any of the carriers shown on that statement?

A. Yes.

733 Q. Which one?

A. The Florida East Coast Car Ferry Company primarily. I do not know all of the others.

Q. Any others?

A. I do not know that it competes with any of the others, in any direct manner. There is no real substantial competition with any of the others.

Q. The Florida East Coast Car Ferry Company is the only one?

A. Yes, the Florida East Coast Car Ferry Company is the only one.

Q. What portion of the cars that you handle are handled on the superstructure deck; just roughly, I do not want it exactly?

A. I should say, at the present time about 8 per cent of the cars.

Q. Have you ever had any damage to the contents of these cars on account of water?

A. No; not to my knowledge.

Q. On that voyage in September when you ran into the hurricane, did you not damage cars that way; did not a lot of damage to contents of the cars happen on account of the cars being washed over or sprayed with sea water?

A. No.

Q. Well, have you ever had any damage to the contents of any of these cars on account of sea water?

734 A. Not that I know of.

Q. Were not these cars I have just referred to, during the hurricane, damaged, and the contents of the cars also damaged on account of the cars being washed over or sprayed over with sea water?

A. Well, it was not sea water.

Q. What kind of water was it?

A. And, the extent of the damage was extremely light.

Q. What kind of water was it?

A. Rain water.

Q. The damage was on account of sea water?

A. No.

Q. Damage would not occur on account of sea water, you mean?

A. No, it would not.

Q. What kind of water would it be?

A. With a 140-mile an hour wind, driving rain, the contents of the cars—of two cars, were damaged from the hurricane.

Q. Has the Hoboken or the Seatrain paid any attention to Rule 4?

A. Do you mean have we handled our cars in accordance with Rule 4?

Q. Yes; have you obeyed it in any way at all?

A. We have not.

Q. You compared the services of the Seatrain and Hoboken handling traffic with that of the Morgan Line, as to the
735 interchange and so forth. You refer to the lighterage services. The terminals of the Morgan Line are across the river from Seatrain, are they not?

A. That is correct.

Q. If a water carrier was operating from the same side of the river as you are, could the cars not being spotted at the dock of the water carrier, on the tracks there, and the contents thereof unloaded on the dock without the necessity of lighterage service?

A. They could; unfortunately, that is one of the problems of the Hoboken Manufacturers Railroad. We have been trying to get the railroads to stop lightering and send by rail.

Q. Is it done?

A. It is done.

Q. Only in the case of the water line asking for lighterage service, do they get it where rail service is available?

A. No, that is not correct. The railroads choose whether or not they send it by lighter—in most instances——

Q. That answers the question.

A. All right.

Mr. MUCKLEY. I think that is all, Mr. Examiner, I would like to, in accordance with the agreement with Mr. McCollester, refer to the testimony of Admiral Cone, given in Docket No. 25565 and have that considered a part of the record in this case. I
736 understand Mr. McCollester will refer to the testimony of other witnesses, but I would like to refer to that testimony in connection with the cross-examination of Mr. Brush and my understanding is with Mr. McCollester that we can refer, by reference to the testimony of any witness in the former case, and that that will be considered as a part of the record in this case.

Mr. MCCOLLESTER. Mr. Examiner, on that point I think the understanding was, and certain all that I intended to agree to was that the parties should, within a reasonable time, say 10 days after this date, indicate the portion of the record in the other case that they intend to rely on or to refer to here, but I would certainly not agree, when it comes to briefing, that the entire record in the other case be argued here.

Mr. MUCKLEY. I am simply naming Admiral Cone's testimony.

Mr. MCCOLLESTER. I have no objection except I would object upon the point that Admiral Cone's testimony has no relevancy to any testimony here. I do not object to it on the grounds that it is not here but in another record, and if the Examiner overrules my objection of immateriality and irrelevancy, I would agree that that testimony go in without objection on the grounds stated.

Mr. MUCKLEY. This is only to save the expense of having the testimony copied in the first case.

Exam. FLEMING. I do not understand what this agreement of you gentlemen is. I think you referred to an agreement
737 reached at the beginning of this hearing.

Mr. MCCOLLESTER. We have not come to this part of it yet.

(Discussion off the record.)

Exam. FLEMING. Mr. Muckley, it is a fact, is it not, that the agreement to which you have just referred is not an agreement already referred to in this record but you desire to stipulate a portion of the record in Docket No. 25565 in the first case by this accord between you and counsel on the other side?

Mr. MUCKLEY. That is correct, and the part of the testimony I want to designate at this time is that of Admiral Cone.

Exam. FLEMING. His testimony in toto, including——

Mr. MUCKLEY. Cross-examination.

Exam. FLEMING. Cross-examination and any exhibits offered in connection with it, Mr. Muckley?

Mr. MUCKLEY. Yes. There were no exhibits offered in connection with Admiral Cone's testimony.

Exam. FLEMING. Do you desire to stipulate also certain portions of the record in that, Mr. McCollester?

Mr. MCCOLLESTER. I would like to say that so far as Mr. Muckley's proposal is concerned, I agree that the testimony of Admiral Cone may be stipulated, if I may have an objection to it on the ground of its irrelevancy and immateriality. I do not object to it being included in this stipulation. I do not object to the manner of its being put into the record.

738 One of the same agreements between opposing counsel and for the purposes of saving duplication of testimony already before the Commission, I desire to stipulate for the record here, for the purpose of showing the interest of shippers in having their non-break-bulk service via Seatrain, the testimony both direct and on cross-examination of the following witnesses in Docket No. 25565:

Mr. Norris W. Ford, the Manufacturers Association of Connecticut; that testimony is at pages 548 to 575, inclusive.

Mr. Edward L. Hefron, of the Boston, Massachusetts, Chamber of Commerce, that testimony is to be found at pages 575 to 594, inclusive.

Mr. A. G. T. Moore, of the Southern Pine Association, whose testimony is to be found at pages 594 to 692, inclusive.

Mr. C. J. Bachman of the Jefferson Island Salt Company, whose testimony is to be found at pages 625 to 653, inclusive.

Mr. William N. Webb of the Celotex Company, whose testimony is to be found at pages 653 to and including 680.

Mr. Charles V. Hanlon of the two Terra Cotta Companies—the Federal and the other one, whose name I do not have before me just at the moment, but whose testimony is to be found at pages 681 to and including 690 of the record.

Mr. W. S. Cornell of the Shreveport Chamber of Commerce. His testimony is to be found on pages 690 to 698, inclusive.

I think these page references give the entire witness'
739 testimony both on direct and cross, but if it does not it is my intention that the entire testimony of these witnesses, and any exhibits identified by them are to be stipulated here.

Mr. McGEHEE. I wish to say that we have no objection to the manner of introducing this testimony, but I do object to the relevancy of that testimony as not relating to the issues in this case.

I would like to stipulate in that same manner the testimony of Mr. Joe Marks, who testified as a witness for the Southern Railway.

Exam. FLEMING. Do you desire to introduce only his direct or the cross?

Mr. McGEHEE. Including his direct and cross and any exhibits that he may have introduced.

Mr. LEHMAN. Mr. Examiner, I should like to have the opportunity to indicate any other portions of the record which, after I have had an opportunity to examine the portions of the previous record described by Mr. McCollester, I feel should be made a part of this record on behalf of the Trunk Line Association. I will be glad to do that within a period of time stated by you and to furnish for the counsel a description of the portion of the record I would like to have considered.

Mr. McCOLLESTER. That is entirely agreeable to me, Mr. Examiner, and as I say I might desire to stipulate additional
740 portions also. Can you leave it that the parties would have 10 days in which to name any portions of the record in Docket No. 25565 that we desire to stipulate and five days thereafter to indicate any additional portions? I have in mind if I indicate some portions my opponent may want to put in something else to answer that.

Mr. THURTELL. I think your suggestion is a right one: Namely, this; we can, by an examination of this record, find certain testimony which would so closely apply to the testimony which we wish to offer here, that I am sure that the railroads would be glad to agree that within 10 days counsel would furnish to opposing counsel a list of the testimony which they want to refer to, and may refer to, and take from that previous record.

Mr. MCCOLLESTER. Yes.

Mr. THURTELL. Suppose Mr. McCollester furnishes that to us within 10 days and then we have 5 days in which to also furnish the list of the testimony and the appropriate references to the testimony which we want to avail ourselves of.

Mr. MCCOLLESTER. I do not think it ought to be specified. I think that each side, in 10 days, should furnish a list of the testimony and that also each side be given an opportunity to furnish a supplemental list within 5 days.

Mr. MUCKLEY. I think that is all right.

741 Mr. THURTELL. I think that is all right.

Exam. FLEMING. Leave will be accorded to file, within 10 days, with the Commission, furnishing copies to opposing counsel, such description of such portion of the previous record referred to which they requested.

Leave will also be accorded for counsel to file, within 15 days, certain further portions of that testimony that they may find they desire then to stipulate, in the view of the present understanding, furnishing opposing counsel with copies of that matter.

Mr. THURTELL. I have just one question to ask.

By Mr. THURTELL:

Q. Mr. Brush, you spoke about your insurance rate, it being a favorable rate.

A. Yes.

Q. Also, referring, I suppose, to the insurance on each—to the insurance on the hull and machinery?

A. Hull and machinery.

Q. How is the hull insurance, is that a percentage value?

A. Yes. Our hull insurance rate is 2 percent with a deductable franchise of $4,500 in sinking, stranding, fire, collision, and, I think, heavy weather, and the amount of the franchise is dropping down from that level of $4,500.

Q. The hull insurance rate is 2 percent of the value?

A. That insures our hulls to approximately 60 percent of the value of the vessel and the rest is covered by freights and

742 disbursements.

Q. You reckon this vessel as worth about one and one-half million dollars?

A. Yes.

Q. On which you carry $900,000 worth of insurance?

A. No; we carry one and one-half million dollars, partly in the hull and partly in freight and disbursements, which is a very much lower rate, 1⅞ and 1¼—1¼.

Q. Your hull insurance is 2 percent, and that is 2 percent of one and one-half million dollars?

A. No. That covers the hull, the balance of the vessel is covered by the freight—seven-eights of one percent; and disbursements at 1¼ percent.

Q. Now, in the event of a loss your insurance, then, would not make you even and whole so far as the loss of the vessel is concerned?

A. Oh, yes; we are fully covered including freight on board.

Q. I think you said you had the vessel insured for a million, and it was worth one and one-half million dollars. I do not quite get the drift of your statement.

A. I will try to explain marine insurance.

Q. It is somewhat complicated.

Mr. McCollester. If you understand it, Judge, you are a good lawyer, indeed.

By Mr. Thurtell:

743 Q. Make plain, if you can, how, with the insurance policy you would pay out a million and a half dollars, in the event of total loss, you are still protecting this freight you have aboard the vessel.

A. Because we also insure what we call disbursements to the extent of $440,000, which is the total loss insurance for that vessel, if that vessel is lost you get your $440,000 of so-called disbursements. Also, the freight which we insure for about $40,000, being the maximum freight money that we might earn on any particular voyage, where the vessel is lost, we include that and in case of loss we receive $40,000 for the freight, so that taking the vessel at a total loss, we would collect in the neighborhood of fifteen hundred thousand dollars.

Q. What is that?

A. Fifteen hundred thousand dollars. In the case of a partial loss the value of approximately 50 percent of the hull is sufficient to pay for any part of the loss, if the vessel was stranded, and it cost more than one million to repair it, why, it would be called a total constructive loss and we would collect then our freight and disbursements.

Q. Well, now, we will say that the vessel is insured for a million and on that base rate of 2 percent. If this $440,000 or $450,000 that you spoke of that you have paid for, is there a rate on that?

A. Yes, those are the disbursements rates—freight and
744 disbursement rates which are seven-eights and one and one-fourth percent of the value.

Q. Which is which?

A. The freights are the lower of the two.

Q. The disbursements would be one and one-fourth?

A. Yes.

Q. Then you have your "freight" which you say would be covered by insurance in the amount you have described. In other words, it would be 2 percent on $1,000.

Mr. McCollester. Two percent on one million dollars.

By Mr. Thurtell:

Q. Two percent on one million dollars, and one and one-fourth percent on $45,000—$440,000; and seven-eighths percent on another $40,000?

A. That is approximately correct. Those figures are approximately correct.

By Mr. McGehee:

Q. You had a vessel to sail this morning from New York at 6 o'clock?

A. Yes.

Q. For what port did that vessel sail?

A. Havana, Cuba.

Q. When will that vessel arrive in Havana, Cuba?

A. Why, she is scheduled to arrive in Havana on the fourth day—wait a minute—no; wait a minute—she will arrive in Havana in 3½ days.

Q. Does that carry—does that vessel carry cars loaded for
745 points in Cuba?

A. Yes.

Q. They will be unloaded at Havana?

A. Yes.

Q. Speaking of the cars that that vessel had when it got to New York destined New Orleans to points in the interior there, and from New York, will it pick up any traffic in Havana destined to New Orleans and to points in the interior?

A. That is correct, in accordance with our usual practice; whether we get anything this week will depend upon whether they stop fighting down there or not.

Q. You do not have any sailings of the Seatrain direct from New York to New Orleans, do you?

A. Not scheduled; no.

Q. They all go through Havana?

A. That is the way our schedule is made out.

Q. The witness on yesterday, Mr. Brush, Colonel Ballantine, he described and drew certain comparisons as to the handling of cars from time to time by rail as compared with Seatrain—that is, as to the standpoint of time—and he used for his illustration, New York to New Orleans.

A. Yes.

Q. I have a map here of the Southern Railway for your convenience. Have you solicited traffic—furniture, to be exact, and asked the Southern Railway to furnish cars at Martinsville,
746 Virginia, to be moved to New York and then—that is, to be moved to New York by rail, then by Seatrain to New Orleans, then by rail from New Orleans to Meridian, Mississippi?

A. I have heard rumors of such instances. Whether it actually moved I do not know and the reason for such a movement I do not know.

Q. It is obviously a peculiar condition where traffic moved by Seatrain or any other vessel.

What I am driving at, and what I want to know, so as to make a proper comparison, you have expressed the most favorable one, I want to take the most unfavorable one that I can find, if I can find what it is, to be perfectly frank with you—will you tell me how far south of the Southern Railway system you want to come and want us to load cars to New York to Cuba and through to New Orleans and back into the interior?

A. I can answer that clearly: We do not expect and do not believe that that would be economical or do not believe we would be able to get traffic which could move all rail. There is so much traffic moving on water routes that we could obtain for our ships and move it to the ports by rail instead of truck if the railroads would cooperate with us that we would never have one single pound of freight taken away from the all-rail routes, and, in fact, would have to build more ships for the traffic, even so.

Q. You say you did not expect and do not want to get
747 traffic which would ordinarily move all-rail?

A. No.

Q. You say that your are seeking traffic which moves by the all-water routes or by the rail and water routes?

A. Yes, there is so much traffic moving by the water carriers that we could obtain for our ships and which we could originate the haul to the port on the rail carriers instead of having it hauled to the port by trucks, as it now is, if we could only secure the cooperation of the railroads for our mutual benefit. If we could do that, we would never take one single pound of freight away from the all-rail routes and our business would be tremendously increased at the same time. This would bring about a correspond-

ing increase, in our opinion, of the business that the railroads would enjoy.

Q. You would want us to deliver you cars as far back as points in North Carolina or Virginia, for a rail movement in connection with Seatrain—you would want us to permit you to have it moved by Seatrain instead of moving our cars directly to the point of destination, all rail?

A. I think that is obviously a case of some peculiar rate structure or some peculiar condition, but, as an economic proposition——

Q. It is all wrong?

A. It is absolutely wrong.

Q. In other words, in order to take a car from a point
748 away back in North Carolina or Virginia, and bring that car all the way to New York—take the car from New York to New Orleans via Seatrain—take the car from New Orleans by rail to the destination somewhere in Mississippi; you do not think that it would be right as an economic proposition?

A. No. Positively not.

Q. Is it your idea that the direct all-rail movement would be preferable under those circumstances?

A. Certainly.

Mr. McGuire. That is all I have.

By Mr. Kerr:

Q. Mr. Brush, what proportion of Seatrain traffic originates on the Hoboken Railroad and terminates on the New Orleans & Lower Coast, or vice versa?

A. At the present time about 50 percent of our traffic handled at New York is what we call "local business" and originates on the Hoboken or destined for points on the Hoboken. Something around 35 percent of the traffic at New Orleans, including the Belt Line, and the New Orleans & Lower Coast would be the same.

There is no traffic that I know of that is delivered on the New Orleans & Lower Coast Railroad or that is originated on the New Orleans & Lower Coast Railroad.

These figures of local movement are especially high, higher than they should be if we had the proper co-operation of the railroads in utilizing—correctly using the Seatrain service.

749 Q. I understand from your answer to that question you mean that practically none of your traffic originates on the Hoboken Railroad and terminates on the New Orleans & Lower Coast or originates on the New Orleans & Lower Coast and terminates on the Hoboken; that was my question.

A. If there had been any traffic originating on the Lower Coast or destined to a point on the Lower Coast, regardless of origin or destination, respectively, I do not know of it.

Q. When you speak of Hoboken, you mean the Hoboken Railroad or New York Harbor?

A. When I speak of Hoboken I mean the Hoboken Manufacturers Railroad.

Q. That traffic did not originate beyond the Hoboken or terminate beyond the Hoboken?

A. Wait, I can make it clear there. By the term "Hoboken" I mean that the traffic has come from the ship, either there loaded on the tracks of the Hoboken, or has been brought to the Hoboken by lighter or truck or some other vehicle, and not by rail.

Q. I see.

A. In other words, it is a local traffic of the port where no other movement is involved, as I say, either loaded on the tracks of the Hoboken, or has been brought to the Hoboken by lighter or truck or some other vehicle besides a rail movement.

750 Q. Is this correct, that practically all the traffic that the Seatrain has so far handled require some services beyond Hoboken at the Hoboken end or beyond New Orleans & Lower Coast at the New Orleans end?

A. Services of the nature of a truck, lighter, or barge, rail, is that what you mean?

Q. I had reference to rail services.

A. No; I am trying to point out that we are endeavoring to encourage more rail services up to the Hoboken and away from Hoboken and up to the New Orleans & Lower Coast and away from the New Orleans & Lower Coast.

Mr. KERR. It is perfectly obvious that you do not understand my question, and I will ask the reporter to read it or I will repeat it.

(Question read.)

By Mr. KERR:

Q. I want particularly to call attention to——

A. Do you define "service" as rail service?

Q. Yes.

A. Only about 50 percent of our traffic has required rail service.

Q. Did you not state that the New Orleans & Lower Coast originates and terminates practically no traffic and if that is true, is it not obvious that there is a rail service required on practically all of this traffic?

751 A. There is a rail terminal service at New Orleans in addition to the New Orleans & Lower Coast where they begin and end and where the Missouri Pacific terminal begins and ends—I am not entirely familiar with the point where the New Orleans & Lower Coast terminal service begins and ends and, as I say, where the Missouri Pacific terminal begins and ends.

Q. I see.

A. In addition to the New Orleans & Lower Coast at New Orleans there is the Texas Pacific-Missouri Pacific Terminal Company that completes the local deliveries for Seatrain?

Exam. FLEMING. Any further questions?

Mr. MCCOLLESTER. Yes.

Redirect examination by Mr. MCCOLLESTER:

Q. Referring to Mr. McGehee's question to you regarding the hypothetical shipment of furniture or something else from a point on the Southern Railway; if there are rates and routes in effect which would permit the shipment to move in the manner that Mr. McGehee described via the rail and water break-bulk route there is no reason why such a shipment should not move by the rail and Seatrain route?

A. No, if the rate permit it is very much better if it is going to move by rail and water routes for the railroads to have it moved via Seatrain than to have it move in such a roundabout way by some other type of water carrier.

Mr. MCCOLLESTER. I think that is all.

752 Recross-examination by Mr. MUCKLEY:

Q. That traffic which moves through South Atlantic ports, could it not with a very much shorter water haul?

A. I do not know. If that is true, then it shows the need of Seatrain advantages and facilities at some of these southern ports.

By Mr. BURGER:

Q. Mr. Brush, I have some questions I would like to ask you.

A. Go ahead.

Q. I gather from your answer to Mr. Kerr that there is a great deal of traffic that is trucked from interior points, perhaps, to Hoboken terminals of the Seatrain; is that true?

A. No; that is not true.

Q. What is the fact?

A. That traffic is local traffic of North Jersey points. We discourage shippers handling traffic with trucks to Seatrain which could move all rail and have repeatedly put in rates to make it move all rail.

Q. When you say "North Jersey points," that is a radius of how many miles?

A. Taking the commodity which we handle in the largest volume at Hoboken, that is, refined sugar. It is being trucked out of points on the Hoboken Railroad to nearby groceries all over Jersey City, Hoboken, Weehawken, and points like that.

Q. Go ahead.

753 A. We have repeatedly asked the railroads to straighten out their problems on the so-called Belt Line

13 so that we can switch cars and provide additional revenue to the railroads to have it an attractive business to the nearby rates, but the rates are just so high it forces the trucks from nearby points to distribute from Hoboken and bring the stuff to Hoboken. That is not the traffic that we can most economically handle and we endeavor to seek the traffic from interior points that can move by rail up to the port and away from the port via Seatrain.

Q. The incident you told us about was that of sugar that was being brought up from southern origins by Seatrain, but I have in mind that loading in the opposite direction.

A. Well——

Q. Have these trucks reached out to give you loads to carry southbound by Seatrain?

A. Due to our policy of finding ways and means to prevent the trucks from hauling long distances, practically none of our traffic southbound has originated in interior points and then brought into Hoboken by truck. There have been many instances where it has formerly moved by our competitive water lines and trucked up to 250 miles then, since our service has started, has come to New York by rail and gone out of New Orleans by rail.

Q. Then, up to this time, you have not reached out any
754 considerable distance and drawn by truck any merchandise or any traffic that you could haul southbound by Seatrain?

A. No, if there are exceptions to that, they are very few.

Q. I gather that the trucked merchandise reaches the terminals of Seatrain in both cases from nearby points, perhaps within the switching limits of five or ten miles?

A. That is correct.

Q. When you load them on Seatrain, of course, that merchandise as it is trucked to the terminals of Seatrain must be loaded in box-cars; is that not so?

A. Yes. We use all types of cars, depending upon the commodity.

Q. All types of cars; where are you getting these cars from?

A. The Hoboken, for loading southbound, we are using, as I testified before, cars which we have brought northbound from the southern roads, primarily the Missouri Pacific and the Texas Pacific, and if we have not enough cars we rent cars.

Q. Do you have in mind that trucked traffic that is being offered you, in bringing empty Texas Pacific and Missouri Pacific cars northbound in your Seatrain vessels?

A. It is possible that some empty Missouri Pacific and Texas Pacific cars have been brought northbound via Seatrain; but, my guess is that they were working their way to Cuba, and there has been some particular New Orleans loading at Havana which has made it desirable to so handle these cars. To my

knowledge, there has been no great need or any material
755 need for us, so far, to bring cars up from the South to put on the Hoboken especially for loading southbound. Economically, there should be no need because the railroads should be turning over to us loads or loaded cars of the southern railroads to take back south, to avoid the payment of per diem and the wear and tear on those cars. That is what we have been asking the roads to do as an economic necessity.

Q. Does Seatrain bear the loading expense when merchandise is brought by trucks into its terminals at either Hoboken end or the New Orleans end and there loaded in the box cars and transferred to Seatrain?

A. Oh, yes, because that is strictly a water movement, and the Hoboken, for example, here at New York acts as agent for Seatrain and obtains the freight and loads the cars and charges Seatrain for the loading of the cars, and so forth. We can extend our terminals a little bit further and do it ourselves, like other water lines.

Mr. BURGER. That is all.

Exam. FLEMING. Any further questions?

Mr. MCCOLLESTER. I have no further questions, Mr. Examiner, now.

Exam. FLEMING. Mr. McCollester, I would like to ask at this point whether the position of the complainants in this proceeding is the same or whether the situation in question
756 obtains to traffic to and from Cuba, on the one hand, or to and from New Orleans, on the other; I am not clear as to that.

Mr. MCCOLLESTER. As to that, Mr. Examiner, yes; I will answer the question in this way: It is our contention that any rule for car service which prevents or is designed to prevent the Hoboken Manufacturers Railroad Company from delivering cars of an owning road to the Seatrain is an unreasonable, discriminatory and otherwise unlawful rule, whether or not the cars are going to Cuba, or whether or not they are going to New Orleans; that a reasonable car service rule should apply no restriction upon the delivery of a car by the complainant or by any other rail carriers to any connecting carrier which is engaged in transportation of freight and railroad cars.

Exam. FLEMING. Would it follow from your statement, as you view it, and are contending here, that there is no distinction in the situation in those two instances?

Mr. MCCOLLESTER. It may be necessary, Mr. Examiner, to argue the two points in our brief. We are making the contention that the rule is unreasonable and unlawful and discriminatory in both situations. I want to direct your attention to the fact that the

record has shown that railroads make no distinction except in the case of Seatrain, to the delivery of their cars to other connections in both Canada, Mexico, Cuba, or wherever they may go. In other words, the fact that the cars are going to a foreign
757 country has never, except in the case of Seatrain, been made the basis for a distinction.

Exam. FLEMING. The matter can be discussed in the brief, but is there anything to be added here in the matter of facts as to whether your contentions, all of your contentions apply to both situations or as to whether some of your contentions or as to whether some of the alleged violations apply only to one of the situations?

Mr. MCCOLLESTER. I think not, as to the evidence. If the Examiner wants to hear argument, that is another matter, but as to facts, we are prepared to close our case in chief, and we think we have presented to you, as far as the Hoboken is concerned, evidence as to all of the facts that we consider pertinent from the standpoint of both phases, both the movement of cars to Cuba and the movement of cars to New Orleans. If the Examiner, and if the Commission thinks that the inquiry should be extended further, and develop further facts we would be only too glad to offer evidence as indicated.

Exam. FLEMING. I am trying to clarify the record.

Mr. MCCOLLESTER. Yes, I was just answering your question.

Exam. FLEMING. Well. I have no other questions in that immediate connection, except, I would like to ask Mr. Brush a few questions.

By Exam. FLEMING:

Q. As to Cuba, you pick up loads at Cuba with your Seatrain?

A. Yes.

758 Q. Where is that traffic loaded?

A. It comes from all over the Island, Mr. Examiner, primarily within a 100-mile radius of Havana.

Q. In other words, you take the loaded cars to Cuba, that car, if consigned to some point in the Island, is moved by Cuban railways to that point, is it?

A. Yes.

Q. In turn, cars that you pick up at Cuba, at least, many of them are loaded at points in the Island and moved by the Cuban railways to your connections at Cuba—that is, the docks at Cuba—and picked up by Seatrain?

A. Yes.

Q. Is any of this traffic loaded at Cuban points, loaded in Cuban cars?

A. Occasionally, when American cars are not available.

Q. So that Cuban cars do find their way into the United States in that manner?

A. We so regulate the traffic that we do not go beyond the port in such equipment. We have never had a Cuban car at New York, for example.

Q. If any were loaded in Cuba, and the loaded car picked up by you and that car were consigned to some point on the Baltimore & Ohio Railroad, would that car move to Ohio or would there be a transfer of lading at New York, or what would that situation be?

759 A. No, Mr. Examiner, we have a contract with the United Railways of Havana, our connections at Havana, which provides for the use of American cars only, except when none are available and then, by special arrangement, we would use Cuban cars.

In addition, the United Railways of Havana permit Seatrain to order the cars out for the loading. So that we know, as a practical matter, before the car is spotted at the shipper's loading platform, where that particular car is to go and, hence, there is not, never has been, and should never be a case where a Cuban car should go into an interior point in the United States, as we do not think they are suitable for putting in the heavy freight trains of the United States, and might be damaged, although as far as that is concerned, they are built and maintained in accordance with the American Railway Association rules, and the Master Car Builders Rules.

Q. Looking at the other side of the picture, what is there to regulate the extent to which the American car might be used on Cuban tracks before it would be reloaded and sent back to the United States?

A. Our contract provides for the handling of cars in accordance with American Railway Association rules, as they may be applied to Cuba. We have extended them so that there has never been, to my knowledge, an occasion where a Cuban road has used them for their own traffic.

Q. Are the Cuban railroads members of the American
760 Railway Association?

A. No.

Q. As I understand it, Seatrain is not, either?

A. No.

Q. According to what you say, the rules related to and the rules relied upon to regulate that situation, although neither the Cuban railroads nor Seatrain are members of the American Railway Association or the Master Car Builders Association, are the rules of the A. R. A. and the M. C. B., respectively?

A. They are made a part of our contract; as you will see, our

contract provides the handling of these cars in accordance with the A. R. A. and M. C. B. rules.

Q. Your testimony dealing with the manner in which you secure cars, empties for handling of port-to-port traffic where you require an empty car at Hoboken; suppose that there were no southern car available; no southern line empties available; would you, in that event, use northern line empities if they were on the Hoboken tracks?

A. No; not without their permission, sir. That, incidentally, would be in violation of Car Service Rules other than Car Service Rule 4.

Q. A question now as to this Belt Line situation.

A. Yes.

Q. The only connection of the Seatrain Lines at Hoboken is the Hoboken Manufacturers Railroad; is it not?

761 A. Yes.

Q. Where does the Belt Line figure in that? Is that the switching line between the Hoboken Line and the other lines which, through the Belt Line, would connect with the Hoboken?

A. Not exactly, sir. The Belt Line with which we connect and to which we have referred is known as Belt Line No. 13 and runs from the station called Undercliff, three or four miles above our terminal, the whole length of the Jersey water front down to the Central of New Jersey tracks at Communipaw, joining the Central of New Jersey, the Lehigh Valley, the Pennsylvania, the West Shore of the New York Central, and the Erie. To the Delaware, Lackawanna & Western, I do not think it connects to the Belt—it does not connect with the Belt Line except through the Erie. The Hoboken tracks run into the Belt Line somewhere about the middle of the Belt. So that, in the interchange of traffic between the trunk lines of the Hoboken or at Hoboken, traffic first goes over the Erie tracks, because the Belt Line is just on the other side of the tracks. Then it moves to the West Shore, north or south, to the Pennsylvania tracks, and then south to the Lehigh tracks, and then south, to the Central of New Jersey tracks, and thence connects with the Baltimore & Ohio and the Reading and so forth.

Q. I understood you to say or express yourself to this effect: That the Seatrain Lines, Inc., is not eligible for membership in the American Railway Association but that Overseas was:

762 is that correct?

A. No, sir. Overseas was not and neither is Seatrain.

Q. Overseas was not?

A. Overseas was not; Overseas applied and they advised us that we were a water line and not eligible for membership.

Q. I misunderstood you as to that.

A. Yes.

Q. I understood from your testimony that there are joint rates maintained by Seatrain in connection with its southern connection.

A. Yes, the New Orleans & Lower Coast?

Q. Yes.

A. And also the Missouri Pacific and the Texas Pacific Railways and other short-line connections into the interior.

Q. As I understand your testimony, it was that the southern connections generally maintained those.

A. I beg your pardon, sir.

Q. I say, as I understood your testimony it was with the southern connections of the Seatrain; that is not correct?

A. No, sir. We have a case now before the Commission where we are asking the Commission to require other southern and southwestern railroads to join with Seatrain in the establishment of certain through rates and other rates as they do with other water carriers.

Q. What lines do you connect with in the South?

763 A. We connect with all lines entering New Orleans having—or, rather, via the switching line which is called the Belt Line.

Q. What was your answer to that again?

A. We connect with all lines entering New Orleans via the switching line which is the Belt Line.

Q. All joint rates now in effect in connection with the Seatrain are to what points; that is, to points on what lines?

A. To points on the Missouri Pacific and Texas Pacific lines.

Q. You mean to these two lines, the Missouri Pacific and the Texas Pacific?

A. Yes; but other roads have refused to join in the joint rates.

Q. As to these rates, are they contained in tariffs, tariffs filed by the southern lines such as you have indicated, and the Seatrain?

A. Yes.

Exam. Fleming. Are there any other questions, Gentlemen?

Mr. McCollester. Mr. Examiner, I am afraid that our efforts to shorten the proceeding by referring, for example, to the Commission's decision in Docket No. 25565 have not made the entire situation as clear to you as I thought we had, and as clear as it would have been had we gone over the entire ground here before some of the questions that you have asked I think are answered in that decision, in the Commission's description of the Seatrain.

764 I am sorry that we left these things unanswered in your Honor's mind up to this time.

I would like to ask Mr. Brush a couple of questions that may clarify one or two points that I believe you have in mind.

Exam. FLEMING. Proceed.

Redirect examination by Mr. MCCOLLESTER:

Q. On business to and from Cuba, Mr. Brush, in the first place, is my understanding correct that if the Hoboken Railroad receives a car from a trunk line connection and delivers that car to Seatrain for movement to Cuba, the Hoboken Railroad holds itself responsible for per diem on this car during the entire period that car is on Seatrain ships; during the entire period the car is in Cuba; during the entire time or period the car is on the Seatrain ship returning from Cuba and delivering that car, and, in fact, until that car gets back to another railroad signer of the per diem rules.

A. That is correct.

Q. The Hoboken Railroad, in turn, has, with Seatrain, a contract, which is in evidence here by which Seatrain undertakes to reimburse Hoboken for the per diem for which the Hoboken is responsible for the period that the car is in Seatrain's possession, and in the possession of the Cuban Railways, is that correct?

A. That is correct.

Q. Seatrain, in turn, has an agreement with the Cuban
765 railroads by which the Cuban railroads agree to handle cars in Cuba only in accordance with the Car Service Rules of the American Railways Association and, to reimburse Seatrain for per diem, with certain deductions; is that correct?

A. That is correct.

Mr. MCCOLLESTER. Does that clarify the point that you had in mind, Mr. Examiner?

Exam. FLEMING. Well, I asked certain questions really as a preface to asking certain other questions.

By Mr. MCCOLLESTER:

Q. Mr. Brush, was the arrangement which the Seatrain made with Cuban Railways similar to the arrangement with the Florida East Coast Car Ferry Line and the Cuban Railroad?

A. Yes, it is similar.

Q. You would say that the arrangement which the Seatrain has and the arrangement which the Florida East Coast Car Ferry Company has are very similar?

A. They are very similar.

Mr. MCCOLLESTER. That concludes our case in chief.

(Discussion off the record.)

(Witness excused.)

Mr. MCCOLLESTER. It is now 1:15; does your Honor desire to adjourn for lunch at this time?

Exam. FLEMING. We will adjourn until 2 o'clock p. m.

(Recessed at 1:15 p. m. until 2 p. m.)

766 AFTERNOON SESSION, 2 P. M.

Exam. FLEMING. Proceed.

Mr. SPENCE. Mr. Examiner, I think perhaps we had better take up the point that was left unsettled, but I understand that the defendants are now agreeable to stipulating or making the same stipulation with regard to the complainant in the case of the New Orleans & Lower Coast as they made with regard to the complainant, Hoboken Manufacturers Railroad, pertaining to certain statements of fact in the complaint.

Mr. LEHMAN. That is correct, Mr. Examiner.

Exam. FLEMING. Well, these cases are being heard upon a consolidated record, and you are a party to this consolidated record; the carrier which you represent is a complainant in this consolidated record; is that not true?

Mr. SPENCE. Yes, Mr. Examiner, but this pertained only to certain statements of fact which they had not had an opportunity to check yesterday, in our complaint, and they have done so, and they are agreeable to stipulating that; is that a correct statement of facts?

Mr. LEHMAN. That is correct.

Mr. MUCKLEY. That is correct.

Exam. FLEMING. Off the record.

(Discussion off the record.)

Mr. MUCKLEY. I think Mr. McCollester might care to make a statement in regard to that.

767 Mr. MCCOLLESTER. No, I think Mr. Muckley had better make it on behalf of defendants.

Mr. MUCKLEY. I had in mind something else but I will go ahead: "The defendants stipulate that the allegations in Section 1 of the complaint of the New Orleans & Lower Coast are correct and may be taken as true; the allegations of Section 4, except the last sentence, we will make the same stipulation. The allegations of Section 6 with the exception of the word "as complainant is informed" may also be taken as true.

Exam. FLEMING. All right.

Mr. MUCKLEY. Before the New Orleans & Lower Coast proceed and at the close of the case of the Hoboken Manufacturers Railroad I want to ask at this time for an adjourned hearing solely for the purpose of rebutting the testimony of Colonel Ballantine. You will recall that Colonel Ballantine seemed to think that the Car Service Rules were more honored by their violation than by their obeyance and made some charges that reflect on the administration of those rules by the Car Service Section of the American Railway Association.

Mr. Thom, Jr., called me this morning and said that Mr. Kendall of the Car Service Division would like to appear to rebut that testimony. They are not here now and we cannot get them here.

768 We would have to have the testimony in any event so they could look it over. Therefore, I asked for an adjourned hearing to be had for that purpose alone.

Exam. FLEMING. I notice that someone made an oral appearance yesterday for Mr. Thom. I had asked that no one note an appearance unless they were actually present. You say that Mr. Thom was not here yesterday and would, therefore, have to look over the testimony in this case?

Mr. MUCKLEY. That is correct. Mr. Thom was not here. That was, perhaps, an oversight in announcing his appearance in that manner. I do ask for an adjourned hearing for that purpose.

Mr. MCCOLLESTER. I object to that. This case has been set for hearing, and ample notice to all concerned has been given and if the defendants do not come here prepared to evidence to meet the evidence that is to be introduced, and that they can reasonably expect to be introduced here, that is their misfortune and certainly the proceeding cannot be held open forever to enable them to rebut evidence with which they are supposedly taken by surprise.

Mr. MUCKLEY. There was no issue here as to the general observance or nonobservance of the Car Service Rules. Colonel Ballantine took it upon himself to make such statements, and I think we should be permitted to answer that; I think the American Railway Association should have an opportunity to do that.

769 Mr. MCCOLLESTER. If there is anything that is here under consideration it is the car service rules, and certainly Mr. Kendall and Mr. Thom could easily have been here. Incidentally he made this statement on cross-examination.

Mr. MUCKLEY. Regardless of where he made it he did make it.

Mr. THURTELL. He used these words first, that they were more honored in the breach than in the observance.

Exam. FLEMING. In any event, Gentlemen, it seems clear that there can be no such further hearing by agreement of counsel. Under those circumstances, Mr. Muckley, it would seem that no course is left to the Examiner except to close this hearing when the testimony is at an end and if you desire such further hearing, you can take it up with the Commission.

Exam. MUCKLEY. I am making the request now; whether the rules of the Commission permit you to grant it under the circumstances of course I do not know; now, whether the request is ruled upon by yourself or by the Commission, I do not know about that, either.

Exam. FLEMING. The Examiner is stating that it would seem that there is no force left open to him except to rule that he has

no authority for granting such a subsequent hearing, and that you would have to take it up with the Commission, after the conclusion of this hearing, and in which event the Commission itself would set the case for further hearing.

770 If you gentlemen were in accord; if there were no objection to your request, by agreement, the above course might be possible to be pursued, that is to say, an adjourned hearing by agreement of counsel.

Mr. MUCKLEY. I think the parties have some rights in a case of this character, frankly, and with respect to the testimony of this character that was given by Colonel Ballantine, we certainly were surprised by the testimony of that witness; it was not an issue involved in this case particularly, but it is a statement which casts considerable reflection upon the American Railway Association and I think we should be given an opportunity, in all decency and fairness, to answer such slurs as that given to their enforcement of the administration of the rules.

Exam. FLEMING. I take it that if you do take the matter up with the Commission, subsequent to this hearing, and you would set forth the grounds for the further hearing in your report, the Commission would certainly give consideration to the question of whether or not such a further hearing were necessary.

Is there anything further?

You may proceed.

Mr. SPENCE. I will call Mr. McDermott.

R. J. McDERMOTT was sworn and testified as follows:

771 Direct examination by Mr. SPENCE:

Q. State your name, and your position with the New Orleans & Lower Coast Railroad Company?

A. R. J. McDermott, Assistant Superintendent of Transportation of the New Orleans & Lower Coast Railroad Company.

Q. Where is the New Orleans & Lower Coast Railroad Company located?

A. From Algiers 59.7 miles to Buras.

Q. How and with what common carriers by rail does the New Orleans & Lower Coast connect?

A. Direct with the Texas, New Orleans & Pacific, the Missouri Pacific, the Texas Pacific-Missouri Pacific Terminal Company.

Q. Does the New Orleans and Lower Coast connect and interchange traffic with Seatrain Lines, and if so, where?

A. Yes, at Belle Chasse, about 10 miles south of Algiers; and it interchanges with Seatrain Lines traffic moving to and from points in Southern and Southwestern, and other territories via connecting rail lines.

Q. Is there a substantial volume of traffic delivered to and received from Seatrain Lines by the New Orleans and Lower Coast?

A. Yes; I have here a statement showing the number of cars interchanged during representative periods in 1932 and 1933.

Q. Is this the statement?

A. This is the statement.

Mr. SPENCE. We offer this statement in evidence, Mr.
772 Examiner.

Exam. FLEMING. It will be received.

(Exhibit 29, Witness McDermott, received in evidence.)

By Mr. SPENCE:

Q. Does the New Orleans & Lower Coast make per diem payments to owning lines on cars delivered to Seatrain in accordance with A. R. A. rules?

A. Yes; I have here a statement of per diem payments made during representative periods in 1932 and 1933. The New Orleans & Lower Coast has a contract with Seatrain Lines under which it receives regular per diem payments on railroad-owned equipment while in Seatrain possession and this is paid to the owning lines. The amounts shown on this sheet are actual amounts collected from Seatrain and paid to owning rail lines.

Q. Is this the statement you refer to?

A. Yes. This shows the amount collected from Seatrain Lines by New Orleans & Lower Coast for per diem paid on railroad-owned cars all ownerships.

Mr. SPENCE. We offer that in evidence, Mr. Examiner.

Exam. FLEMING. It will be received.

(Exhibit 30, Witness McDermott, received in evidence.)

Q. Have you made any investigation to determine whether Seatrain handling results in any damage to lading of an unusual character or extent?

A. I have made an investigation, and New Orleans & Lower Coast records fail to show that any claim payments have
773 been made or formal claims filed.

Q. Have you made any investigation to determine whether Seatrain handling results in damage to equipment of any unusual character or extent?

A. Yes. Investigation shows that of a total of 17,743 cars received from Overseas and Seatrain since the inception of this service January 1, 1929, only 177 defective cars have been reported, or less than one percent of those received. Of these, in 161 instances the defects were attributed to Seatrain handling. I have a sheet showing the details.

Q. Is this the sheet which I now hand you, containing certain portions of the contract to which you have referred?

A. It is. This had reference to a contract between Seatrain and the New Orleans & Lower Coast Railroad Company as to the use of the equipment.

Mr. SPENCE. We offer this exhibit, consisting of two pages, Mr. Examiner.

Mr. LEHMAN. Do you know the date of that contract?

Mr. SPENCE. No; I do not have the date of it.

The WITNESS. It is in January, 1929.

Exam. FLEMING. That will be Exhibit No. 31.

(Exhibit 31, Witness McDermott, received in evidence.)

By Mr. SPENCE:

Q. Proceed.

A. I have reviewed a statement of the defects on these cars and they are all of a minor and normal character. I might
774 say in that connection that 66 of these cars were reported defective in 1929, during which period, or most of it, some of the clearances on Seatrain vessels were insufficient, which resulted in a number of defects which would not otherwise have occurred and which have not occurred since the clearances were made sufficient.

Q. Is this the sheet to which you refer?

A. It is.

Mr. SPENCE. I offer that in evidence.

Exam. FLEMING. It will be received.

(Exhibit No. 32, Witness McDermott, received in evidence.)

By Mr. SPENCE:

Q. This statement is headed New Orleans & Lower Coast Railroad—statement of Defective Cars from Seatrain Lines, Inc., from January 1, 1929, to October 27, 1933, inclusive. Is that correct?

A. That is correct.

Q. What have you to say regarding depreciation and deterioration of equipment when handled in Seatrain vessels as compared with all-rail handling for a comparable distance?

Mr. LEHMAN. I object to any testimony by this witness with respect to the condition of the depreciation of the equipment. He has not been qualified as to that, and I take it that only an engineer or a car builder or a mechanical expert would be qualified to testify with respect to that.

Mr. MCCOLLESTER. Not by any means. This witness is
775 qualified on car service and transportation matters generally, and he is qualified to make a statement of that character.

Exam. FLEMING. The objection will be noted and the testimony may be received for what it is worth.

By Mr. SPENCE:

Q. Proceed.

A. In my opinion the deterioration and depreciation of equipment when handled in vessels of the Seatrain Lines is considerably less than when being handled a comparable distance by rail. Cars being handled in train or switching service suffered severe shocks in starting and stopping trains, due to action of air breaks, draft-gear actions, etc. These shocks are transmitted to the couplers, draft gears, underframes, and superstructure which causes a great deal of wear and tear and weaving on the various parts.

There is also wear on wheels, axles, journal boxes, brake beams, journal bearings, and all other truck parts that occur while car is moving. The entire car body, underframe and trucks, and all details are continuously wearing when cars are moving due to constant vibration caused by track conditions, rail joints, frogs, and switches. Furthermore, there is considerable deterioration to equipment account of rain, snow, sleet, heat, and other weather conditions.

The cars moving over the Seatrains of course suffer practically no deterioration or wear and tear. That is, for the reason
776 that they are not in motion but are securely fastend in position and are practically fully protected from water.

Q. Do Class I railroads generally permit free interchange of equipment with connecting carriers including short and industrial carriers which have little or no equipment of their own?

A. All Class I railroads have assumed obligations in supplying equipment orders of short and industrial lines.

A. R. A. Transportation division Circular D–II–385, issued April 1, 1933, pages 41 and 42, carries rules known as Appendix B, reading:

"Rules governing settlement for the use of foreign railroad-owned freight cars by short line railroads located within the United States, which are less than 100 miles in length and which return railroad-owned equipment to the road from which received excepting as provided in Rule 6."

Rule 6 has reference to coal-producing roads which have special rules as to no-bill loads, etc.

The above recognizes beyond any doubt the fact that Class I railroads assume obligation of supplying their short-line connections with equipment of any and all classes—in the absence of short lines owning suitable equipment to protect traffic originating on their rails.

The Missouri Pacific have twenty-six such connections totaling approximately 3,000 miles of road, who produce
777 at the present time 5,000 cars annually for return movement

in connection with the Missouri Pacific, and who own no equipment. Class I railroads recognize further the deficiency of each other, in that it is not an uncommon occurrence for all lines to borrow equipment from one another in order to meet demands of their patrons, in the absence of owning or having such equipment available as they might be called upon to supply.

The Missouri Pacific in the past several months has borrowed 5,000 coal cars from the Pennsylvania this season to protect coal loading on its rails, paying rental for the cars, assuming car repair bills and being responsible for the cars while in their possession.

Q. Is there any car shortage in the areas to and from which traffic moves via the New Orleans & Lower Coast and Seatrain Lines?

A. No, on the contrary there is a surplus. I have an Exhibit of three sheets, showing surplus equipment available on October 1, 1932, and October 1, 1933. The information is shown for the country and by districts and is compiled from semi-monthly A. R. A. reports.

Q. Is this the sheet that you have referred to?

A. Yes, sir.

Mr. SPENCE. We offer this in evidence, Mr. Examiner, as Exhibit No. 33.

Exam. FLEMING. It will be received.

778 (Exhibit 33, Witness McDermott, received in evidence.)

Mr. SPENCE. This is an exhibit of three sheets.

By Mr. SPENCE:

Q. Did the New Orleans & Lower Coast construct special facilities at Belle Chasse for the purpose of handling traffic interchanged with Seatrain? If so, indicate what they were and their approximate cost.

A. Yes. Special tracks, layouts, and additional yard facilities were necessary, as well as an increase in motive power, and improvement to existing power. Certain improvements to the line between Belle Chasse and Algiers were also necessary and the expenditures for all these total $296,730.

Q. From your experience in such matters, Mr. McDermott, state the purpose of car service rules and state your opinion as to whether new car service rule 4 is consistent with that purpose?

A. When the Government returned the railroads to their owners after the War the empty equipment of the country was in a chaotic condition so far as location was concerned. It was to overcome this condition that new car service rules were promulgated, Rules Nos. 1 to 5 being designed for the express purpose of overcoming these chaotic conditions.

As stated by the President of the American Railway Association in a letter dated January 31, 1930, addressed to presidents of American railroads:

"Car service rules are designed to do three things:

779 "(1) To return owners' cars to home territory for proper maintenance;

"(2) To meet the demands of traffic;

"(3) To avoid wasteful movement."

Railroads and shippers from that date up to the present have been called upon and encouraged to observe these rules. Particular stress is laid upon the co-operation and solicitation of shippers at large. Field forces are maintained by the Car Service Division of the Association to insure compliance by the railroads so far as possible, practicable, and economical in the observance of the rules. I desire to direct attention also to the fact that the rules, while binding so far as practical and economical of application, were intended to be so flexible as to permit common sense handling and regulations at all times.

In Bulletin C. S. D.–15 dated March 31, 1923, and signed by Chairman Gormley of the Car Service Division, it is stated numerout instances have been brought to the attention of the Car Service Division, indicating——

"cases where such a strict interpretation has been placed upon Car Service Rules and their requirements that shipping of industries and individuals would be seriously interfered with if instructions were followed literally. Rules intended to be drawn to include such flexibility that observance generally may be

780 had without the necessity of inconveniencing the shipper.

It is not practical to require shipping to wait an unreasonable length of time for the placement of proper car of the ordinary type. In emergency cases priviliges must be given to load equipment which is available.

"Shipper should not be required to transfer cars to avoid violation of Car Service Rules."

These instructions were a follow-up of similar instructions given to district managers of the Car Service Division who were charged with policing observance of car service rules. I desire to point out also that to the old car service rules 1 to 5, inclusive, there was a note reading:

(A) Car service rules 1 to 5, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.

Effective February 28, 1933, however, A. R. A. Circular 2966 Transportation Division Circular D–II–381 was issued amending notes to car service rules 1 to 6, inclusive, the note reading, "Car

Service Rules 1, 2, and 3 do not apply to cars reconsigned with original lading under duly filed and published tariffs."

Thus, originally, the railroads were not charged with violation of any car service rule when a car was reconsigned with original lading. Under the amended form and note this exception is limited to rules 1, 2, and 3, which has the effect of attempting
781 to prohibit reconsignment of loaded cars of certain ownerships under Rule 4.

Q. Was the restriction of new competitive lines of traffic or the competitive control of traffic within the purpose of car service rules?

A. No. No rule in any of the original rules contained any regulation purporting to prohibit the delivery of cars of any ownership to any particular common carrier by rail or water. No where was there any mention made of traffic, nor was there any attempt to control traffic on designated routes or preferential routes. It was never the intent to restrict opening new competitive lines of traffic and I am able to state from my experience that there is no practical reason for the new rule.

Q. What will be the practical consequences of the enforcement of new car service Rule 4?

A. There is now free interchange of equipment among railroads and there are many cars of various ownerships being made empty on each other's lines. To force railroads to select cars of certain ownerships to move via given water lines and to get such cars to move via such routes would lead to the chaos and confusion which it was and is the real purpose of the car service rules to eliminate. Compliance by the carriers of this rule would necessitate transfer of carload shipments en route on account of improper cars being reloaded by shippers.

782 As an instance of the practical difficulty; a shipper located locally on the Southern Pacific and routing a shipment to New York via Southern Pacific, New Orleans, New Orleans & Lower Coast—Seatrain, would have to make other arrangements or wait until Southern Pacific could find a car of proper ownership, if the Southern Pacific refused to furnish one of its own cars. Who would be responsible for claims covering such delays, would be a difficult, practical question. Any necessary transfer of lading would result in claims which it would practically be difficult to settle.

Another practical difficulty which we would confront would be this: One shipper might receive all the cars he wanted for loading to Havana or New York, or vice versa. Another shipper located in the same city on a railroad refusing permission for its equipment to move via Seatrain Lines might have to await the finding of suitable cars or divert his traffic to another route.

The literal application of Car Service Rule 4 and amendments thereto would in all the cases suggested, create a congestion of cars, particularly at terminals, and on the rails of the New Orleans and Lower Coast, and would create complications which it would be hard to settle as a practical matter.

Q. Is it your conclusion, then, that new car service Rule 4 is contrary to rather than consistent with the purpose and proper function of the car rules?

783 A. It is. The rule also conflicts with Car Service Rules 2 and 3 which read:

"(2) Foreign cars at home on a direct connection must be forwarded to the home road, loaded or empty;

"(3) Foreign cars at home on other than direct connections must be forwarded to the home road, loaded or empty."

It has always been the practice of rail owners of cars to permit their equipment to be used in any class of service which would not damage such equipment and providing the prevailing per diem rate was allowed. As a practical matter, from an operating and transportation standpoint, I know of no reason whatever for an exception to this practice such as is embodied in New Car Service Rule 4.

Q. You referred to the facilities which were installed at Belle Chasse in contemplation of Seatrain interchange. State whether or not those facilities would be adequate for transportation of these goods if the transfer of lading at Belle Chasse were necessary?

A. It would not.

Q. Would new and enlarged facilities be necessary?

A. They would be, considerably, warehouses, additional tracks, additional yards, trains and other facilities generally necessary in the transferring of lading from one car to another would have to be installed, and in general the facilities would have to be greatly extended.

784 Mr. SPENCE. Cross-examine.

Cross-examination by Mr. LEHMAN:

Q. When were the facilities, which you have described, built?

A. Prior to the inception of Overseas service.

Q. Back in 1929?

Mr. SPENCE. 1928.

By Mr. LEHMAN:

Q. 1928?

A. That is correct.

Q. Were they constructed at that time merely for use in connection with Seatrain service between New Orleans and Havana or Overseas service, rather, between New Orleans and Havana?

A. At that particular time.

Mr. McCollester. May I ask one question before you proceed?

By Mr. McCollester:

Q. Mr. McDermott, I understood you to testify that the examination which you made disclosed that less than one percent of the cars received from Seatrain showed defects; is that correct?

A. Yes.

Q. How does that compare with the percentage of cars showing defects which you received from rail connections?

A. About 5 percent less, I should say our normal is about 6 percent of cars received from connections have defects of one kind or another.

Q. About five percent less; do you mean 500 percent less?

785 A. Yes, because 6 percent is about normal.

Q. In other words, rail interchange cars coming to you, you find in them about 6 percent have defects and in the cars Seatrain interchanges with you you find less than one percent?

A. Yes.

By Mr. Lehman:

Q. Throughout your testimony you have mentioned the purposes of the original rules of the American Railway Association?

A. Yes.

Q. Do you contest in any way the validity, or the regularity of the adoption of the American Car Service Rule 4 by the membership; either the method by way of its adoption, or the rule itself?

A. As to the validity of its adoption, no we have just handled it in accordance with the rules, bylaws and regulations of the American Railway Association through letter ballot in the usual manner. We do object to the rule itself for the reason set forth in the complaint.

Mr. Lehman. That is all.

By Mr. Kerr:

Q. I would like to ask you a few questions, Mr. Spence.

A. Certainly.

Q. Mr. McDermott—I beg your pardon.

A. Oh, that is all right.

Q. Mr. McDermott, how long have you been connected with the New Orleans & Lower Coast?

786 A. For the past 2 years, only for the reason that my immediate superior was just made superintendent of the New Orleans & Lower Coast 3 years ago.

Q. How long have you served in that connection?

A. In a similar capacity?

Q. No, on the New Orleans & Lower Coast?

A. For that long. I have served 2 years.

Q. In your Exhibit 30 showing the amount collected by the New Orleans & Lower Coast for the per diem paid on cars.

A. Well, I have it here.

Q. Does that represent per diem collected from Seatrain and per diem collected by lines for the use of their cars by Seatrain?

A. This reflects the per diem which the New Orleans & Lower Coast paid out on railroad cars to various car owners for per diem.

Q. That is what your exhibit contains. I will ask you now if it represents per diem collected from Seatrain Lines for the use of equipment while in possession of Seatrain Lines?

A. Yes.

Q. Does it include anything else?

A. No.

Q. Are you familiar with the seventy or eighty carloads of machinery handled from New England to a cotton mill in New Orleans during October, 1932?

787 A. In a general way, yes.

Q. How many cars arrived on the first boat from Hoboken?

A. I do not recall that now.

Q. I believe fifty, was it not?

A. I do not know. It does not seem to me like it was that number. Without referring to the record I could not say definitely.

Q. Where was that mill located in New Orleans?

A. If I remember the location correctly——

Exam. FLEMING. Now, gentlemen, if any conferences are had here between counsel if request is made a reasonable time will be allowed for that, but the reporter cannot get a correct record if you are going to talk at the same time that the witness is attempting to testify.

Mr. LEHMAN. I beg your Honor's pardon, I did not realize that I was sitting so close to the reporter when Mr. Knowlton was speaking to me.

Exam. FLEMING. Proceed.

The WITNESS. As I recall it, the mill was located on the New Orleans Belt Railroad.

By Mr. KERR:

Q. Is it not true that that mill was not in position to take—rather, was only in position to take a few carloads of that particular lot of machinery per day?

A. That is not my understanding. It was my understanding

that they were in position to take all of it, under certain
788 conditions.

Q. Did they take all of it?

A. No, they did not.

Q. How was that arranged so that they would get certain parts of the cars—that is, certain numbers of the cars per day?

A. It was handled under the demurrage rules and regulations.

Q. Was one penny of demurrage collected on these cars?

A. No, I do not think so. I do not think they were ever able to collect any demurrage on account of some difficulty.

Q. Is it not true that the New Orleans & Lower Coast held up the movement of that machinery?

A. No.

Mr. SPENCE. That question has nothing to do with this witness' testimony about per diem payments collected from Seatrain Lines and paid to the rail carriers.

Mr. KERR. I expect that it has an important bearing on this case in two respects: First, I think if Mr. McDermott will take his Exhibit No. 30, covering per diem collected from Seatrain Lines in connection with these cars that they will show compensation to New Orleans & Lower Coast, and that you got that compensation for per diem rather than out of demurrage.

By Mr. KERR:

Q. Is that true?

A. It is true, as I stated, that we were unable to collect demurrage and, in the final analysis, because of some
789 technicality we could not get it.

Q. You collected it from Seatrain Lines under the guise of per diem?

A. We collected per diem from the Seatrain Lines and paid it over to the car owners. We make them whole whenever we are responsible to them for such per diem.

Q. Taking that particular lot of machinery, would you say that that came within the rules of shipments—class of shipments that Colonel Ballantine referred to yesterday as requiring six days for a round trip movement between Hoboken and New Orleans?

A. Under the circumstances, no. It would be an exception to the general movement.

Q. It took considerably longer than 16 days, did it not?

A. Naturally they did.

Mr. KERR. That is all.

By Mr. MCGEHEE:

Q. Taking your Exhibit No. 33.

A. All right.

Q. As I understand it, that shows the surplus cars on hand by various railroads on various dates; is that right?

A. Yes.

Q. Take the Southern Railway System Lines, according to that statement, and tell me the number of surplus cars on Southern Railway System Lines on October 1.

A. I am not familiar with all of the lines affiliated with
790 the Southern Railway Company.

Q. You have them down there on this exhibit, you show them, do you not?

A. System lines.

Q. That is what I am talking about; that is what I am asking you; turn to page 3, Southern Railway System.

A. Southern Railway System. Southern Railway System, apparently, at that time only reported to the Car Service Division as having on hand October 1, 1932——

Q. I said 1933, how many before.

A. It does not show in '33.

Q. How many does it show in '32?

A. 1932, it shows 10,000 box cars and 800 coal cars.

Q. How many coal cars did we have on hand October 1, 1932?

Mr. SPENCE. 1933?

By Mr. McGEHEE:

Q. I said '32.

A. You do not report any.

Q. In 1932?

A. That is right, correct.

Q. Coal cars—look again, please, sir. I said '32.

A. I was looking at flat cars. Eight hundred.

Q. How many on October 1, 1933?

A. You do not report any.

Q. If that report is correct, as far as the Southern Railway System is concerned, we do not have all of that surplus
791 equipment is in good order lying around waiting for the Seatrain to grab it up and take it off to sea?

A. If your reports as submitted to the Car Service Division of the American Railway Association are correct, that would appear to be the fact.

Q. If your exhibit is correct, we did not have them on hand, did we?

A. No.

Q. Take a shipment coming in by the Seatrain through from Havana—that will do—coming in on your line to be delivered at some point on the Southern Railway in New Orleans, how would it be handled moving over your line?

A. Moving to the New Orleans & Lower Coast, and over the Texas Pacific-Missouri Pacific Terminal Company and delivered to the Southern Railway.

Q. Two lines would handle it before it reaches the Southern Railway?

A. Yes.

Q. Have you had any such car shipments coming in from Havana to be delivered to the Southern Railway?

A. I do not recall. I presume that we have had. We have had them for everybody else and I do not presume that we have overlooked the Southern Railway.

Q. Do you know how much time would elapse for that movement?

A. I would say about six or eight hours.

792 Q. For delivery by the Southern Railway?

A. For delivery to the Southern Railway. I do not know how long it takes the Southern Railway to deliver them to the consignee after they get it.

Q. You do not know that?

A. No. I do know that it would only take about six or eight hours to get it to the Southern Railway.

Q. Did you not state that it would only take six or eight hours including the Southern Railway?

A. Oh, no; I said it would take six or eight hours to get it to the Southern Railway. How long it takes you people to move a car a few miles I do not know.

Q. Then, I ask you, as the usual practice, how long does it take to unload that car and return it empty to you?

A. You mean how long it would take to unload the car and return the empty car after it has been delivered to the Southern Railway Lines, and to take it back by us to the Seatrain?

Q. Yes.

A. I should say that to deliver a car, empty it and return it to us as an ordinary practice would be approximately four days.

Q. About four days?

A. That is a pretty good average.

Q. I want to ask you just one other question, please, sir.

A. Go ahead.

Q. Take a shipment that comes in at New Orleans via
793 Seatrain and routed by the shipper, destined to some point served by the Missouri Pacific Railroad, and by the Southern Railway, would you observe the shipper's routing, if it were by the Southern Railway?

A. To the best of my belief we do.

Q. You are certain of that?

A. No; I am not certain of it. I have not checked all of these waybills and the bills of lading to see, and that would be neces-

sary before I could make a definite statement, Mr. McGehee, as you know.

Q. Will you investigate that and advise us whether or not you regard or disregard the instructions of the consignor in such an instance or instances and send those cars by the Missouri Pacific Railroad or whether you ship them over the road by which they were routed by the consignor, if they were routed by other than the line of the Missouri Pacific Road? Would you advise us as to that? You would know whether that is true.

Exam. FLEMING. That statement will be filed subsequent to the hearing embracing that point?

Mr. SPENCE. I am not entitled to furnish that information because I do not think it has anything to do with this case. I think it is a frivolous request and I am sure that Mr. McGehee knows it.

Mr. MCGEHEE. No. I think it has this to do with the case: I may not be correctly informed, Mr. Spence, but that is the
794 information I have.

Mr. SPENCE. If you are going to state your information, let us have it off of the record.

Mr. MCGEHEE. I have already stated it as far as I care to at this time.

Mr. SPENCE. All right.

Mr. MCGEHEE. I have already stated my information.

Mr. SPENCE. I do not care to furnish it.

Mr. MCGEHEE. I am trying to state my information as fully as I can. If there is anything you want to ask me, I will be glad to answer it.

Mr. SPENCE. I still do not see that you have pointed out the relevancy of this information. That would just be a whole lot of hard work for nothing.

Mr. MCGEHEE. I was going to do that when you interrupted me; I was going to try to do that.

Mr. SPENCE. Well, go ahead. Go ahead.

Mr. MCGEHEE. We have been told of the benefit the railroads would get from the movement of cars via Seatrain. Take a Southern Railway car and say, for example, that car happened to originate at Martinsville, Virginia, loaded with furniture, and it goes by Seatrain; they pick it up at New York and move it down to New Orleans; and it is routed back over our line but when it comes to New Orleans, routed over our lines to Meridian, Mississippi, they do not give it back to us regardless of the routing, I think it has got a whole lot to do with the alleged benefits about letting Seatrain—about letting Seatrain move our cars
795

all around Robin Hood's barn. Of course, if you will not furnish it I cannot make you furnish it. If I could I would.

Mr. SPENCE. That is a very nice speech, but I am still not inclined to furnish it on the facts.

Exam. FLEMING. The Examiner will not ask you to furnish it but you have heard counsel's remarks. If you wish to furnish it you may do so. I understand you deem it immaterial, and under the circumstances do not care to furnish it.

Mr. SPENCE. I hate to seem disobliging, Mr. Examiner, but it seems to me so immaterial that I am not inclined to furnish it. It would involve some work, and we are trying to be as economical as we can on our line, in view of present conditions.

By Mr. THURTELL:

Q. In your Exhibit 33, you have got the heading "Auto-box." Is the word which you use one which includes what you might call your automobile cars and box-cars together?

A. Yes, that is the formula of the American Railway Association.

Mr. THURTELL. That is all.

Exam. FLEMING. Any other questions?

796 Redirect examination by Mr. SPENCE:

769 By Mr. SPENCE:

Q. Does your per diem statement include also amounts received from per diem for cars that are in Cuba?

A. Yes.

Mr. SPENCE. That is about all of the questions, Mr. Examiner, that I have for this witness. Do you have any questions for the witness, Mr. Examiner?

Exam. FLEMING. Yes.

Mr. MCCOLLESTER. May I direct your Honor's attention——

Exam. FLEMING. Have you any questions for this witness?

Mr. MCCOLLESTER. No, I have not, but it has relation to the questions that the witness was asked on cross-examination by Mr. McGehee. If your Honor will refer to Exhibit 9 you will see that the Southern Railway, although it may not have had a surplus cars during some of the time referred to on the witness' exhibit, nevertheless consent to the delivery of its cars to Seatrain for movement between New Orleans and Havana.

Mr. MCGEHEE. We treat that just as we do the Florida East Coast Car Ferry Company, and I expect we may have to remove that permission also.

Mr. McCollester. I thought I would just direct your Honor's attention.

By Exam. Fleming:

Q. I had the impression, Mr. McDermott, that there was the one-line track connection with the Seatrain Lines at New Orleans, and that those lines were what?

A. The only line is the New Orleans & Lower Coast.

797 Q. New Orleans & Lower Coast Railroad Company?

A. Yes.

Q. Am I right or wrong in understanding that there was a one-line connection with the Seatrain at New Orleans?

A. You are correct, the New Orleans & Lower Coast is intermediate between their switching limits and the trunk lines, but the New Orleans & Lower Coast serves the Seatrain Lines exclusively.

Q. There was something indicated in the previous question that I asked that seemed to be premised on the view that I had an incorrect understanding of the situation in that respect. When the traffic is received, we will say, from the Seatrain Lines by these southern carriers that is had through that carrier; in other words, it, through that carrier, New Orleans & Lower Coast, may have connections with various other southern lines; is that the situation?

A. That is the situation.

Exam. Fleming. That is all.

(Witness excused.)

Mr. Spence. I will call Mr. Long.

W. T. Long, Jr., was sworn and testified as follows:

Direct examination by Mr. Spence:

Q. Please state your name, residence, and occupation.

798 A. My railroad service commenced in 1905 with the Missouri Pacific Railroad, and for 12 years I was connected with that carrier, holding various positions in its mechanical, and operating departments, including its car department. Among other duties, I rendered and supervised the car repair bills in accordance with American Railway Association, and Master Car builders rules. After leaving the Missouri Pacific in 1917 I was employed in the operating department of the St. Louis-Southwestern Railway Company for about one year. I came to the Texas and Pacific on March 1, 1918, as chief clerk to the general manager, and later held the positions of assistant to the general manager, and trainmaster.

Since March 1, 1929, I have been superintendent of transportation, and have had jurisdiction over car service matters and the

freight claim department, which makes a study of loss and damage prevention, and disposes of loss and damage claims.

Q. Have you recently made an inspection of any ship belonging to Seatrain Lines, Inc., particularly with reference to the loading and unloading of freight cars, and the manner in which they are made secure on such ship for its sea voyage?

A. On October 17 and 18, 1933, I made such an inspection of Seatrain "New Orleans," while it was docked at its pier at Bell Chasse, Louisiana.

Q. Please state the result of that investigation.

799 A. This ship docked on the morning of October 17th with 96 loads and 3 empties. I, personally, witnessed the unloading of 28 of these cars and no damage occurred to any of them. They were released from their blocking on the ship and pulled, one by one, upon the ship's cradle with a cable; then the cradle and the car were lifted by an overhead crane over the side of the ship and placed upon rails running alongside it. From this point, the cars were moved by a switch engine of the New Orleans and Lower Coast Railroad into its train yard where each car was thoroughly inspected and properly switched to connecting lines.

After witnessing the unloading of these 28 cars, I went to the train yard of the New Orleans and Lower Coast Railroad and, in company with its Car Inspector Cony, I personally inspected 46 additional loaded cars which had been removed from the ship, and found no defects or damage of any kind. Of these cars, 31 were delivered by the New Orleans and Lower Coast Railroad to the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans for movement to destination over the lines of the Texas and Pacific and Missouri Pacific. Inspectors for the Texas and Pacific-Missouri Pacific Terminal Railroad of New Orleans inspected these cars as they were delivered by the New Orleans and Lower Coast Railroad, and no exceptions were taken to any of them; and they moved out of New Orleans in regular scheduled trains,

800 without delay, on Tuesday evening, October 17, 1933.

On October 18, 1933, I witnessed the loading of the Seatrain "New Orleans." A total of 102 loaded cars were placed aboard the ship. One by one these cars were transferred from the loading rail of the New Orleans and Lower Coast Railroad to the ship's cradle in reverse order of the unloading process just above described, and they were moved separately off the ship's cradle to an assigned spot by a cable attached to the drawbar of each car. The cars which were unloaded on October 17th, and those which were loaded on the 18th, were blocked and made secure in the fashion described by Mr. Brush in his testimony. The entire work of unloading or loading, including the blocking, requires

only a few minutes per car, and the entire operation is carried out in an orderly manner, without confusion, and with a minimum amount of labor.

Q. I am informed that you have the name of that particular vessel wrong, and that the name of the vessel is not the one you mentioned, that vessel is not in the service now.

A. That may be. I did not pay particular attention to the name of the vessel.

Q. Please state the experience of The Texas and Pacific Railway Company with reference to damage to cars or lading moving via Seatrain Lines as compared with all rail movement between similar origins and destinations.

A. Cars moving all rail necessarily receive some damage
801 from the elements and from natural wear and tear to running gear, couplings, etc., incident to yard switching service and line hauls. Of course, this character of damage to equipment is eliminated when the cars move via Seatrain Lines, as practically all are protected from the weather in the ship's hold and remain stationary during the entire voyage. Further, they are so securely fastened on shipboard that there is no opportunity for them to sustain damage by running into each other or against the ship's bumpers.

I recall one incident, in which a car was received from one of the Seatrain ships in a slightly damaged condition. This was a steel box car, Maine Central 5471, which left New York about September 13, 1933, enroute to Dallas, Texas. There was placed on the track next to this box car PRR–470148, a flat car loaded with very heavy machinery. While en route the ship encountered a violent storm, the most severe in many years, during which the wind velocity was reported as 135 miles per hour. While the storm was raging, the machinery shifted and some of it was thrown against the side of Maine Central 5471, bending five of its side sheets and punching three holes in them. However, this car, after unloading at Belle Chasse, moved to its destination without delay. Our records show that this is the only car receiving damage while enroute by Seatrain.

Of course, there have been some instances of short delays
802 to shipments, after delivery by Seatrain, caused by repairs being made to defective safety appliances and other defects existing at the time the cars were loaded and before they were delivered to Seatrain for the water movement.

For example: CGW 86394, arriving Belle Chasse June 13, 1933; MP 85501, and Erie 92113, arriving July 4, 1933, NH 161289, arriving July 18, 1933; and Erie 107736, arriving August 1, 1933; all received some delay while their decayed running boards were being

repaired; and PRR 45190, which arrived at Belle Chasse July 4, 1933, was delayed account repairs, old air date, and its running board, a considerable portion of which was decayed. All of these cars were repaired by the Texas Pacific-Missouri Pacific Railroad Terminal of New Orleans, and since they were "owners' defects," bills were rendered against their owners.

Cars moving via Seatrain receive no wear and tear and no repairs are necessary. On the other hand, cars moving all rail are subjected to considerable damage, requiring many inspections and frequent light repairs, in addition to the usual wear and tear on such equipment in yard and train service.

Our records show that there is practically no damage to lading while moving via Seatrain. For the 12 months' period ending September 30, 1933, The Texas & Pacific Railway Company participated in settlement of loss and damage freight claims
803 for only one car out of every 74.8 cars received from and delivered to Seatrain Lines, Inc.

Stated differently, the Texas & Pacific during that period participated in the settlement of only 19 loss and damage freight claims in which part of the movement was via Seatrain, and our net payment, including salvage received from damaged freight, was only $137.81. A breakdown of these 19 claims showed that none of the claimed damage was directly placed while the shipments were in possession of Seatrain Lines, Inc.

Q. You mean by that, that it was not ascertained that the damage was directly attributable to Seatrain handling?

A. No, it was classed as unlocated damage.

Q. No located damage?

A. Yes.

Q. Continue.

A. None of the damage was peculiar to water transportation, but on the contrary, such damage is common to both carload and less than carload transportation by rail. For example, one claim covered a carload of furniture, ten pieces of which were broken, and our proportion of the loss was $5.71; another covered a carload of crackers in which some packages were crushed, and our portion of the loss was $5.54; another claim covered a carload of newsprint paper of which some rolls were torn, and our proportion of the damage was $3.84; another claim covered
804 damage to bottled grape juice, and our proportion of the loss $2.17; and still another claim covered a leakage of lubricating oil out of drums which had been loaded into a box car, and on this claim our proportion of the loss was $19.74.

The Texas & Pacific Railway Company, during the 11 months' period ended August 31, 1933, participated in the payment of one

loss and damage freight claim for every 17.12 loaded cars handled by it, compared with its participation in the payment of one loss and damage freight claim for every 74.8 loaded cars handled by it in connection with Seatrain Lines, Inc., and further compared with its participation in the payment of one loss and damage freight claim for every 3.87 loaded cars handled by it in connection with other steamship lines.

These figures conclusively show that shipments moving over our line in connection with Seatrain Lines, Inc., receive less damage than shipments handled over our line in connection with other steamship companies or all rail carriers; and these figures also bear out my statements that there is no appreciable damage either to equipment or lading when moving via Seatrain Lines, Inc.

Q. Are Shipments moving by rail and steamship lines, other than Seatrain Lines, Inc., subjected to more damage than shipments moving by rail-and-Seatrain, and do your records disclose any particular case in which there was considerable damage to such lading?

805 A. Shipments moving by rail and steamship lines other than Seatrain are transferred from rail equipment to lighters, often remaining on the latter as much as 24 hours before they are loaded into vessels. While on the lighters the shipments are exposed to the elements, often resulting in damage. In addition, the numerous transfers from rail to lighter, from lighter to ship, from ship to dock, and from dock to rail result in considerable damage to the lading.

For example, I have in mind a shipment of chocolate confectionary moving from Hershey, Pennsylvania, to El Paso, Texas, in May, 1930, on which a claim of $2,500 was paid, the Texas & Pacific paying $913.82 of that amount: this sum was charged out in its June, 1933 accounts. This shipment was loaded in a box car on May 5, 1930, and was routed Reading Railroad to Philadelphia, Southern Steamship Company to Houston, International-Great Northern Railroad to Fort Worth, and the Texas & Pacific to destination.

The shipper gave no instructions as to ventilation or refrigeration, and when the shipment reached Philadelphia it was loaded upon a lighter, where it remained from 2 p. m. one day until 12:05 p. m. the next day. It was then loaded and stowed upon a vessel for movement to Houston. At the latter point the shipper gave instructions to load the confectionery into a refrigerator car and to transport it from Houston to El Paso with vents open and
806 plugs out. His instructions were obeyed and the car moved to destination on schedule.

At El Paso the shipment was unloaded and placed in storage, but after some of the boxes had been delivered to customers, it

was found that there was considerable damage due to heating. The damaged goods could not be disposed of to advantage at El Paso, and 108 cases were returned to the shipper for salvage purposes.

Damage to this character of lading would not occur in movements by rail and Seatrain as it would not be held on lighters and subjected to damage by the elements.

Q. Has the Texas & Pacific Railway Company registered any protest against its equipment being used for shipments moving via Seatrain?

A. No restriction whatever has been placed on the use of Texas & Pacific equipment. It can be loaded and moved without restriction in connection with any rail carrier, including short line, and industrial carriers owning no equipment, Seatrain, or any other water carrier.

Q. State whether or not the defendants in this proceeding prohibit or permit the movement of their freight equipment to short line, and industrial carriers owning no equipment, and to foreign railroads, and countries.

A. Freight equipment belonging to the defendants to this proceeding is daily delivered by The Texas and Pacific Railway Company, with the permission of the owners, to short line,
807 and industrial carriers owning no equipment, and El Paso, to the National Railways of Mexico, and the Southern Pacific Railroad of Mexico for movement into the Republic of Mexico. The defendants also permit the movement of their freight equipment into Canada; and into Cuba, over the Florida East Coast Car Ferry.

Q. Mr. Long, you heard the testimony of Mr. McDermott as to the purposes and the proper function of Car Service Rules?

A. Yes.

Q. I will ask you: Do you subscribe, generally, to what is said in that connection?

A. Yes.

Q. I will ask you if you know of any particular reason for the exception to the general rule of freight car interchange which exception is embodied in new Car Service Rule 4?

A. No.

By Mr. McCollester:

Q. As to the damage claims that you have referred to in connection with these shipments that move via Seatrain; were these claims for damage of a character which is common to rail movement, as well as Seatrain?

A. Yes.

Q. They were not peculiar to Seatrain movement?

A. As I stated, they were practically the same as all-rail; we

have similar claims for all-rail shipments.

Mr. SPENCE. Cross-examine.

808 Cross-examination by Mr. MUCKLEY:

Q. Do you know whether or not the New Orleans & Lower Coast is observing the Car Service Rule 4 of restricting its cars?

A. I do not know whether they are or not. I have no connection with the New Orleans & Lower Coast.

Q. You do not know that?

A. No.

Mr. MUCKLEY. Would you mind letting me, Mr. Spence, ask Mr. McDermott that question?

Mr. SPENCE. I will state that it does not.

Exam. FLEMING. Any further questions?

By Exam. FLEMING:

Q. I understood a portion of your testimony referred to the New Orleans & Lower Coast and another portion to the New Orleans & Southwestern?

A. No, sir.

Q. It did not refer to the New Orleans & Lower Coast, or, rather, you did not refer to the New Orleans & Southern and the New Orleans & Southwestern?

A. No, sir. I did not refer to them, I did refer to the Texas Pacific Missouri-Pacific Terminal Company located at New Orleans.

Exam. FLEMING. I just wanted the record clear in that respect.

Mr. SPENCE. That is all for us, Mr. Examiner. If I have

809 not done so already I will offer in evidence Complainants' Exhibits Nos. 29 to 33, inclusive. I believe they have already been received in evidence.

Exam. FLEMING. Yes. They were received as you went along. That is the complainant's case, is it, gentlemen?

Mr. MCCOLLESTER. That is correct so far as the Hoboken Manufacturers Railroad Company is concerned.

Mr. SPENCE. That is correct so far as the New Orleans & Lower Coast Railroad is concerned.

Exam. FLEMING. Now, I would like to ask counsel a few questions before the defendants proceed with their testimony. Is there anything in this record to show the character, the organization, the extent of authority of the American Railway Association?

Mr. LEHMAN. The articles of association were put in as well as the bylaws and the rules themselves, they have been received in the record as exhibits. I think they were offered by Mr. McCollester.

Mr. McCollester. I was the machinery for offering the bylaws and I have not seen them yet.

Exam. Fleming. Are the bylaws in evidence in this proceeding?

Mr. Muckley. They are in evidence as Exhibit 2.

Exam. Fleming. What has been offered in that connection to show that, will show fully both the character, organization,
810 and the extent of authority of that organization?

Mr. Muckley. It does show that, Mr. Examiner.

Mr. McCollester. Of course, Mr. Examiner, we do not agree that these documents are conclusive as to the extent of the authority of the American Railway Association and the officers and the representatives of the American Railway Association to bind other parties where they have held themselves out to act, and the parties have, without objection, accepted that action.

Mr. Lehman. We do not think, of course, Mr. Examiner, especially under the circumstances such as the present, where the complainant is itself a member of the Association and is a subscriber to it, that such a comment is of any particular moment.

Mr. McCollester. It is not a member of the Association—excuse me, they are simply associate members, which is quite different.

Exam. Fleming. You will be getting into an argument if you are not careful. What I am after is to know that the facts are shown so that the Commission will have sufficient facts. That is all I wish to be informed of in this connection. Does the record show whether that association is a voluntary association or an incorporated association, and matters of that character?

Mr. Lehman. I think that is fully shown, Mr. Examiner.
811 It appears from the articles of association that it acts by recommendation only and the purposes and objects are also shown in the articles of association.

Exam. Fleming. The rules of that Association are not published in any tariff, are they, Mr. McCollester?

Mr. McCollester. They are not, Mr. Examiner. The per diem rules, however, were investigated by the Commission.

Exam. Fleming. Was that in the so-called Car Hire case?

Mr. McCollester. That is my understanding.

Mr. Muckley. Are not the per diem rules filed with the Commission, and why did you ask for suspension otherwise?

Mr. McCollester. Because we conceive that the Commission has the power to suspend the rules even if they are not filed with it.

Exam. Fleming. The Car Service Rules of this Association are not, and there is no requirement of the Commission that they be filed; there is no formal requirement that they be so filed?

Mr. McCollester. There is a question of law on that. The Act requires that the Commission may require that they be filed, and I understand that there has been no such order and these are not filed in response to any such order.

Mr. Muckley. I understand they are filed, however.

Mr. Spence. They are filed, although not required to be filed.

812 Mr. Muckley. They are not filed in the tariff but they are filed with the Commission?

(Discussion off the record.)

Exam. Fleming. It would be well for the record to show whether they are filed with the Commission; if so, whether they are on file as a tariff or otherwise, and also whether they are filed under any requirement of the Commission or is a voluntary act of the Association filing them, or what the exact facts are.

Mr. McCollester. When I say they are not filed, Mr. Examiner, it is my advice that they are not filed in the sense that they are not filed as a tariff. They are not made a tariff. The per diem agreement, according to the agreement itself, a duplicate of the agreement is filed by the subscriber with the Commission as evidence of designation of the American Railway Association as the agent of the subscriber. I do not know that they are filed with it for other purposes, but I have no doubt that the Commission, in the Commission's Car Service Division, are no doubt familiar with the rules.

Mr. Lehman. I understand that the rules are filed with the Commission for a stipulation. Not as a rule or tariff filed by any obligation imposed by the Commission.

Exam. Fleming. Is there anything in the record to show what carriers are members of the Association, or are parties to that Association or organization?

813 Mr. McCollester. The complaint, Mr. Examiner, of the Hoboken, and, similarly, of the New Orleans & Lower Coast Railroads recites the fact that all or most of the defendants are members of the American Railway Association and it is admitted in practically all of the answers to the complaint.

Exam. Fleming. That is in response to the question to a certain extent, but my question was as to what carriers are or are not parties to this Association.

Mr. McCollester. I do not know, but as I understand it, all of the Class I Railroads are members of the Association.

Mr. Muckley. I understand that all of the Class I railroads are members and many of the other railroads are associate members, such as the Hoboken and the New Orleans & Lower Coast.

Exam. Fleming. Mr. McCollester, attached to the complaints there is what purports to be a proposed division of the Car Service

Rules. That proposal was and is actually one that has been adopted, actually adopted; is that in line with what has been shown in the record?

Mr. McCollester. That is correct, Mr. Examiner; you are referring to the appendix of the complaint.

Exam. Fleming. Appendix B.

Mr. McCollester. The proposed form of new Car Service Rules that is the Car Service Rule which is the subject of complaint here, and which is in the record in—it is shown in Exhibit No. 3.

814 Exam. Fleming. "That were proposed" standing alone would be misleading in this record. That has reference to the previous rules; these are the rules in effect today?

Mr. McCollester. Those are the rules which have been filed and are in effect today.

Exam. Fleming. Under the rules prior to that provision there was no Rule 4 in the numbered rules?

Mr. Muckley. There was a Rule 4 but they changed the number.

Mr. McCollester. There was an old Rule 4 and that is why we call this "New Rule 4."

Exam. Fleming. That is what I was getting at, the word "new." The only rule that is specifically challenged so far as this proceeding is concerned is Rule 4, is that a fact, the only numbered rule?

Mr. McCollester. May I reply to you this way, Mr. Examiner; you are correct in stating that new Rule 4 is the only rule that is specifically mentioned.

Exam. Fleming. I said numbered.

Mr. McCollester. It is the only numbered which is specifically challenged in our complaint. We ask the Commission to declare that rule an unreasonable and otherwise unlawful rule and to require the defendants to adopt and abide by a more reasonable rule.

Exam. Fleming. I have not gone any further than that. That answers the question as far as I can concerned.

815 Mr. McCollester. That is correct.

Exam. Fleming. In addition to that you attack various alleged instructions and requirements, and so forth, which are published in connection with the Car Service Rules, I believe?

Mr. McCollester. That is correct.

Exam. Fleming. Those have been specifically pointed out in your testimony, have they not?

Mr. McCollester. They are embodied in the record and have been referred to.

Exam. Fleming. There are a number of these rules which you might term "sub-rules" and instructions or requirements, or mat-

ters of that character shown in Appendix B of the complaint. What I wish the record clear about is whether you are attacking each and all of these matters, or only certain portions of them. If only certain portions they should be pointed out.

Mr. McCollester. We attack all the instructions and sub-rules that have been issued in connection with Car Service Rule—new Car Service Rule 4—and, also, the refusal of the railroads under that rule to give us cars.

Exam. Fleming. That is a question of practices?

Mr. McCollester. Yes.

Exam. Fleming. I am speaking to you now about matters which are published under the rule.

Mr. McCollester. Yes, that is correct.

Exam. Fleming. You attack only so much of them as has
816 any pertinence or bearing upon Rule 4; is that correct?

Mr. McCollester. I should say this, that all of these are relating to Rule 4 and are designated as such; they are designed to carry out and carry into effect Rule 4, and if Rule 4 falls, they fall along with Rule 4.

Exam. Fleming. You are, in your attack upon the Car Service new Rule 4, and those various instructions and matters just referred to, those matters are attacked by you which would fall in as matters covered by no tariff, but as matters which an agent of the defendants publishes, and which governs and determines practices of the carriers; would that be the situation?

Mr. McCollester. I do not want to mislead the Examiner. I am not sure that I follow your point. We say that all of these rules are rules, regulations, and practices relating to car services which are unjust, unreasonable, and otherwise unlawful.

Exam. Fleming. I am merely trying to clarify the issues: Ordinarily, regulations of the carriers that may be assailed before the Commission are found in public tariffs. There may be practices in them. I think that doubtless these matters here attacked as shaping the policy of the practices of the carriers, and they are, for that reason, under attack? In other words, these matters here were attacked as shaping the policy or practice of the car-
817 riers, and for that reason they are under attack?

Mr. McCollester. That is correct.

Exam. Fleming. You attack section 1, paragraph 4, which pertains, in part, to routes and joint rates, and also to rules and regulations with respect to the operation of such routes. Would it be a fair assumption that these particular complaints here under consideration do not attack that provision of the act so far as it refers to routes and rates are concerned, but only insofar as the rules and regulations are concerned?

Mr. McCollester. That is correct, Mr. Examiner, for this reason: There are, of course, no routes involved in these proceedings. We are not here asking for the establishment of joint rates nor are we asking, in this proceeding, for the establishment of through routes between defendants and Seatrains where such routes do not exist at the present time.

Those matters are covered in the complaint of Seatrain which is set for hearing on December 18.

Exam. Fleming. I see.

Mr. McCollester. We do expect to argue, however, at least I do, in this proceeding that, insofar as there are through rates and joint rates in effect at the present time, that Car Service Rule 4 and the regulations and practices of the defendants thereunder interfere with and therefore constitute unreasonable and unlawful regulations with respect to the operation of those through routes.

818 Exam. Fleming. You allege violation of section 3, paragraph 1, and also paragraph 3. Is it your view that section 3, paragraph 1, covers or has reference to undue prejudice as between carriers?

Mr. McCollester. I think it does, Mr. Examiner, at least we shall argue that, anyhow.

Exam. Fleming. That is your position.

Mr. McCollester. Unless we change it when we come to prepare our briefs and study the law somewhat more fully on that subject.

Exam. Fleming. It will be discussed in your briefs?

Mr. McCollester. Yes.

Exam. Fleming. As to Section 3, that complaint, as I understand it, is founded upon two lines: First, the alleged prejudicial character of defendants' practices generally insofar as covered by the allegations, and the other, the specific allegation in connection with the Florida East Coast Car Ferry Company.

Mr. McCollester. Yes.

Exam. Fleming. Insofar as the Florida East Coast is concerned, the Commission has held, I believe, that the transportation is, from Havana to Key West, by ferry; is that correct?

Mr. McCollester. Well, they have considered it a common carrier by sea subject to the Panama Canal Act.

Mr. Thurtell. They said it was an extension of the rail-
819 road.

Exam. Fleming. The ferry portion, and therefore the section of the rail service?

Mr. McCollester. Perhaps so.

Exam. Fleming. As I understand New Rule 4——

Mr. MUCKLEY. You said that the Commission held it was a water line subject to the Panama Canal Act?

Mr. MCCOLLESTER. In the Florida East Coast Ferry service between New Orleans and Havana.

Mr. MUCKLEY. It was held to be an extension of the rail service. The Panama Canal Act was not involved in this case so far as I know.

Exam. FLEMING. The new car Service Rule 4 states that railroad cars of railroad ownership must not be delivered to steamship, ferry, or barge lines, and so forth, without permission of the owners; do you not understand from that rule that the prohibitions of the rule as the same to ferry service as to service operating in connection with Seatrain Lines?

Mr. MCCOLLESTER. They made no distinction so far as I can observe.

Exam. FLEMING. Under the rule?

Mr. MCCOLLESTER. Under the rule.

Exam. FLEMING. So that your sole claim as to undue prejudice in connection with the Florida East Coast grows out of the practices of the railroads and not out of the rules; is that
820 right?

Mr. MCCOLLESTER. Oh, yes. It is not the rule itself, but it is the practices under the rule.

Exam. FLEMING. According to your claim the rule is being violated as to the Florida East Coast and adhered to, to your prejudice, in your case.

Mr. MCCOLLESTER. Well, if you want to put it that way; I would not say that it is being violated as to the East Coast. That is, if they have given their consent as to deliveries to the East Coast and not to us and have so arranged their regulations and practices and deliveries of the cars to the East Coast is not in violation of the Rule 4, however, establishing such regulations and practices with reference to Seatrain we think is in violation of the law and unreasonable and prejudicial.

Exam. FLEMING. Are you making the point that the Florida East Coast has given its consent or that that particular situation results in undue prejudice because of such consent also?

Mr. MCCOLLESTER. It is not the Florida East Coast that has given its consent that constitutes the violation, but it is in the Florida East Coast getting its consent that we allege the undue prejudice. The point is this: The Pennsylvania Railroad will permit its cars, and acting under Car Service Rule 4, will permit its cars to go to Havana by the Florida East Coast Car Ferry and
will not permit the same cars to go to Havana by
821 Seatrain.

Exam. FLEMING. What is the basis of your claim in that connection as to any undue prejudice by the Florida East Coast or by other carriers?

Mr. MCCOLLESTER. By the carriers who own the cars and have given their consent for delivery to the Florida East Coast and not for delivery to Seatrain.

Exam. FLEMING. Are there any other questions for the witness?

Mr. MCCOLLESTER. No.

Mr. SPENCE. No.

Mr. LEHMAN. No.

(Witness excused.)

Mr. MCCOLLESTER. Mr. Examiner, I do not want to have you overlook the point, and I do not assume you have, of course, in your questions, but we allege that the Car Service Rule and the practices of the carriers under these rules are in violation of paragraph 11, section 1, as—that you have not mentioned.

Exam. FLEMING. I only mentioned those that had anything to do with the specific questions I was asking.

Mr. MCCOLLESTER. I see. I would just direct your attention to the fact that paragraph 11 is specifically a point.

Exam. FLEMING. Paragraph 11 of section 1 is included in the summary of issues read in the beginning of the proceedings?

822 Mr. MCCOLLESTER. That is correct.

Exam. FLEMING. The defendants may proceed.

First, however, is there any testimony to be offered by or on behalf of the intervenor supporting the complaints in these proceedings?

Mr. MCCOLLESTER. There is no testimony, Mr. Examiner, in addition to the testimony which has already been offered.

Exam. FLEMING. Then, defendants may proceed.

Mr. LEHMAN. Mr. Examiner, we have not been able to anticipate exactly the course which the testimony of complainants would take so that we have not here present the operating officials of all of the Trunk Line carriers. It so happens that a representative of the Pennsylvania Railroad is attending here and is present, and I am asking him to give some testimony with respect to certain matters.

I merely make that statement because I want to make it clear that I am not selecting Pennsylvania with any particular purpose in mind, I think their situation is the same as any other trunk line.

Mr. MCCOLLESTER. You think there is nothing sinister in his appearance?

Mr. LEHMAN. Oh, no.

R. P. RUSSELL was sworn and testified as follows:

823 Direct examination by Mr. LEHMAN:

Q. Will you please state your name and address.

A. R. P. Russell, Philadelphia, Pennsylvania.

Q. What is your position?

A. Superintendent of car service.

Q. What company?

A. Pennsylvania Railroad.

Q. Have you given some study to the Seatrain situation insofar as it relates to the use of equipment of the Pennsylvania Railroad?

A. To some extent.

Q. Did you make an analysis of the equipment situation during the month of September of this year?

A. I did. I secured a list of cars that the Pennsylvania delivered to and received from the Hoboken Shore Railroad for movement to and from the Seatrain Lines for the month of September.

Q. Do you have information which indicates whether or not loaded Missouri Pacific cars were received from Seatrain in the month of September, 1933, and delivered at points on the Pennsylvania Lines from which shipments going via Seatrain originated in the same month?

A. No; no such cars.

Q. Will you please state, in brief, the result of your examination of the situation with reference to those points.

824 A. My records show that we received from the Seatrain Lines or from Hoboken & Shore, that originated on Seatrain Lines during the month of September a total of 23 loaded cars. There were no—there were—one moment; let me look at this record—there was one Missouri Pacific and one Texas Pacific car. The Texas Pacific car went to Harrison, New Jersey, and the Missouri Pacific car went to Jersey City—destined to Jersey City. None of them went to destinations out in Pennsylvania. I mean, neither one of them went to destinations on the Pennsylvania Railroad from which we had loaded cars to Seatrain.

Q. In the same month?

A. Yes, in the same month.

Q. Is Seatrain returning Pennsylvania cars to you under load, or is it returning them to you empty?

A. I did not analyze the empty car situation but—that is, to any great extent—but of the 23 loaded cars that we got from the Seatrain in September there were 1, 2, 3, 4, 5—five of them were Pennsylvania cars.

Q. Do you know what percentage of the Pennsylvania cars which have moved via Seatrain carry any destination on the bill-

of-lading which would indicate that the movement is to be via the line of that carrier?

A. I would say about one-third of them, based upon one month's study.

Q. You mean that two-thirds of them did not bear any
825 indication on the bill of lading that they are going via Seatrain?

A. No.

Q. Was that study also made in the month of September, 1933?

A. Yes.

Q. Under the rule of the American Railway Association, can a southwestern car, such as a Missouri Pacific or a Texas Pacific car be loaded for movement on a local bill of lading to Hoboken?

A. No, it is not permitted with the car service rules.

Q. Or, would a loading of that kind be in violation of the car service rules?

Mr. McCollester. What is the question?

(Question read.)

Mr. McCollester. All right.

By Mr. Lehman:

Q. Go ahead. Why would it not be?

A. Because we are a direct connection of the Missouri Pacific, and, under the car service rules, we should load those cars in the direction of the Missouri Pacific Railroad.

Q. A movement terminating on the Hoboken, on a local bill of lading would not be to a location on the Missouri Pacific?

A. No, it would be in the opposite direction.

Q. Are all of the shipments of the Pennsylvania to Hoboken on local bills of lading?

A. To the best of my knowledge; yes.

Q. Would the consignee at Hoboken have the right to
826 reconsign or reship his goods upon arrival at Hoboken to any other point in the United States notwithstanding the fact that, in some instances, the bill of lading might contain some notations to the effect that the movement was in care of Seatrain?

Mr. McCollester. Mr. Examiner, not that it is an important point, but I think that bears upon the terms of the tariffs, and I do not think that this witness is qualified.

The Witness. I would rather not testify on that point; I would rather not answer that question.

By Mr. Lehman:

Q. Has the Pennsylvania Railroad received payment in the form of per diem from Hoboken Manufacturers Railroad?

A. Not this year.

Q. Not this year?

A. No.

Q. Did any arrangement exist between Pennsylvania Railroad Company and either the Hoboken Manufacturers Railroad Company or the Seatrain for the use of cars?

A. Not that I am familiar with.

Q. Has it ever existed?

A. Not to my knowledge.

Q. Was the payment of per diem stopped before the time that switching reclaims were withdrawn?

A. It was.

Q. Are you able to state whether or not the per diem
827 situation which you have described is equally applicable to other trunk line carriers?

A. I am so informed.

Mr. McCollester. What is the question?

(Question read.)

Mr. McCollester. I move to strike out the question and answer; it is plainly hearsay and a conclusion of the witness.

By Mr. Lehman:

Q. Let me ask you this: Were you present at a meeting of operating officials at which this matter was discussed and was the information revealed to you at that meeting by other officials?

A. My information comes from officers of other carriers occupying the same position on their roads that I occupy on the Pennsylvania.

Mr. Lehman. That is all.

Cross-examination by Mr. McCollester:

Q. When was that meeting held, Mr. Witness?

A. That information I got at different meetings or contacts one way or another, one was as late as today.

Q. Was there a meeting today?

A. No, just a meeting with a person, another officer of a railroad.

Q. I thought you said this information was exchanged at a meeting?

828 A. He did, but it was not today.

Q. Mr. Russell, was there any meeting held on October 30 which was attended by you?

A. Yes; I forgot all about that meeting. There was. That is right.

Q. With reference to the various trunk lines, were there various trunk line representatives present at that meeting?

A. Several of the trunk lines were represented at that meeting, if that is what you mean.

Q. That is right. Was the Hoboken Shore Railroad car situation discussed there?

A. It was mentioned.

Q. Was the question of reclaim with the Hoboken discussed at that meeting?

A. Yes; that subject was mentioned also, I do not know whether it entered into any particular discussion.

Q. Was it at that meeting that various representatives of railroads and other roads such as the Central of New Jersey and Lackawanna were told, specially the Central of New Jersey and the Lackawanna, to stop paying reclaims to the Hoboken?

A. It was not.

Q. Were you present at a meeting when representatives of your roads and other roads told the Central of New Jersey and the Lackawanna—the Delaware, Lackawanna & Western to stop paying reclaims to the Hoboken; when that was done?

829 A. I would not know.

Q. Was that a meeting in which one or two representatives advised that they were allowing reclaim to the Hoboken?

A. I do not know.

Q. Do you know whether or not any representative of the Pennsylvania was present at such a meeting?

A. I do not know.

Q. Mr. Russell, supposing the Pennsylvania received from the Hoboken, under load, a Missouri Pacific car and that car is made empty at some point on the Pennsylvania. Are we to understand, from your testimony, that under the Car Service Rules that car cannot be loaded back to Hoboken?

A. No, sir. I do not want you to understand that.

Q. It could, could it not?

A. Yes.

Q. Then, just what do you mean when you said that cars of southern lines or Southwestern Line membership, could not be loaded to the Hoboken Railroad under local bills of lading?

A. This: We get, I presume that we get a Missouri Pacific car from the Missouri Pacific, and that went to Pittsburgh, Pennsylvania. If we loaded that car from Pittsburgh, Pennsylvania, to Jersey City that would be a violation of the Car Service Rules.

By Mr. SPENCE:

Q. What rules?

830 A. One, two, and three. We should load it in the direction of St. Louis, home, in the direction of St. Louis, Missouri.

Q. How about a car on some point on the Pennsylvania which was less distant from Hoboken than it was from the western connection on the Missouri Pacific, would you load that traffic; could you load that car to the Hoboken?

A. No.

Q. Would that be in the direction of the home route?

A. No.

By Mr. McCollester:

Q. You said that you received loaded cars from Seatrain in September.

A. That is my record.

Q. Five Pennsylvania railroad cars?

A. Yes.

Q. Do you know how many of the remaining cars belonged to southwestern or southern railroads?

A. I cannot tell you. I can tell you according to our records. [Refer to several papers.]

Q. Are you now in a position to give us that?

A. Yes. According to our record one Texas Pacific—I do not know whether the Rock Island is a southwestern road or whether it is located in southwestern territory. I have one of those cars. One Northern Pacific, one Delaware & Hudson.

Q. One Northern Pacific?

A. Yes. One International Great Northern; it is I. G. N., and I think that stands for International Great Northern.

831 One Atchison, Topeka & Santa Fe. Another International Great Northern. So, we have one, two, three, four, five, six, private cars. I mean private line cars. That is, according to our records; in other words, what we call a private line car.

Q. No Missouri Pacific?

A. No Missouri Pacific.

Q. Our records show two.

A. 47252.

Q. That is a Texas & New Orleans car?

A. Yes; T. & N. O. 51967. Here is one I took for a private car, it is loaded with cottonseed oil. It is a Rock Island car.

Q. Do you mean the cottonseed car is a Rock Island car?

A. No; the one after that.

Q. That accounts for 18 cars. Will you tell us what each of those cars are?

A. I will call them off to you: Pennsylvania Railroad; Pennsylvania Railroad; Texas Pacific; private; private; St. Louis, San Francisco; Pennsylvania Railroad—now, I am getting mixed up.

Q. Pennsylvania Railroad?

A. I will start all over again.
Q. I will check them with you on my sheet as we go along.
A. All right. Pennsylvania Railroad.
Q. Pennsylvania Railroad?
832 A. Yes. Another Pennsylvania Railroad.
Q. Another Pennsylvania Railroad?
A. Yes. Texas Pacific.
Q. Yes.
A. Private.
Q. Yes.
A. Private.
Q. Yes.
A. St. Louis-San Francisco.
Q. Yes.
A. Pennsylvania Railroad.
Q. Yes.
A. Private.
Q. Yes.
A. Rock Island.
Q. Yes.
A. Boston & Maine.
Q. Yes.
A. Pennsylvania Railroad.
Q. Yes.
A. Texas & New Orleans.
Q. Yes.
A. Northern Pacific.
Q. Yes.
A. Delaware & Hudson.
833 Q. Yes.
A. Missouri Pacific.
Q. Yes.
A. Texas Pacific.
Q. Yes.
A. International Great Northern.
Q. Yes.
A. Santa Fe.
Q. Yes.
A. Pennsylvania Railroad.
Q. Yes.
A. Private car.
Q. Yes.
A. International Great Northern.
Q. Yes.
A. Private.

Q. Yes.

A. And did you say you had another T. & P.? This may be T. & P. It is in red pencil and it is hard to read.

Q. I have two Missouri Pacific cars, I have four Texas & Pacific, and I have two Northern Pacific.

A. Here is the other Texas & Pacific. That is all.

Q. During that same month our record shows that there was 34 Pennsylvania cars delivered under load to the Pennsylvania Railroad via the Hoboken—by the Pennsylvania to the
834 Hoboken for movement via Seatrain.

A. Let me see. That will pretty near check with what I have. Forty I have.

Q. Forty you have in your count?

A. Yes. My count is forty. There may be a little difference but not much. There might be a little difference on each end. I may have taken in just a little longer period one way or the other.

Q. Mr. Russell, suppose bills of lading, instead of reading locally for Hoboken, showed as destination some destinations New Orleans or beyond, would it then be permissible for you to furnish for loading the southwestern line car, if such a bill of lading were furnished, to be forwarded to Hoboken via Seatrain and beyond?

A. According to my understanding, we do not receive such bills of lading.

Q. Assuming that you do, assuming that you do receive such a bill of lading.

A. Why should we assume that which we do not do?

Q. Because you have been asked to issue such bills of lading and it is my point that it is the refusal of the Pennsylvania Railroad to issue such bills of lading that makes it possible for it to take advantage of this technicality in the car service rules.

Mr. LEHMAN. Mr. Examiner, the request of complainant
835 for through routes is involved in I. C. C. Docket 25727. No through routes now exist which would require the issuance of through bills of lading.

Mr. MCCOLLESTER. Well, we deny that we assert that there are through rates; that is, that we deny; we do assert that there are through routes, but that has nothing to do with the question I am asking now. I am simply asking the witness to indulge me in an assumption that such a bill of lading was issued by the Pennsylvania and asking him whether, under the car service rules, and I am limiting it to the car service rules, if a shipment were tendered under such a bill of lading it would violate the car service rules for the Pennsylvania to furnish a car of southwestern ownership.

Exam. FLEMING. You say you contend there are such routes?

Mr. MCCOLLESTER. That is not the issue in this case.

Exam. FLEMING. You mean by through routes, routes in connection with the joint rates?

Mr. MCCOLLESTER. No; I do not mean that.

Exam. FLEMING. You mean physical connections?

Mr. MCCOLLESTER. I mean routes to which there are physical connections and arrangements for the handling of the traffic and rates on file with the Interstate Commerce Commission.

Exam. FLEMING. You may answer the question.

By Mr. MCCOLLESTER:

Q. Will you answer the question?

A. Yes; that would be a technical violation of the car
836 service rules.

Q. Why?

A. Because the car service rules do not permit cars to be moved that way. I want to qualify that, but that is a technical violation of the car service rules to do that as you have just stated.

Q. Would the car service rules permit you to furnish for loading a car of the southern railroads for movement to Norfolk and then to the—say it were a North Western car, for better comparison; would the car service rules permit you to furnish for loading a car of the North Western Railroad for movement to Norfolk and thence to the Northwest over one of the differential routes?

A. Car service prohibits such a movement.

Q. Are there any established routes between interior points on your line and the Northwest?

A. I would do it, but the car service rules prohibit it. I would send that Northern Pacific car via Norfolk if I knew it were going to the Northwest.

Q. Is the Pennsylvania returning empty southwestern cars to Hoboken?

A. I understand it is, that they are to a considerable extent.

Mr. MCCOLLESTER. That is all.

By Mr. SPENCE:

Q. Does the Pennsylvania Railroad receive, or is it now
837 receiving, per diem payments from the New Orleans & Lower Coast on cars handled via Seatrain?

A. As far as I know; I could readily have looked in the books and found out, but I did not do so.

Q. You know of no failure to do so?

A. I would like, if it is proper, to explain violations of car service rules if I might. I would like to clarify that a little further.

By Mr. MUCKLEY:

Q. I think you made the reply that a car received from a line in the Southwest, or of southwestern ownership at Pittsburgh——

A. Yes.

Q. Under the rules it could not be loaded to move to Hoboken?

A. I said no, it could not be moved under the rules.

Q. It could not?

A. No.

Q. Let me see if I understand you correctly: If a car were received by the Pennsylvania Railroad from lines in the Southwest, of southwestern ownership, at Pittsburgh, Pennsylvania, under the rules they could move under load to Hoboken or not?

A. They absolutely could not. It would be a clean-cut violation of the rules.

Redirect examination by Mr. LEHMAN:

Q. It is your opinion that Car Service Rules are more honored in the breach than in the observance?

A. It is absolutely not, and they are not more honored in
838 the breach. I know of no single factor of operation on the Pennsylvania Railroad that is given more attention. In other words, there is a constant effort, supervision and checking made on the Pennsylvania Railroad to carry out the car service rules just as closely as good operating practice makes it possible. That is why I say that while we do violate car service rules there is always what we consider a very good reason, an operating saving to be effected, a shipper to be accommodated without delay, or some other good reason when the car service rules are not technically complied with and followed out.

By Mr. BURGER:

Q. Mr. Russell, how many cars, in that paper that you hold before you, represent cars delivered to you by the Seatrain?

A. Twenty-three.

Q. In the month of September?

A. September.

Q. 1933?

A. Yes.

Q. Do your records show, or will the waybills or the bills of lading as given your line by Hoboken show, the origins of those cars?

A. No.

Q. It will not?

A. No.

Q. Do you know where they originated?

839 A. On the Seatrain, you mean?

Q. No; where they came from.
A. Well, you mean how they were given to us?
Q. They were given to you at Hoboken?
A. By the Seatrain.
Q. Yes.
A. Oh, we do not know where they originated.

By Mr. LEHMAN:

Q. You cannot—you mean delivered by the Hoboken when you say delivered by the Seatrain?
A. Exactly.

By Mr. MCCOLLESTER:

Q. From what source did you obtain these figures?
A. I obtained my figures from our freight agent.

By Mr. BURGER:

Q. Will any or all of these twenty-odd cars of which you have a record show a destination?
A. Yes. We would have to know that in order to know where to send the cars.
Q. Other than Hoboken, I mean.
A. Oh, yes. These cars come from the Hoboken Shore Railroad for a destination on the Pennsylvania Railroad.
Q. None of the transfer slips to you or waybills or bills of lading by which you refer to these shipments and upon which you receive these cars at Hoboken would show the exact origin?
A. Not to the best of my knowledge and belief; no, sir.

Mr. BURGER. Would you, Mr. McCollester, or the Hoboken
840 Railway furnish the railroads a detailed list of these cars about which Mr. Russell has been testifying?

Mr. MCCOLLESTER. No. I cannot see that it is relevant. When the Hoboken Railroad receives a car from Seatrain consigned to a place on the Pennsylvania Railroad, I presume it is going to the place where the bill of lading was issued, and they forwarded it there.

Mr. BURGER. But the exact origin of these may or may not be in a certain locality, and therefore we believe that it will have a great bearing upon the reasonableness of this particular rule. I think that the points of origin of these cars will have a definite, positive, and considerable bearing upon the reasonableness of this particular Rule 4.

Mr. MCCOLLESTER. I cannot agree to that.

Mr. BURGER. Mr. Examiner, I have just asked counsel to volunteer to furnish this information; now, I am going to make a request upon you to have him furnish that. We want to know that,

I think it will be illuminating, and I think it will be helpful to you in determining the reasonableness of the rule.

Mr. McCollester. I would appreciate it if counsel would explain the relevancy of that information to any issue in this proceeding.

Mr. Burger. It is very simple. Suppose that cars originate in the vicinity of St. Louis; I do not know what the destinations
841 are; but suppose the destinations are Buffalo, New York, or is Buffalo, New York. Obviously, if the car originates in St. Louis and is to move all the way down to New Orleans by rail and then be carried all the way around the world and it comes up to New York and then by rail from New York back to Buffalo, no one may gainsay that that car is moving away from its destination instead of toward it in all of these movements except the movement from the New York port west-bound to Buffalo.

Mr. McCollester. Of course, if Mr. Burger is contending that that is a proper theory, then all of the differential routes which are in existence in the United States, and permit the railroads to haul cars all around Robin Hood's barn, are improper routes, and when a car is billed over any of these differential routes, it is violating the car service rules under that theory. It is violating, or ought to be violating, some car service rules because it is going away, at the moment, from the direction of ownership, although ultimately it will go back to the owner. There is nothing to that at all.

If our opponents are going to make the contention, as apparently they are, that it is a proper function of the car service rules to control the route over which cars may travel and to control the routing of freight, I am very glad to know it at this stage of the game, because it is decidedly helpful to us.

Mr. Burger. I do not presume we are obliged to argue
842 this out at the hearing. We are simply here to get the factual data. We can argue the matter out at a later time.

Exam. Fleming. It still is not furnished.

Mr. Burger, are there any more questions?

Mr. Burger. No; I am asking you to request that complainants furnish it.

Mr. Lehman. You have not got it?

Mr. Burger. No; we have to get it from the record, and we do not have the record.

Exam. Fleming. I do not feel that the Examiner should, himself, make the request that that be furnished. You do not have that information here at the hearing, I understand?

Mr. McCollester. We have not, Mr. Examiner.

Exam. Fleming. Are there any other questions for the witness? Apparently not.

(Witness excused.)

Mr. McGehee. We would like to ask that a subpoena be issued today to Mr. McCollester, having him furnish that information.

Exam. Fleming. Mr. McGehee, this hearing is very near its close, I understand. How would you contemplate that anything would be obtained; or, that anything could be obtained and should be produced at this hearing? Do you think it could be produced at this hearing?

Mr. Muckley. We would like to have it.

Mr. McGehee. We think it could be furnished later, as
843 far as we are concerned. That is information that we want.

Take, for example, this Santa Fe car. Suppose that Santa Fe car was loaded on the rails of some line other than the Santa Fe, in New Orleans. We are not talking about routes or roads, we are talking about the car service rules—and, instead of taking it there and delivering it back to the Santa Fe—you have got the rules before you—they take it all the way around and carry it all the way up here, and it may not be concluded by any stretch of the imagination as in compliance with the car service rules.

(Discussion off the record.)

Exam. Fleming. There being further request that complainants furnish the information referred to by Mr. Burger, is anything to be said further, Mr. McCollester?

Mr. Burger. Can I make my request a little more explicit?

Exam. Fleming. Yes; do so.

Mr. Burger. While the representative, Mr. Russell, employed by the Pennsylvania Railroad, and representing them, was testifying, he spoke of forty-odd cars on the Pennsylvania or of Pennsylvania Railroad ownership which was moved to Hoboken for transportation thence via the Seatrain to New Orleans, and he also spoke of twenty-odd cars which the Pennsylvania Railroad received at Hoboken or from the Hoboken Railroad destined to interior points.

My request is that Mr. McCollester take that list of cars
844 which will be furnished him by Mr. Russell, of 23-odd cars which he received from Hoboken—which the Pennsylvania Railroad received from Hoboken, and the 40-odd Pennsylvania cars which—I will eliminate the latter number—all we want now is, as finally decided upon—is a record of the destinations of the 23 cars.

Mr. Lehman. You mean the origins?

Mr. Burger. The origins of the 23 cars which the Pennsylvania Railroad received. We want the car number and final origin, the lines upon which those cars were loaded, and the destination.

Mr. McCollester. You will furnish me the car number; you have the destination. You furnish us with the destination.

Mr. Burger. We will furnish you with a list, and you will furnish us the origins and the railway upon which the car was loaded.

Mr. Thurtell. Not the consignor nor the consignee. That need not be furnished.

(Discussion off the record.)

Exam. Fleming. You will undertake to furnish that, Mr. McCollester?

Mr. McCollester. I will furnish, Mr. Examiner, a statement showing the points of origin and the railroads on which the cars were loaded, which will be the numbers of the cars furnished me by Mr. Russell.

845 Mr. Burger. The car number and initial of each car will be furnished to you.

Mr. Lehman. I would like to request that similar information be furnished in regard to the forty-odd cars—I mean the forty-odd cars which moved south-bound, and we will furnish similar information.

Mr. McCollester. I will do that, too.

Exam. Fleming. Is it understod that when this preliminary data which Mr. McCollester will need will be brought in here before you gentlemen separate from the hearing, as the leave given will be predicated upon that and will be only to furnish the information which he has stated he will furnish, and that he will furnish it to the Commission, copy to the defendants.

(Discussion off the record.)

Mr. Lehman. I will call Mr. Hodkinson.

E. A. Hodkinson was sworn and testified as follows:

Direct examination by Mr. Lehman:

Q. Will you state your name, occupation, and business address.

A. E. A. Hodkinson, Commerce statistician for the Trunk Line Association, 143 Liberty Street, New York City, New York.

Q. State your experience.

A. I have been engaged in railroad work for over 25 years, particularly along accounting and allied work of that
846 nature. I am appearing in this case for the Trunk Line carriers and the New England carriers.

Q. Have you made an analysis of the traffic which moved via Seatrain in the period October 1932 to March 1932?

A. 1933.

Q. 1933.

A. Yes, I have. We got that information from our member carriers, and among other information we asked them to furnish

us the route over which these particular commodities which heretofore moved—had heretofore moved before the inauguration of Seatrain service

Q. Was that information discussed with representatives of the water carriers?

A. It was; I went into that very careful to make sure that we were not overstating the situation.

Q. From the analyses made by you, what proportion of the traffic handled during the 6 months, previously moved all rail?

A. Sixty-two per cent.

Q. Did a substantial portion of the remaining 38 per cent also move partly by rail and partly by water, or in conjunction with water carriers?

A. It did; it moved by rail to the ports and thence by the break-bulk lines.

Mr. LEHMAN. That is all. You may cross-examine.

847 Cross-examination by Mr. MCCOLLESTER:

Q. I would like the detail of your analyses if you have them.

A. I have not sufficient copies to furnish now, but I can undertake to furnish them within 10 days.

Mr. LEHMAN. We will be glad to furnish copies of those if you desire.

By Mr. MCCOLLESTER:

Q. Have you a copy of it there?

A. I have one copy.

Q. Let me see it.

By Mr. LEHMAN:

Q. Will you please state how many carloads of traffic were handled in the study made by you?

A. 432. I am not sure that this is all the traffic that moved via the Seatrain Line during the first 6 months, but it was all that was reported to us by our member roads. You know, of course, we do not show through bills of lading for the transportation of shipments via Seatrain Lines, bills of lading simply read to Hoboken, so it is quite possible that quite a number of shipments went forward by Seatrain which we did not receive any report on.

By Mr. MCCOLLESTER:

Q. What was the purpose of this exhibit?

A. The purpose of the exhibit originally was to show to the Shipping Board the extent to which the Seatrain Line had taken the traffic away from the railroads.

Q. Is that the contention of the trunk lines for whom

848 you are testifying?

Mr. LEHMAN. I will tell his intention.

Mr. MCCOLLESTER. You will?

Mr. LEHMAN. Well——

Exam. FLEMING. Mr. Lehman, you may state the intention.

Mr. LEHMAN. It is our contention that most of the traffic handled by the Seatrain Lines has been diverted from the all-rail routes between New York and the Southwest through the St. Louis and Memphis gateways, for example.

Exam. FLEMING. Deprived from traffic which has been diverted from routes from where, if it had not been diverted it would have moved through St. Louis or to the Memphis gateways?

The WITNESS. Yes. This study and our investigation showed that very clearly. The exhibit and study also includes diversion from through rail routes as well as the rail routes concurred in by the trunk lines, although it includes some displacement tonnage which moved from Georgia to New York and other traffic of that kind.

It includes the salt from Louisiana which would displace the New York State salt.

By Mr. MCCOLLESTER:

Q. Did you prepare this exhibit?

A. It was prepared under my supervision.

Q. Did you insert the information under the column headed "Previous movement"?

A. I did, on advice from the railroads that they show in
849 previous movements. Some of them is designated as all rail; some of it is designated as rail, water-rail; some of it is designated truck to New York, water beyond and some of it is designated in other forms, which is set forth in the exhibit. That is the information which we got from the rail carriers reporting the shipments, and they gave that information in addition.

Q. It was not your judgment?

A. No. It is not my judgment. It is actual knowledge received from the carriers who conducted the investigation to find out just how these shipments did move.

Mr. MCCOLLESTER. I object to the testimony of the witness and I move to strike it on the ground that it is based upon conclusions of railroad witnesses who would be available to defendants and who have not been called upon to testify here and as to whom we certainly would have the right of cross-examination. For instance, whether or not, and, to the extent that certain traffic formerly moved all rail, and other matters of that kind.

The WITNESS. I can supplement what I have said by the personal investigation that I made: You take bakery goods from Long Island City. This was going into the Southwest. At the

time the Seatrain service started I made a personal contact with the traffic manager of Loose-Wiles Company. I used to work with the man who handles that traffic out there, and I
850 asked him how his bakery goods had moved and he said that his bakery goods had all moved all rail before. I also conducted an investigation into New England to determine what the movement was up there.

By Mr. McCollester:

Q. You also heard advice to the contrary.

A. I still contend no matter what I heard that that is the real movement.

Q. Will you answer the question?

A. Yes; I heard to the contrary, but I still contend that my information is correct. You cannot have afforded to crate that machinery to go by break-bulk lines, if that is what you are talking about.

Q. From your information, how many carloads of W. P. Dishes moved to Waterville, Maine, to the Southwest all rail?

A. I do not know without looking at the statement which you have before you.

Q. Do you know how many cars of can ends moved from Pittsburgh, Pennsylvania—from Canonsburg, Pennsylvania, rather, to New Orleans, Louisiana, all-rail?

A. I do not.

Q. Then, clearly, your opinion in this matter is based entirely upon the opinions of the sources where you obtained the alleged facts set forth on this exhibit; I mean by that that you are simply stating the opinions of the men who furnished this data.

851 A. It is my opinion.

Mr. McCollester. It is quite obvious that this is simply a compilation of the opinions obtained from many men, the men who furnished the data and who are not available here for cross-examination. This is a summary of opinions of a lot of railroad traffic men, and it might change a great deal if they were subject to a little cross-examination.

Mr. Muckley. I want to point out for the record that the last two questions are very similar, with the answers, to questions and answers which were allowed in connection with the statement brought out by Mr. McCollester with Mr. Brush when Mr. Brush was testifying. Further, I want to point out that, irrespective of what has gone on in the complainants' case, these two questions which were asked by Mr. McCollester I think have no material bearing upon this case, because it is perfectly obvious that this witness cannot keep in his mind individual shipments in a six months' study of freight traffic without reference to the statement.

Mr. SPENCE. This question did not relate to the information shown on the exhibit, did it?

Mr. MCCOLLESTER. Yes, I was referring to that. However, it really did not relate to the information shown on the exhibit, but it related to information on the basis of which conclusions have apparently been drawn by this witness and placed into the exhibit.

852 The WITNESS. Mr. Examiner, the way this statement was prepared was under a perfectly clear questionnaire to the traffic departments of each of the railroads serving New York City. They were put on notice that we expected them to go to the shippers of these particular commodities and determine from them what the previous movement had been and this is their judgment. We cannot bring twenty traffic people here. That is why I prepared this statement.

Mr. MCCOLLESTER. I do not see why they cannot bring twenty traffic people here, these men are all apparently right in this immediate neighborhood, and certainly if they expect to put the information in that you put it in by the witnesses who derived it, themselves, more or less by hearsay and conversation by other shippers.

Mr. LEHMAN. Mr. Examiner, similar testimony was offered by Mr. Brush. He stated, on a number of occasions, that, similarly, that none of the traffic had been diverted from the all-rail routes. If we are going to be required to bring hosts of witnesses here to testify concerning this traffic, and concerning the statements made by the witness on the stand, then we are going to make the request that Mr. Brush bring the details of the information in here, by means of shipper witnesses, so we can see what these witnesses have to say themselves. Let him bring them here so we can question them, and so we can determine what the exact situation

853 is in regard to the movement by Seatrain.

(Discussion off the record.)

Mr. MCCOLLESTER. As I understand, Mr. Examiner, the witness is testifying from a statement which he has before him which was prepared to embody the conclusions stated in communications addressed to him in response to a questionnaire which he sent out. I have objected to and I move to strike the testimony of the witness on the ground that it is hearsay and that the sources of information, the persons expressing the opinions which are supposed to be reflected in the witness' testimony, are not here to be cross-examined, to the prejudice of the complainants in this case.

Exam. FLEMING. I understand in reality this objection is based primarily on such portion of the statement forming the basis of this testimony as indicates the previous movement up to the port?

The WITNESS. Prior movement prior to the inauguration of the Seatrain service, October 6, 1932.

By Exam. FLEMING:

Q. Previous movements prior to the institution of the Seatrain service itself?

A. Yes, sir; prior to the institution of the Seatrain service at New York.

Q. In other words, whether the previous movement was all-rail or rail, water and rail or truck, water and rail?

A. Yes, sir; whether it was all-rail, rail, water rail, or
854 truck, water and rail or truck, water and truck.

Q. Is there anything, in view of the objection, is there anything further you care to state to show the weight that you think should be given to this testimony?

A. Well, I would like to say, in connection with the bakery goods, I personally interviewed the traffic manager of Loose-Wiles Baking Company, the shippers at Long Island, and he advised me that prior to the inauguration of the Seatrain his bakery goods to the Southwest had always moved all rail. I interviewed the Break-Bulk people and they told me that they had never handled bakery goods in carload lots.

I would further like to call attention to the fact that this includes quite a number of tank cars. Tank cars were never handled by the break-bulk lines, showing that there cannot be any possible claim that my previous testimony is hearsay.

Mr. McCOLLESTER. This is a very important point because our information is that there was no all-rail movement on many of these items, and never could have been. I think an accurate investigation in this matter would disclose that fact.

Exam. FLEMING. Your objection is based upon the fact that the specific figures which form the basis of the exhibit are not offered?

Mr. McCOLLESTER. My objection goes to the exhibit. I would make the request that if the witness' testimony is allowed to stand, over my objection, the defendants be requested to
855 furnish for the record statements from which the witness has just testified is the basis of his exhibit, and that the defendants also furnish for the record the questionnaires which the witness sent out and the replies to those questionnaires upon which the statement was made up.

The WITNESS. Some of them were in person.

Mr. LEHMAN. We have no objection to furnishing anything that we have. So far as the questionnaires are concerned, I think the witness stated that they consisited of letters. I would be willing to furnish the letters.

Mr. McCollester. I want the word "questionnaire" included because that is what the witness says it was.

Mr. Lehman. I am perfectly willing to give you these letters. However, I want to point out that some of the information was supplied from our own information, and some of it was furnished by the water carriers, so, to that extent, you will not find replies covering every portion of it. This testimony was offered in the other case, and from the situation there, I would say that it indicates that all, or at least the very great majority of the information shown in his statement is absolutely correct; in other words, that the statement is substantially correct; and, Mr. Examiner, we hesitate to bring so much of the record in this case, but, in view of what has transpired, I will say right now that I will ask to be incorporated by reference to the proceeding, the testimony
856 which deals with this particular instrument or, rather, with these various items in connection with this exhibit.

Mr. McCollester. Will you specify the various witnesses and pages in the other record at which that testimony appears?

Mr. Lehman. I do not have it now.

Mr. McCollester. I do not ask you to do it now, but will you point out the exact part of the testimony in the case that you have reference to as bearing upon this particular exhibit?

Mr. Lehman. We will.

Mr. McCollester. I think we are entitled to know the character of the inquiries addressed by this witness, and that can only be determined by the question that was sent out.

Exam. Fleming. I understand that he is going to furnish the questionnaires and the replies.

Mr. Lehman. I will furnish you with the copies of the questionnaires, or, rather, the letters that were sent out, and the replies which were received.

Mr. McCollester. The letters and replies received in connection with this statement?

Mr. Lehman. Yes.

Exam. Fleming. Let the record show that leave is accorded to file the statement just described by Mr. McCollester and by Mr. Lehman as the basis of the testimony of this witness in that particular and also the correspondence so described which form, in part, the basis of this statement, such statement to be filed
857 within 10 days, copies to be furnished opposing counsel.

Mr. McCollester. It is getting late, and I have one statement before we close for tonight.

Mr. Lehman. Have you finished with this witness?

Mr. McCollester. No; I want to cross-examine.

Mr. Lehman. Before the hearing is concluded tonight, it is quite probable that I will not be here in the morning, and I, there-

fore, wish to make several statements on the record before leaving.

Mr. McCollester. I want to cross-examine this witness.

Mr. Lehman. Go ahead.

Mr. McCollester. I just have one question.

The Witness. Yes.

Cross-examination by Mr. McCollester:

Q. You stated you interviewed these respective water lines; will you state what roads and what water lines, and what representatives of each you interviewed?

A. Yes. Mr. Simmons of the Southern Pacific; Mr. Tye, who is also with the Southern Pacific; Mr. Levis, of the Mallory-Clyde Lines.

Mr. McCollester: That is all.

(Witness excused.)

Mr. Lehman. I would like to ask permission to refer, by reference in this record, to the tariffs of any of the water
858 carriers or car ferries referred to in the circulars of the American Railway Association, as to which carriers are alleged to have given preference in the matter of car service and equipment.

I am making that request because I want to show, later, in the course of the proceeding, that the car ferries operate under a rail basis of rates whereas the Seatrain operates upon the break-bulk or water basis of rates.

Mr. McCollester. On that I am only too glad to accommodate my opponents and get into the record pertinent data in the manner described, as simply as possible, but it puts us at somewhat of a disadvantage because I do not have the tariffs of these water lines and do not know what they contain. If counsel will furnish me with them or furnish me with a statemnent of the tariffs on which he expects to rely, and that part of them specifically I will have no objection.

Mr. Lehman. I will make a list of them, at the same time indicating that portion of the tariffs to which I expect to refer.

Mr. McCollester. In addition to a list of the tariffs, will you give me excerpts from the tariffs that you rely upon, because I do not have the tariffs, and I would be completely at a loss to know what it was all about.

Exam. Fleming. What do you wish to stipulate? I do not understand exactly what is desired to be stipulated at this time.

859 Mr. Lehman. To stipulate that we may refer, by reference in this proceeding, to the tariffs which are published by the car ferry lines or water carriers which the company alleges are preferred by us in the matter of equipment.

Mr. McCollester. Are they a part of the other record?

Mr. Lehman. No; they are not.

Exam. Fleming. What do you propose to furnish?

Mr. Lehman. I will furnish an identification of those tariffs.

Exam. Fleming. I am not clear as to how this matter is to be stipulated. If you wish to furnish it later, the question of whether you should be accorded leave to do so is another question.

Mr. Lehman. The rules of the Commission specifically provide that tariffs may be referred to without offering them as an exhibit in this proceeding. All that I am really required, by rule, is to identify the particular tariffs and that, I am willing to do within the same time that we furnish the other information.

Exam. Fleming. You are speaking exclusively of tariffs on file with the Interstate Commerce Commission?

Mr. Lehman. Yes.

Exam. Fleming. Are you anticipating specifying in detail the portions of such tariffs so that those portions can be identified?

860 Mr. Lehman. I will do so.

Exam. Fleming. Is there any objection to that stipulation, Mr. McCollester?

Mr. McCollester. There is no objection, Mr. Examiner, my understanding being that Mr. Lehman is going to identify the portions of the tariffs in such a way to indicate to me their substance, and I assume he will make tariffs available to me. I presume you have the tariffs in your office?

Mr. Lehman. We have, we undoubtedly have them available in our office.

Mr. McCollester. I do not run a tariff file.

Exam. Fleming. The record will show that leave is so accorded. That such matter is stipulated by the defendants with the consent of opposing counsel in this record contingent upon them supplying within 10 days the statement to the Commission specifying in particular detail such portions of the tariff, in addition to a description of the tariff, that you rely upon.

Mr. Lehman. Yes; Mr. Examiner, I think the record in this proceeding should show that litigation is pending in the district court of the United States for the Southern District of New York concernng the use of equipment owned by the trunk line carriers in Seatrain service. That litigation is entitled "New York Central Railroad and Erie Railroad, plaintiffs, v.

861 Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Company," and is Equity No. E-7699.

Mr. McDermott. I understand that this is received in evidence, or is it?

Mr. McCollester. I think if this testimony is going to go in it will be necessary for that exhibit to go in, too.

Mr. Lehman. It was our intention merely to offer his oral testimony, and to use this to refresh his recollection.

Mr. Hodkinson. I think the exhibit ought to go in.

Mr. McDermott. I only have one copy of it.

Mr. McCollester. I believe you stated you can furnish other copies later.

Mr. McDermott. Yes; within 10 days. I will do that.

Exam. Fleming. It will be received.

(Exhibit 34, Witness McDermott, received in evidence.)

Mr. McCollester. Now, your Honor, with reference to this suit in the United States District Court here in New York if that information, Mr. Examiner, in connection with the reference to that litigation, has to be placed into this record, I think you should be informed that the answers of the defendants in that case, among other things, states and sets up as a defense that the subject matter of the suit is one entirely within the jurisdiction of the Interstate Commerce Commission, not within the jurisdiction of the court.

Exam. Fleming. Mr. Lehman, will make the record clear as to your object in referring to that proceeding?

862 Mr. Lehman. As a matter of information to the Commission, I think the Commission ought to be advised that such a proceeding is pending.

Exam. Fleming. There is no request to stipulate anything in that connection?

Mr. Lehman. No information whatever. I should add, however, that the various trunk line carriers involved in that proceeding are the Pennsylvania Railroad, the New York, Ontario & Western Railway; the New York, New Haven & Hartford Railway, the Delaware, Lackawanna & Western Railway; the Boston & Albany; the Central Railroad of New Jersey; the Reading and the Lehigh Valley.

Mr. McCollester. That suit was instituted some time after this present complaint was filed; is that correct?

Mr. Lehman. I would not know about that, Mr. McCollester; I think that is probably right.

Mr. McCollester. That is right.

Exam. Fleming. It is understood that in connection with leave given in the last matter, that as to the additional matter, that copies will be furnished to opposing counsel?

Mr. Lehman. Yes, sir.

Exam. Fleming. There is nothing else tonight?

Mr. Thurtell. Yes, Mr. Examiner.

Exam. Fleming. What is it?

Mr. THURTELL. Mr. Examiner, I have a witness, Mr.
863 Green, who wants to get away tonight I would like to swear him now.

Exam. FLEMING. It is somewhat late now. Could you call him in the morning?

Mr. THURTELL. I think the delay that this witness has been subjected to is outrageous—there is no reason for it. I cannot understand why he can't testify tonight so that he can return, without further unnecessary delay here at New York.

Exam. FLEMING. Mr. Thurtell, I certainly am surprised at your statement. This is only the second day of the hearing in these cases, and it is now about 5:35 p. m. Most of the time has been devoted to the taking of the complainants' testimony, and the defendants have, of course, determined the order in which they would present their witnesses.

Particularly, in view of the technical nature of the proceedings, it would further seem that a witness coming all the way of St. Augustine, Florida, could not have reasonably contemplated that he could be excused so that he could return to St. Augustine today.

However, if the session will not be unduly protracted, we will permit him to proceed. How long do you think it would take?

Mr. THURTELL. About 10 minutes for the direct.

Exam. FLEMING. And how long for the cross-examination?

Mr. MCCOLLESTER. I would not like to be bound by any agreement, but I will limit it as closely as I can. I do not know
864 what he is going to say.

Exam. FLEMING. Well, we will go ahead for a reasonable length of time.

(Discussion off the record.)

Exam. FLEMING. Gentlemen, proceed.

D. B. GREEN was sworn and testified as follows:

Direct examination by Mr. THURTELL:

Q. Will you please state your name, your position, and the railroad company with which you are connected.

A. My name is D. B. Green. I am general freight agent of the Florida East Coast Railway Company.

Q. You have been in the employ of the Florida East Coast Railway Company for how long?

A. About 20 years.

Q. You are familiar with the business of the Florida East Coast Railway?

A. I am.

Q. Does the Florida East Coast Railway have any connection with the service of a car ferry?

A. Yes; they are two separate companies; the one is the Florida East Coast Car Ferry Company, operating from Key West to Havana, and acts in connection with the Florida East Coast Railway Company.

865 Q. The distance from Key West to Havana is how much?

A. Ninety knots, or approximately 106 miles.

Q. What time is taken in the transit?

A. On the car ferries it is approximately 7 hours.

Q. When was the service by the car ferry instituted?

A. Out of Key West in 1915, I believe early in the year.

Q. Was there any service prior to that time, Mr. Green?

A. Yes; there was a different type—a small service from what is, or rather, was the end of the railroad line to Cuba. This was a similar service, but it was on a smaller scale.

Q. The service from Key West to Havana has been in effect for about 18 years?

A. Yes.

Q. This is one of the various car ferries, and is operated as described by Mr. Brush, is it not?

A. Yes; I believe it is.

Q. Cars are switched on board; is that correct?

A. Yes; they are handled over a ramp, the cuts are switched directly onto the ferry, over this movable ramp.

Q. The service has been such as to make it necessary, I suppose, information as to the weather reports, the likelihood of storms, of bad weather, and you have such reports, have you not?

A. That is true. We keep very close touch on the weather situation in connection with the operation of the ferries.

866 Q. In the course of the 18 years since they have been operated, have you ever lost a ferry?

A. We have never lost a ferry; we have never had a claim paid, or presented from anyone as to marine damage.

Q. You have never lost a car?

A. We have never lost a car yet.

Q. The insurance on these ferries is such as described by Mr. Brush, is it not, the percentage of value?

A. I understand that it is almost, if not wholly offset as to that phase of it, however. However, I am not very well posted as to that phase of the matter. I know that we do carry complete coverage of insurance both as to hull and cargo from all of those sources of information which I have.

Q. Does the Florida East Coast Car Ferry Company have equipment?

A. Yes; and incidentally, before I get off of the matter of the insurance of the Florida East Coast Car Ferries, that they carry; they carry full insurance on all of the cargo as well as equipment. The rates of the Florida East Coast Car Ferry generally; in fact, I can say in all cases; also include the marine insurance.

Q. Can you tell us about the equipment?

A. The Florida East Coast Car Ferry Company does own itself a considerable amount of equipment.

I have an exhibit, consisting of one sheet, which I now
867 offer as my Exhibit No. 35.

(Exhibit 35, Witness Green, received in evidence.)

By Mr. THURTELL:

Q. Proceed.

A. My Exhibit No. 36, consisting of one sheet, which I have just offered into evidence, which is a copy of Florida East Coast Railway completion report changes made in equipment during 6 months ended—general account 11—53—Freight train cars class and subclass.

This copy of the completion *of the completion* report showing certain equipment owned by the Florida East Coast Car Ferry Company. It shows that in 1920 the Florida East Coast Car Ferry Company purchased 500 additional box cars at a total cost of almost 2 million dollars—476 of those cars were in service at the end of last year. The Florida East Coast Car Ferry Company, in 1923, purchased 175 cars. These were refrigerator cars which, as shown by the exhibit, are now under lease to the Fruit Growers Express, and as far as our records go, all of those cars are still in operation and available for use.

Those cars were purchased at a cost of approximately one-half million dollars, or a total of considerable better than two million dollars.

Q. Does that conclude the statement that you wanted to make, Mr. Green?

A. Yes; it does. However, there has been reference
868 made about the relative insecurity of the Florida East Coast Car Ferry Company type of car ferry as compared with the relative security of this new type of vessel, but the fact remains that we have been in continuous operation, at times the service was as much as three ferries each day. At the present time it is substantially less than that because of the lack of traffic, but there has been no difficulty at all, there has been no loss; not a penny of insurance has been collected. We are in position, because of the comparatively short haul, to keep in definite touch with the weather, and in the case of bad weather, the ferries do not put out. They stay in port.

This is not the case in just ordinary weather, but it is the case in extreme bad weather—hurricane weather.

That is all I have.

Mr. THURTELL. Thank you. Mr. Examiner, that is all.

Exam. FLEMING. Cross-examine.

Cross-examination by Mr. McCOLLESTER:

Q. Mr. Green, in connection with these cars shown on your Exhibit 35, were they not loaned to the Florida East Coast Railway Company?

A. I do not know the exact date.

Q. Was that shortly after their purchase?

A. I really do not know.

Q. Will you please look that up and advise us?

869 A. I will do so.

Exam. FLEMING. Leave to furnish that information is granted, same to be furnished to the Commission within 10 days, copies to counsel.

By Mr. McCOLLESTER:

Q. In other words, was this the situation: That the Florida East Coast Car Ferry Company having some money bought some cars for the use of the Florida East Coast Railway Company and loaned them to the railway company?

A. They naturally had the money if they were bought by them at that time; and, also, at that time the Florida East Coast Railway Company had some money also.

Q. They are a family concern, both owned by the same interests?

A. The same interests in general. They are jointly in control of both of these companies.

Q. If the railroads, acting under Car Service Rule 4, should refuse permission for the delivery of their cars to the vessels of the Florida East Coast Car Ferry Company would you object to their action, and consider it unreasonable?

A. We have not been advised that any such move is contemplated.

Q. Can you indulge your imagination enough to state whether or not you would object?

A. I would rather not answer the question.

Mr. THURTELL. I would not ask that question, Mr. McCollester.

By Mr. McCOLLESTER:

Q. You know you would, do you not?

Exam. FLEMING Now, that is too problematical, Mr.

870 McCollester.

By Mr. McCOLLESTER:

Q. Your companies have fairly consistently opposed the Seatrain in various ways in proceedings before the Commission and before the Shipping Board, and otherwise?

A. I object to the question. It does not refer to any part of his direct testimony.

Mr. McCOLLESTER. I am prepared to make him my own witness on this point.

Mr. THURTELL. You can recall him if you want to, but at the present time you are cross-examining him.

Mr. McCOLLESTER. Will he be here tomorrow for cross-examination or direct?

Mr. THURTELL. Will you pay his expenses?

Exam. FLEMING. We will proceed with the cross-examination at this time.

Mr. McCOLLESTER. I would like to have my question answered.

Exam. FLEMING. I thought your answer to the objection or reply to the objection conceded that the question was not a proper question on cross-examination.

Mr. McCOLLESTER. We do not concede that, Mr. Examiner, but if the Examiner so rules I will have it considered direct examination.

Exam. FLEMING. I understood that you would examine the witness as your own on that.

Mr. McCOLLESTER. I am prepared to do that.

871 Mr. THURTELL. If you are going to finish your cross-examination let us get through with that, and then we will see about making him your witness.

By Mr. McCOLLESTER:

Q. You have been operating, you say, since 1915?

A. I believe that is the date. It was my recollection that it was about 1915 that the car ferries first began operating. It may, possibly, have been earlier—early in 1916, but it is my recollection that prior to that time there had been some service from Knights Key for approximately 3 years, which started in 1912.

Q. Was that operated by your company?

A. The original steamship line, as I understand it, was operated by the railway company for a while. How long, I just do not know.

Q. Did the original company handle railroad cars?

A. The original vessels did not. I would say this: I do not believe that the original company did handle railway cars.

Q. When the car operation began across the straits, were the car ferries owned by the railway?

A. No.

Q. Owned by separate company?

A. Yes.

Q. Operated by a separate company?

A. No; operated generally by the same. It had the same
872 officials for both companies.

Q. It was a separately operated and distinct company, was it?

A. It was a separate company but operated by the same officials for both companies.

Q. Has there not been a separation made at some time between the railway and the Florida East Coast Car Ferry Company?

A. I understand the Florida East Coast Car Ferry Company has been as it is from the beginning. I may be wrong as to that.

Q. During all of that time has any railroad ever refused permission to the Florida East Coast Car Ferry Company for the delivery of cars to that car ferry company, for delivery to and from Cuba?

A. No, sir; not that I know of.

Q. Is the Florida East Coast Car Ferry Company a member of the American Railway Association?

A. Not that I know of.

Q. Has the Florida East Coast Railroad been and is it a member of the American Railway Association?

A. They are.

Q. Does the Florida East Coast Railroad subscribe to the code of car service rules and the code of per diem rules?

A. They do.

Q. How about the Car Ferry Company?

A. I really cannot say. I do not know.

Q. During all of this period that you have been operating
873 in business to and from Cuba, has the Florida East Coast Railway been responsible to the car owners for per diem accruing on cars delivered to the car ferry company?

A. I understand that they have.

Q. Do you know that they have?

A. Yes.

Q. During these 15 years have you encountered any competition in handling cars to and from Cuba?

A. Yes.

Q. What competition?

A. Overseas Railway and later the Seatrain Lines.

Q. When did that competition begin?

A. In 1929 and has continued to date.

Exam. FLEMING. Have you concluded?

Mr. McCOLLESTER. I have no further questions.

Mr. THURTELL. Nothing further.

Exam. FLEMING. You may be excused.

(Witness excused.)

Exam. FLEMING. Is there anything further that anyone desires to present this afternoon before we adjourn?

We will adjourn until tomorrow morning at 10 o'clock.

(At 6 o'clock p. m., November 3, 1933, the above-entitled hearing was adjourned to November 4, 1933, at 10 o'clock a. m.)

874 ASSEMBLYROOM, MERCHANTS ASSOCIATION,
322 BROADWAY, NEW YORK CITY, N. Y.,
November 4, 1933.

Before HARRIS FLEMING, Examiner.

Met pursuant to adjournment at 10 a. m.

Appearances: The same as heretofore noted, with the exception of Mr. Roland J. Lehman.

876 PROCEEDINGS

Exam. FLEMING. You may proceed.

Mr. KNOWLTON. Mr. Examiner, Mr. Lehman will not be here today, as he was called away.

Mr. MCCOLLESTER. Mr. Examiner, it might be convenient for all concerned if the record shows that the report of the Commission's investigation of Seatrain Lines, Docket No. 25565, is now in printed form and is to be found at 195 I. C. C. 215.

MR. MUCKLEY. Is that all you had on that?

Mr. MCCOLLESTER. Yes.

Exam. FLEMING. You may proceed to call your next witness.

Mr. BURGER. I will call Mr. Kerr.

J. G. KERR was sworn and testified as follows:

Direct examination by Mr. BURGER:

Q. Mr. Kerr, will you please state for the record your name, with what carrier you are connected, and, otherwise recite your experience in traffic matters.

A. My name is Joseph G. Kerr, I am assistant to the traffic vice president of the Louisville & Nashville Railroad Company. I have been connected with that company in its traffic department, in various capacities, for a period of over 30 years.

Q. Describe the location of the Louisville & Nashville Railroad.

877 A. The Louisville & Nashville Railroad has somewhat over 5,000 miles of line serving, in all, 13 States, but principally the States of Kentucky, Tennessee, and Alabama, although it has a substantial mileage in Illinois, Georgia, and Mississippi.

Its main lines extend from Cincinnati, Ohio, Louisville, Kentucky, Evansville, Indiana, and St. Louis, Missouri, on the north, to the Gulf Ports of New Orleans, Mobile, and Pensecla, also to Atlantic, Georgia, and Memphis, Tennessee, on the south.

Q. Is the Louisville & Nashville Railroad an active line in the transportation of freight traffic in railroad cars between Trunk Line and New England territories, including Buffalo-Pittsburgh territory, on the *hand* hand, and points in the States of Alabama, Mississippi, western Florida, and northern Georgia, on the other hand?

A. It is. At Cincinnati, Ohio, and Louisville, Kentucky, the Louisville & Nashville Railroad connects with the great east-and-west railroad systems of Official territory, namely the Baltimore & Ohio, New York Central, and Pennsylvania systems, as well as with other roads such as the Monon, Erie, Chesapeake & Ohio, and Norfolk & Western, and these lines, together with the Louisville & Nashville Railroad constitute reasonably direct all-rail routes between the East and that part of the South served by the Louisville & Nashville Railroad. These routes are used in the transportation of a large tonnage. Besides, we have other all-rail
878 routes between the East and our territory through Montgomery, and Birmingham, Alabama, and a number of other southern gateways, using other railroads east of such gateways.

Q. Does the Louisville & Nashville Railroad participate in joint rates and through routes with coastwise domestic steamship lines in connection with traffic between the East and the South?

A. It does. There exist such routes via Norfolk and other Hampton Roads ports, the several South Atlantic ports, and via Mobile and New Orleans. I should add there, however, that via New Orleans our participation in the routes is very limited.

Q. Does the Louisville & Nashville Railroad permit its freight cars to be used for movement in vessels of the Seatrain Lines, Inc., and, if so, under what circumstances?

A. The Florida East Coast Ferry Company which has been held to be an extension of the Florida East Coast Railroad, operates a car ferry between Key West, Florida, and Havana, Cuba, and, regarding it as merely an extension of a railroad, we have permitted our cars to be taken aboard such car ferries for movement to Cuba and return. When the Seatrain Line's predecessor inaugrated a car ferry service between New Orleans (Belle Chassee) and Havana, Cuba, in competition with the route of the Florida East Coast we likewise permitted our cars to be used by this new ferry route, although, as a matter fo fact, we have been favored
879 with very little traffic when the Missouri Pacific Railroad, having a financial interest in Seatrain Lines, has been in a

position to handle the traffic moving. We do not see any similarity between this situation; that it, of not permitting them to be between New Orleans and Havana, and not permitting them to be used in coastwise service between New Orleans and Hoboken or between Hoboken and Havana.

Q. In what respects are those situations dissimilar?

A. We have no through routes or joint rates in connection with Seatrain Lines, Inc., and do not desire to establish any. The entry of Seatrain Lines into the coastwise service was, we, feel, unnecessary and ill-advised, being into a field already fully occupied and, in fact, with a surplus of transportation facilities; first, in respect of steamship lines, and, second, as to rail lines, between the East and South and Southwest.

If it could be regarded as a railroad it probably never would have been granted a certificate, but being held to be a steamship line, it does not choose to handle freight as do other steamship lines but so constructs its ships as to require the use of railroad freight cars to hold the freight, or as containers for the freight, while they are in its possession.

In other words, we are asked to provide at a nominal charge our freight cars for use by Seatrain Lines as containers and not for rail transportation purposes, and to enable Seatrain Lines, solely by reason of so using railroad freight cars, to
880 provide the equivalent of an all-rail service and, in fact, to furnish about as fast a service between the East and South in competition with our own all-rail routes.

To state the matter differently, we are asked to provide a necessary part of the means by which a new and unnecessary competitor shall enter the field and deprive us of traffic which should properly move via our all-rail routes, or via the existing "break-bulk" routes and to take out of transportation use our cars for the time they are in the vessels of Seatrain Lines.

So far as concerns movements between New York and Havana, manifestly such a movement in Louisville & Nashville Railroad equipment is not in the direction of "home" and should not be permitted.

Q. Are such steamship lines what are commonly known as "break-bulk" lines?

A. Yes; meaning that the freight at the origin end of the steamer is loaded directly into the hold of the steamer and at the destination and is unloaded from the hold onto docks, or trucks, or into cars.

Q. Do any of such "break-bulk" steamer lines either use or demand the use of railroad freight cars owned or within the control of the Louisville & Nashville Railroad for the purpose of

transporting the freight on the high seas between the ports served by them?

881 A. No. When the Louisville & Nashville Railroad originates the freight our equipment is made empty upon delivery of the freight to the steamer line, and when terminating a shipment we simply set in a car at the dock into which the freight is loaded from the ship, and we make delivery at destination. In both cases the freight cars are immediately available for other use.

Q. It is charged in the complaints that Rule 4 is part of a concerted plan to prevent the delivery by complainants to Seatrain Lines, Inc., of cars owned by the defendants. Is this charge correct so far as the Louisville & Nashville Railroad is concerned?

A. It is not. Even prior to the adoption of Rule 4, Seatrain Lines, Inc., and the two railroad plaintiffs in these cases were placed on notice that Louisville & Nashville Railroad cars must not be used by Seatrain Lines, Inc., between other than New Orleans (Belle Chassee) and Havana. So far as the Louisville & Nashville Railroad is concerned, Rule 4 merely carries out instructions which the Louisville & Nashville Railroad had in force beginning with the inauguration of service by Seatrain Lines, Inc., between New York and New Orleans via Havana.

Q. Mr. Kerr, do you care to comment, by way of response, on any of the testimony presented by witnesses for complainants?

A. Yes. It was testified here yesterday that approxi-

882 mately 50 percent of the traffic handled by Seatrain Lines between Hoboken & New Orleans had origin or destination on the Hoboken Railroad and origin or destination on the—I presume would mean within the New Orleans Terminal. In other words, the traffic originated in New York Harbor limits and was destined to points within the New Orleans Terminal limits or it was——

Mr. McCollester. I think you are incorrect in the interpretation of the testimony, Mr. Kerr.

The Witness. That is the way I understand it. I asked the question, I was very careful to do so.

Mr. McCollester. Of course, the record will show.

The Witness. If that is correct, we think it constitutes a very good reason why the railroad cars should not be used in that particular service.

I would also like to call attention to the testimony presented by Colonel Ballantine, in which he compared the roundtrip movement via Seatrain, with the alleged roundtrip movement by the railroads. He used 16 days' time for the roundtrip via Seatrain, and 37 days via railroad. That is the most favorable situation that

he could possibly conceive of although it was one that was thoroughly impracticable. In other words, it was merely a theoretical comparison of Seatrain's operation of a weekly service between Hoboken and New Orleans via Havana. There is a sailing period of 7 days. Manifestly, the ship starts out at Hoboken with freight cars for points within the New Orleans Terminal district, unloads those cars out at Belle Chassee, to return almost immediately to Hoboken—if that were done they could not possibly make the round trip for any one of those cars in 16 days. At the very least, it would require 21 days, because there is a week's lapse between the unloading and reloading at either end of the line.

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To this, however, would have to be added the number of days for the cars within the terminals at either end so you have a member of at least 24 or 25 days instead of 16 days.

On the other hand, taking a theoretical comparison that was made and applying it to the railroad situation, the railroad is in a position to make at least a sixth-day delivery in New Orleans. It is able to do that with a loaded car, and it is in a position to do the same thing with an empty car plus, of course, the time consumed at the terminals at both ends.

Furthermore, much of the traffic that the Seatrain Line handles and desires to handle originates in the interior and terminates in the interior. Manifestly, as to this traffic, or as to most of this traffic, the time necessary for the railroad service is shortened as compared with the time necessary in connection with the rail, water, and rail service. In other words, if the shipment originates at a point like Buffalo or Pittsburgh or Rochester and is destined to a point like Montgomery, Alabama—and they are asking that through rates be established to that point, the all-rail distance from one of these interior points in the South down to Montgomery.

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Q. You mean to one of these points in the East?

A. Yes. From one of these interior points in the East, to Montgomery, Alabama, it is relatively shorter as compared or contrasted with the distance from one of these points to New York, thence via Seatrain to New Orleans, and then via railroad to Montgomery, Alabama. But, Colonel Ballantine did not use—he did not choose to select a comparison as to that, but took the most favorable, as I said, and the most impracticable situation that one could conceive of in making his comparison. That is all.

By Mr. THURTELL:

Q. Mr. Kerr, you have referred to the use of your cars via Seatrain as containers.

A. Yes.

Q. Is there any parallel between that situation and a shipper who desires to avail himself, for reasons of his own, of an opportunity to delay the unloading of cars, and for that reason holds the cars on its sidetracks or elsewhere before unloading the cars?

A. No difference in principle that I can see at all. The Commission, and everybody else, has condemned time and time again the use of railroad cars for warehousing purposes. That is practically what they are while they are in Seatrain services.

885 Q. Take the testimony that was offered with regard to the lack of running expense on these cars while the Seatrain has them on its vessels; is that situation parallel with a case where a shipper holds the car on sidetracks, failing to unload them; is there any running expense to such a car?

A. There is identically the same situation, except there is this difference, of course, that if it is true while they are in the vessels of the Seatrain lines there is no exposure to the weather, while if they stand on the shipper's sidetrack, while there is no running expense, there is a certain amount of depreciation, if I might call it that, due to weather conditions.

Q. How do you protect yourself against a shipper's holding cars for more than the free time?

A. By the assignment of demurrage, which is much in excess of the per diem charge of one dollar per day.

Q. Does that increase with the length of detention?

A. It does in certain conditions.

By Mr. McGehee:

Q. Let us take an industry, at Birmingham, in connection with the Louisville & Nashville Railroad, and you have a shipment that goes to that concern and they take it at the interchange and move it under their own power to a plant; do you of such a situation?

A. Yes.

Q. Where they take a car and after 48 hours they pay overtime?

A. Yes.

886 Q. Beginning, after 48 hours, the time to begin with is $3 per day?

A. Two dollars, I think.

Q. It steps up?

A. It steps up after the second—well, I will say after a certain length of time. I am not positive as to the length of time.

Q. The whole purpose is to get the car rolling and back to the carrier; to get it released?

A. Yes.

Q. Can you conceive of such a situation, if some fellow comes out with some kind of motor transportation where he takes your

car at the station and loads it on a motortruck and carries it out in the country on this truck, and returns it to you; can you conceive of any change in the principle?

A. No.

Q. The only difference is that the transportation here is via water and there it is via land?

A. That is the only thing because—no; in this case he also goes on the high seas into a foreign country, and it eventually gets back. That would be an additional disadvantage, otherwise it would be the same.

By Mr. THURTELL:

Q. One other thing, the demurrage rules: When the equipment is plentiful and no car shortage, do you shrink your demurrage on that account?

887 A. We do not. Those demurrage rules are designed for the purpose of obtaining the most efficient use of railroad equipment for transportation services and purposes. Every reasonable safeguard is put into the rules to answer that purpose.

Mr. BURGER. You may cross-examine.

Cross-examination by Mr. MCCOLLESTER:

Q. Do you charge, to all connecting industrial common carriers——

A. May I ask what you mean by "industrial common carrier"? We have so many designations that I should like to know exactly what you have in mind.

Q. It is a rather widely known term, is it not?

Mr. MCGEHEE. Not down in our territory.

The WITNESS. Not down in our territory. It is a rather common thing up here, but what you might mean in our territory might not convey to me the same thing.

Mr. MUCKLEY. All of these rules are in evidence. I do not see the reason for the question.

Mr. MCCOLLESTER. I have not even stated the question yet, Mr. Muckley. I am referring to the demurrage rules.

The WITNESS. I might add, Mr. McCollester, I do not want to dodge your question, but I do not know of a single industrial common carrier in our territory with the possible exception of the Birmingham Southern Railroad owned, I think, by the Tennessee Coal, Iron & Railroad Company, it is a common

888 carrier.

By Mr. MCCOLLESTER:

Q. What basis does that have at the present time as to car service rules?

A. It all depends on whether they get a division of the rates or a switching charge on the car.

Q. You permit the delivery of the cars of your railroad to industrial common carriers in the North, do you not, such as the Chicago, the Pullman Railroad Company, and any number of them in the North; you make no restrictions as to the delivery of your cars to them?

A. No.

Q. When cars are delivered to those railroads does the L. & N. Railroad get more than its per day—per diem, during the time the cars are in the possession of these industrial common carriers?

A. If they are common carriers by railroad we get $1. It may possibly be that the trunk line connecting with some of these common carriers has a demurrage arrangement.

Q. Speaking of the Louisville & Nashville Railroad, did you ever get more than $1 per day when off of your line except when under some special arrangement for lease?

A. Speaking for the Louisville & Nashville Railroad?

Q. Yes.

A. Correct. That is all.

Q. You describe some——

889 A. I would like to amplify that statement.

Q. Proceed.

A. When a car is on the Louisville & Nashville Railroad, on a private sidetrack beyond the free time period we get demurrage and we get the same demurrage in connection with a foreign car where it is on our lines under the same circumstances; so there is an equalization there.

Q. Do you object to the Hoboken Manufacturers Railroad Company earning demurrage on Louisville & Nashville Railroad cars and paying you $1 for the use of these cars?

A. No; that is a reciprocal arrangement.

Q. You do not object to that?

A. Oh, no.

Q. You described certain steps in the movement of a car in connection with certain supposed routes in connection with Seatrain in your comments upon Colonel Ballantine's testimony.

A. Yes.

Q. You maintained throughout with the break-bulk water lines for the operation of those routes?

A. Well, but I would not want to go so far as to say that we have a route from Buffalo to Montgomery, Alabama, by one of these break-bulk routes.

Q. Of course, you understand my question was general.

A. Probably my answer will be more correct if I again say that We have routes via the break-bulk lines between the eastern

890 Trunk Line territory and the Southern territory adjacent to the Gulf.

Q. You have so far declined to recognize such routes in connection with Seatrain; is that correct?

A. Yes.

Q. You have declined to enter into similar arrangements for through routes over such routes with Seatrain?

A. Yes.

Q. You referred to the fact that the Louisville & Nashville Railroad participates in all-rail traffic between the East and South and Southwest?

A. Yes.

Q. Do you have any competition of through all-rail routes between those territories?

A. Correct; the answer should probably be yes.

Q. You prohibit the use of your cars by other rail carriers participating in said competing routes?

A. No; if the use is in accordance with the Car Service Rules which are on file here.

Q. Some of these routes are circuitous routes, are they not?

A. Some of them are more or less circuitous; yes.

Q. You make no prohibition against the use of those cars by such routes on the ground that they are circuitous?

A. If they meet the requirements of the Car Service Rules they are in the record here; we do not.

891 Q. I do not believe I understood your answer.

A. I meant to say that if they meet the requirements of the Car Service Rules, which car service rules are in the record here, we do not object.

Q. Is there any common carrier that you know of in existence in the United States today, other than Seatrain, to which you have prohibited the delivery of your cars?

A. That question is limited to the narrow one of common carrier, and no distinction between the type of carriers?

Q. That is true.

A. The answer is no; but we do not permit the use of our cars by any steamship company.

Q. You have been continuously in the traffic department of the Louisville & Nashville Railroad, have you not, Mr. Kerr?

A. Yes.

Q. Were you consulted upon the question of whether or not the Louisville & Nashville Railroad could give its consent, under Car Service Rule 4, for the delivery of cars to Seatrain?

A. Yes.

Q. Was it your determination that the Louisville & Nashville Railroad should consent to the delivery of its cars to Seatrain for

the movement between New Orleans and Havana origin and destination group, but not for movement between New York and Havana or between New York and New Orleans?

A. That question, being one of policy, it was determined
892 by the traffic vice president, personally.

Q. Did the fact that you considered Seatrain a competitor of the all-rail routes between the East and the South enter into the determination not to permit the delivery of cars to Seatrain for movement between New York and New Orleans?

A. I do not think there is any question about that; I think my answers have already indicated that that was one of the questions that led us to reach that conclusion, as well as the fact that we did not regard it as a proper use of our cars—I do not want my answer to be considered or construed to mean that if there had not been the competitive element we would not have permitted the use of our cars because I could not—because I do not think we would have. I do not think the competitive element was considered at all.

Q. That was very important?

A. It was considered, but I do not believe that I can truthfully say that it was the determining factor.

Q. What difference, other than the competitive factor, is there between the movement New York and New Orleans, and the movement between New York and Havana?

A. Of course, the first situation we have had is the Key West to Havana which is the Havana—which is the car ferry service, there is no question about that; then, the Overseas entered into the situation and we put the Overseas on a competitive basis with the Florida East Coast Car Ferry Company. If we had
893 it to do over again, I do not know what we would have done. But, the situation is there and we do not have any desire to disturb it.

Q. When——

A. Let me finish. I do not see any similarity between the movement of traffic between New Orleans and Havana and the movement of traffic between New Orleans and New York.

Q. When Overseas entered the service between New Orleans and Havana your railroad built or built over certain cars especially for handling traffic to move over that road; did they not?

A. We did; to be correct, we built them over. I do not know that we built any new ones.

Q. Your railroad handled a substantial amount of coke from the Birmingham district to Cuba via Seatrain; did they not?

A. We did. That was one case where the Missouri Pacific could not get in.

Q. You began to have a substantial return movement of manganese ore from Cuba; did you not?

A. We did.

Q. You were glad to get it, of course.

A. Certainly.

Q. Before Overseas began its operation, did you have that same coke traffic to Cuba and the manganese ore traffic from Cuba via the route of the Florida East Coast?

894 A. No; but we had a certain amount of it over the same lines to Gulf ports and by steamer service back and forth.

Q. How many years before Overseas did you have that movement?

A. That movement had fluctuated a great deal, Mr. McCollester. I think you will find that the movement is off, right now.

Q. At the time——

A. Wait a minute. Sometimes the movement is from a foreign country and sometimes from the United States.

Q. At the time the Overseas entered the field, your traffic was not moving from the United States, was it?

A. I believe that is correct.

Q. You refer to the fact that the Louisville & Nashville Railroad gave notice that it would not permit the delivery of its cars to Seatrain?

A. Yes.

Q. I show you a copy of a letter and ask you if you can identify it as a copy of such notice?

A. Yes; I have seen the original copy of that letter.

Q. This letter was signed by Mr. Brooks, was it not?

A. Operating vice president; yes.

Q. You stated that the attitude of the Louisville & Nashville Railroad as to the delivery of cars to Seatrain was not the result of a conspiracy. I will ask you——

A. I did not give the word "conspiracy."

Q. Or, concerted action. I will ask you to examine the
895 letter which you have just said was the letter from the Louisville & Nashville Railroad Company and tell me if it is identical with the beginning of the second paragraph, of Exhibit No. 19, the notice received or sent by Mr. Lawrence, to the Hoboken Manufacturers Railroad.

A. It is substantially the same.

Q. It is identically the same.

A. I have not compared it word for word, but I think it is practically the same. However, you people were on notice long before that.

By Mr. BURGER:

Q. On notice from the Nashville—from the Louisville & Nashville Railroad Company?

A. Yes.

By Mr. McCOLLESTER:

Q. You recognize these two letters, however.

A. I do.

Mr. McCOLLESTER. I should like to offer into evidence, Mr. Examiner, the letter which I have just shown to the witness and which he has identified as on the letterhead of the Louisville & Nashville Railway Company, dated December 2, 1932, and addressed Mr. Graham M. Brush, president Hoboken Manufacturers Railroad and assigned by Mr. T. E. Brooks, vice president. I do not have the copies here.

The WITNESS. Yes; but have you not some of the earlier letters addressed to Seatrain from the New Orleans & Lower
896 Coast? The New Orleans & Lower Coast was certainly on notice before the inauguration of this service between New Orleans and Hoboken that we would not permit our cars to be used in that service, but I think the letter you have just placed in the record was merely to complete the record as to the movement at the northern end of Seatrain service. We served notice on the New Orleans & Lower Coast, and it should have been served on Seatrain. I imagine it was.

Exam. FLEMING. It will be received.

(Exhibit 36, Witness Kerr, received in evidence.)

By Mr. McCOLLESTER:

Q. Mr. Kerr, did the Louisville & Nashville Railway Company ever lend a car to shippers for storage purposes?

A. I never heard of it.

Q. Do you know whether or not other railroads ever did?

A. I do not know.

Q. Are you prepared to say that the Louisville & Nashville Railroad Company never has?

A. I think my answer fully answers you. I have never heard of it. Of course, I am not in a position to state whether they ever have or not. I am very doubtful if they have.

Q. Prior to the construction of tank cars how were liquids transported by railroad?

A. They have been handled in tank cars, oh, so many years, certainly as long as I have been in and have had any con-
897 nection with the Louisville & Nashville Railroad, and that has been over 30 years. Before tank cars were in service, before that, they were handled, of course, in barrels and drums.

Q. And the tank of the tank cars took the place of the barrels and the drums, did it not?

A. Correct.

By Mr. BURGER:

Q. It did not take the place of it, it was in addition to barrels and drums?

A. No. It took its place.

By Mr. MCGEHEE:

Q. Barrels and drums are still used.

A. Not for the general transportation of liquids. They are used in a limited way, of course.

By Mr. MCCOLLESTER:

Q. And the tank of the tank car is the thing which is now used?

A. Tank cars are now used very generally.

Q. You do not transport the barrel and the drums as well as the tanks?

A. No. The tank car does away to a large extent with the barrels and the drums.

Q. You did not transport the barrel and drums on wheels of the truck?

A. Why, no; of course not. I think my answer is correct. It is perfectly obvious if they used the tank car they would not have to use the barrel and the drums. I suppose that is what you mean.

898 Q. Do you handle grain in sacks and grain in bulk?

A. I would like to finish this barrel and drum and tank car end of it. We do not, ourselves, provide the tank cars; the shippers who use these tank cars lease them from the tank car owning companies, or own their own cars themselves. It is true——

Q. You rent it from the owner of the tank car by paying mileage?

A. No; I would not say that we went it from the owner; we make certain allowances. He has his choice of buying it or renting it.

By Mr. SPENCE:

Q. By making an allowance you recognize the common carrier's obligation to furnish the equipment?

A. To furnish such a car. The car may cost him more and it may cost him less.

By Mr. McCollester:

Q. Do you handle grain both in sacks and in bulk?

A. Yes.

Q. When the grain is in bulk the sides of the car constitute a container for the grain during transportation?

A. That is a proper transportation function.

Q. Will you answer my question, please?

A. Yes.

By Mr. Spence:

Q. Mr. Kerr, does the car service rules permit the leaving of cars, no-bill for such purposes?

A. At the origin end?

Q. Yes.

899 A. The railroads do that.

Q. In that case demurrage does not accrue so far as the cars that have not been billed out are concerned?

A. Correct.

Q. That is in accordance with demurrage rules?

A. Yes.

Q. The notice which you say the New Orleans & Lower Coast received about the nondelivery of your cars to Seatrain was substantially identical with that addressed to the Gulf, Mobile & Northern and other lines at the same time, were they not?

A. I believe so. I won't go so far as to say that it was on the same date, but my recollection, Mr. Spence, is that the letter Mr. McCollester asked me to identify was dated in December ——

The Witness. Was it not?

Mr. Knowlton. December 2.

A. It was not long after a similar notice was given to Seatrain and New Orleans & Lower Coast. My recollection may not be entirely accurate because that has been some time ago, but my recollection is that we discovered later we had not put the Hoboken on notice. That is the reason for the letter of December 2.

Q. You expected at that time and intended to have given the New Orleans & Lower Coast notice?

A. It was merely a formal notice.

900 Q. Do you know to whom the letter was addressed?

A. The New Orleans & Lower Coast.

Q. Do you happen to recall that detail?

A. I do not. I saw the letter at the time.

Q. The fact is, the letter was erroneously addressed and did not go to the New Orleans & Lower Coast officials?

A. I am not sure about that. I think we received an acknowledgment of it.

Mr. SPENCE. Well, that can be established later.

Mr. MUCKLEY. Do you have the letter? That is not included in our stipulation, you know.

By Mr. SPENCE:

Q. Mr. Kerr, I believe in the course of your testimony some reference was made to interplant service. Would you describe that a little bit more than you did at that time? What is the nature of this interplant service that you mentioned where you collect demurrage?

A. I do not think I mentioned in'erplant service.

Q. I thought you answered a question in response to Mr. McGehee.

A. I think Mr. McGehee's question was as far as a shipment—or supposing a shipment originated on the Louisville & Nashville Railroad and was destined to an industrial plant, what it earned while that car was on the tracks of that industrial plant beyond the free time.

Mr. MCGEHEE. That is not an interplant movement.

901 The WITNESS. Do we agree that that was the question that he asked me?

By Mr. SPENCE:

Q. I think that your answer was prior to that one. I thought you were making reference to a case in which there was an interplant movement.

A. I am willing to answer you as to interplant movements now.

Q. If you did not mean to testify as to interplant movements I will withdraw my question. I simply misunderstood, apparently. If I understood you correctly, you stated that the Louisville & Nashville would not refuse the delivery of its cars to a water carrier which was simply an extension of railroad service, but it would to a water carrier which was something more than that.

A. Well, it would all depend, Mr. Spence. When I made that statement, of course, I had in mind the ordinary ferry services that exist today. Now, there may be some change in that situation that might cause us to change our position, but the ordinary car ferry service, a mere extension of a railroad, I do not think we would refuse to permit our cars to be used.

Q. Did you mention any particular considerations by which you distinguished these two cases to your mind?

A. Yes; I did.

Q. I asked if you did; I do not want to examine you on it any further.

A. Yes; I did.

Q. All right. Have you stated the practical differences
902 in the record?

A. Yes.

Q. I also think that you stated that the purpose of the demurrage rules is to keep cars available for transportation service?

A. I believe I made that statement and added, to bring about the most effective use of transportation.

Q. That is, to keep the car available for the purpose of common-carriage?

A. For the purpose of common carrier transportation; yes; on a railroad.

Q. There is one more thing; I believe you said, in answer to a question by Mr. McCollester, that your line placed no restriction on the delivery of cars by circuitous routes, no matter how circuitous, if the cars were loaded in accordance with the car service rules; is that your statement?

A. I do not believe I said no matter how circuitous.

Q. We will put it this way. By "circuitous routes," however circuitous it is, if the car is loaded in accordance with the car service rules; is that your statement?

A. That is correct. The car service rules, themselves, I think, are so framed as to require the use of the car in an efficient manner.

Q. Do you mean to imply by that that your line would not receive a car unless it was loaded in accordance with car
903 service rules?

A. The responsibility is on the originating line and not upon the receiving line.

Q. In that event, you would not refuse to accept it?

A. Of course not, that is a purely practical matter.

Mr. SPENCE. That is all.

Mr. MCCOLLESTER. May I ask one or two more questions?

Exam. FLEMING. Yes.

By Mr. MCCOLLESTER:

Q. What do you mean, Mr. Kerr, by a car ferry that is a practical extension of a railroad?

A. I mean such a line as the Pennsylvania Car Ferry from Cape Charles to Norfolk; the Florida East Coast Car Ferry from Key West to Havana. Your people, I believe, testified at great length why you were not a car ferry; that you were a steamship line.

Q. Did you not contend that Seatrain was a car ferry and was, in fact, a railroad, an extension of a line of railroad of both the Hoboken and the New Orleans & Lower Coast?

A. I still say that, and that is one reason why I answered Mr. Spence as I did, that when we talk about car ferries, in answer

to his question, I had in mind car ferries as they are recognized today.

Q. I would judge from that answer that you consider Seatrain a car ferry of that sort?

A. No.

904 Q. Have you not contended that it was; in my previous question I asked you if you did not contend that Seatrain was a car ferry.

A. We have contended it was a car ferry, and we would still contend that it was a car ferry.

Q. Did you not contend, as a matter of fact, that to all intent and purposes it was a railroad; not so much a car ferry, but, really, in fact, an extension of a railroad of both the Hoboken and the New Orleans & Lower Coast.

A. Yes; a railroad at sea.

Q. You understand my question?

A. Oh, yes.

Q. You now say that you contended that Seatrain was not a car ferry, but was, on the other hand, in fact, an extension of a line of railroads, both of the Hoboken Manufacturers Railroad, at Hoboken, and the New Orleans & Lower Coast Railroad at New Orleans.

A. We said that it was a railroad at sea.

Q. You were contending that at the time Car Service Rule 4 was adopted?

A. Yes.

Q. You contended that at the time you refused to permit the delivery of these cars to Seatrain?

A. Yes. All of these answers are consistent with my answers to Mr. Spence's questions.

By Mr. SPENCE:

905 Q. If I might, I would like to ask you where you draw the line between a car of a car ferry, to which you permit the delivery of a car, as against the one to which you will not permit the delivery of a car; I am still not clear on that.

A. I do not believe I can draw a very fine line between the two. But, certainly, there is a great difference between any car ferry; recognized car ferries today, and the operation of the Seatrain line between New York and Havana and New York and Havana, or, rather, New York via Havana to New Orleans. You might just as well say that we ought to permit our cars to be loaded at Hoboken or some other place on some similar vessel through the Panama Canal and delivered at Portland, Oregon. We would say no as to that.

By Mr. McCollester:

Q. Would you permit the delivery of your cars to a rail carrier or transportation across the continent?

A. If in accordance with car service rules; yes.

Q. Suppose there should be built a new rail carrier in competition with you, would you think you would be entitled to refuse delivery to that new rail carrier?

A. We would have to face that situation when we get to it. There is no way to tell just exactly what we might do when we come to a situation of that sort. It would have to be handled as we saw the situation at that time.

Q. When new railroads have been built in the past, have you refused to deliver any of your cars to such railroads?

906 A. No; if in accordance with car service rules.

Mr. McCollester. That is all.

Mr. Spence. That is all.

Mr. Burger. I have nothing further.

By Exam. Fleming:

Q. Mr. Kerr——

A. I beg your pardon.

Q. I just have one or two more questions. I am not wholly clear upon the question of whether Overseas, when originally established, required the transfer of loading at the ports. I ask you if that is a fact one way or the other, in order to clarify the record.

A. No; Overseas, from the start, took the cars on board their vessels for transportation from New Orleans to Havana, or in the opposite direction. They began, it was testified here yesterday, in 1929.

Mr. McCollester. Correct.

By Exam. Fleming:

Q. You testified, in your testimony, to a movement; I do not recall whether it was with reference to the Seatrain, or with reference to Overseas, a movement between New Orleans and Havana in which I understood you to say that the movement was via the Louisville & Nashville; with respect to your line, did you testify that you handled any of that movement?

A. I think, Mr. Examiner, that the particular discussion and testimony had reference to a movement of coke from the

907 Birmingham district via the Louisville & Nashville Railroad to Belle Chasse, thence via the Overseas and probably later via Seatrain, its successor, to Havana, and a movement of manganese ore over the same road in the opposite direction, and, as a matter of fact, over the same route.

Q. What I am getting at is this: I am merely trying to ascertain as to each of these carriers which you described as a car ferry, whether you were referring to the Seatrain, the present company, or whether you were referring to the former company, the Overseas.

A. I am afraid I have been using this term rather loosely. It is true that we contended that Overseas Lines and Seatrain Lines—when we contended that Seatrain Lines, and, of course, the same thing would apply to its predecessor, Overseas, was a car ferry, that we had reference to the vessels of those companies as operated by either company. The Commission, however, has held that it is not a car ferry but it is a steamship line. On the other hand, the Commission has declared the Florida East Coast Car Ferry Company to be a car ferry and a mere extension of a railroad, the lines of the Florida East Coast Railway, so I should probably draw this technical and legal distinction.

Q. That is what I have in mind: Rather, I have in mind the fact that it would be well for the parties to be, in the use of these terms that they employ, describing these different means of transportation; I think the use of the terms that, if there
908 is any significance that applies to the terms to be used, the terms should be used would be those in line with the findings that the Commission has made, unless they are not in accord with those findings and you see fit to use other terms because they are not in accord with those findings. Otherwise, the record may not be clear.

A. Have I made myself clear now? Frankly, I am just a traffic man; I am not a lawyer. I have been using the terms that appealed to me. But, what I meant was that under the Commission's decision, the Seatrain, no matter where it operates, or Overseas Railway, its predecessor, is a steamship; however, all the others I referred to were car ferries.

By Mr. McGEHEE:

Q. In addition—that is, in addition to the Florida East Coast—the Commission said that the ferry of the Florida East Coast Railroad operating between Key West and Havana was embraced within the term "railroad" as distinguished and defined in the Act; that it should be viewed simply as an extension of the line of the railroad on the Sea Coast. That is what the Commission found as to that.

A. I do not recall the finding offhand.

Q. They also found that the Seatrain itself was not a common carrier by railroad, or an extension of a line of a railroad within the meaning of those terms as used in the Act; is that what the Commission said about it?

A. That is my recollection.

909 By Exam. FLEMING:

Q. What I am trying to get at is this: If the theory upon which either the case of the complainants or the case of the defendants here is based upon the findings of the Commission insofar as the Commission has made findings on any points in this litigation, I would like the record to show that. If their theory of the case is different, and the theory upon which their case here is predicated upon views or findings other than as expressed by the Commission in either case, the record should clearly show that. The Commission having found that, as I understand it, the operation of the Seatrain Lines is not a car ferry, the operation of the Florida East Coast Car Ferry Company between Havana and Key West is a car ferry movement, unless the terms you gentlemen employ in the present case are in accord with that, the record may be very misleading as to the whole theory of your case. Do I make myself clear?

A. As to the theory of the case, that is a matter for the lawyers.

Mr. THUKTELL. I might put it this way: Once in awhile a witness, in testifying, may use an expression not quite as carefully framed as we would like for him to, but the report of the Commission in this case was not appealed from by either of the complainants or any of the parties here. For us now to contend for something else, when we are not appealing from that decision, would be idle and we do not mean to do anything like

910 that. In regard to this decision with regard to the Florida East Coast Car Ferry as it was described in the Commission's report, nobody has appealed from that. If, insofar as we may use expressions with respect to that ferry not in accordance with that report, that would be somewhat improper as wording perhaps and that may happen, but it will not affect the position of the carriers or of the complainants in this case in regard to the decision of the Commission in that regard. It would simply be a slip by the witness in giving testimony to that effect.

Mr. MCCOLLESTER. I should like for information as to whether or not, since the decision in which the Commission referred to the Florida East Coast Car Ferry Company service as an extension of the rails of the Florida East Coast Railroad, there has been any separation between the two as to the corporate separation? In other words, is the corporate set-up of the Florida East Coast Car Ferry Company and the Florida East Coast Railroad Company any different; and if so, just what difference has come about in that corporate situation so that the Florida East Coast Car Ferry is now in a different situation from that described in the decision of the Commission.

Mr. MUCKLEY. Is that true, Judge?

Mr. THURTELL. I do not think it is. I could not say. In other words, I think there has been no change in the situation.

Mr. MCCOLLESTER. You know of no change?

911 Mr. THURTELL. No.

Mr. MCGEHEE. The Commission dealt with that case under the light of present-day conditions as to the ferry from New Orleans.

Mr. KNOWLTON. Can't we get ahead with the case? I want to get through with this.

Mr. THURTELL. One moment. I have something I want to say at this point: We would not be claiming and we would not be admitting that the organization of a separate company for the handling of car ferry business would have made any difference as to the conclusions of the Commission had that situation existed at that time if it did not then exist. I am afraid my previous statements might have been a little misleading. What I meant to say was this: I understood Mr. McCollester's question to mean had there been any difference in the corporate set-up since a short time before the Commission's decision. I am not sure about that. I would not want to say offhand.

Mr. MCCOLLESTER. Perhaps my question was a little misleading; I will state it again: I should like to ask whether or not since the decision in which the Commission referred to the Florida East Coast Car Ferry service as an extension of the rails of the Florida East Coast Railroad, there has been any separation between the two, a corporate separation, and if the Florida East Coast Car Ferry Corporation is in any different situation from that

912 which existed when the Commission reached a decision in this case. Can you tell me about that, Mr. Thurtell?

Mr. THURTELL. I see. I do not think it is, but I would not want to say without investigating the situation and checking up on the dates. As I said a few moments ago, however, we would not be claiming and we would not be admitting that the organization of a separate company for the handling of the car ferry business—if such a course were pursued—would have made any difference in the conclusion of the Commission had that situation been in existence at that time; if it did not then, as a matter of fact, exist.

Mr. MCCOLLESTER. Mr. Examiner, this is all, of course, argument, but we want to help you in the disposition of this case.

Exam. FLEMING. If it is argument, it can be reserved for the brief.

Mr. MCCOLLESTER. I just want to point out to you that the decision of the Commission in Docket No. 25565, in which the Commission held, not exactly what has been stated here, or has been

stated here—held that the Seatrain Lines was a common carrier by water, and the reasons for that holding would appear from the decision; that decision was announced in July—July 11, 1933.

Car Service Rule 4 and the refusal of the railroads occurred in November 1932, at which time, as Mr. Kerr stated, all of
913 the defendants were contending, in this very proceeding before the Commission, and in other proceedings of the same sort, that Seatrain was to all intents and purposes a railroad.

Mr. KNOWLTON. Mr. Examiner, I do not believe that is quite correct. We set up the thing in the alternative, if it were a car ferry, the Commission had full jurisdiction over its acts, and if it were not a car ferry that it had no such jurisdiction over such matters as are here before us.

Exam. FLEMING. We will not stop for this further; I merely thought, for the purposes of clarification of the record, it would be well to use the terms, both on the part of the witnesses and of counsel, as used by the Commission in such decisions as it has previously made in the cases referred to, but unless they have some reasons of their own for desiring to use other descriptive terms, and in which event they can point out why they use the other terms, I thought it would result in clarification of the record.

By Exam. FLEMING:

Q. One further question, Mr. Kerr: There has been some testimony offered, as I recollect, that a certain of the rail carriers gave their consent to the use of their cars by Seatrain Lines in the transportation described, while other rail carriers refused such consent; that that situation would lead to complications; do you understand their testimony had been given to that effect?

A. Yes.

914 Q. Is there anything that you care to say in answer to that testimony?

A. No.

Exam. FLEMING. Any other questions?

Mr. MCGEHEE. Right on that I would like to ask a question:

By Mr. MCGEHEE:

Q. Right on the question that the Examiner asked you; you take, today, Mr. Kerr, the Missouri Pacific and some additional lines that let them have the cars, all the cars that they want; on the other hand, the Louisville & Nashville Railroad will not let them have the cars of that railroad. You have no confusion in your mind about that particular situation as far as your carrier is concerned?

A. Not as far as the Louisville & Nashville Railroad is concerned.

Q. Seatrain may have had some confusion about that particular situation, but the Louisville & Nashville has not?

A. Perhaps.

(Witness excused.)

Mr. BURGER. Mr. Examiner, I desire to file as Exhibit No. 37, a list of 23 cars which were received by the Pennsylvania Railroad from the Hoboken Manufacturers Railroad during September 1933, as to which Mr. McCollester has promised, within a certain period, to furnish the parties to this case with the destinations——

Mr. THURTELL. You mean the origins.

Mr. BURGER. With the origins of those particular cars
915 and on whose lines and in whose cars those shipments were loaded.

Exam. FLEMING. It will be received.

(Exhibit 37, no witness, received in evidence.)

Mr. KNOWLTON. I should like to likewise present as an exhibit, which will be Exhibit No. 38, a document which shows the cars of Pennsylvania ownership on which the origins are shown, and we request that the destinations be supplied, and on what lines those destinations are.

Exam. FLEMING. It has reference to the matter as to which the supplemental sheets are to be filed in accordance with leave heretofore granted?

Mr. KNOWLTON. Yes.

Exam. FLEMING. It will be received.

(Exhibit 38, no witness, received in evidence.)

Mr. THURTELL. At this time I should like to call a witness for the Atlantic Coast Line Railroad and other defendants.

R. J. Doss was sworn and testified as follows:

Direct examination by Mr. THURTELL:

Q. Mr. Doss, with is your position with the Atlantic Coast Line Railroad?

A. Assistant freight manager, headquarters at Wilmington, North Carolina.

Q. Your services with the Atlantic Coast Line Railroad cover how long a period?

916 A. A little more than 20 years.

Q. Mr. Doss, will you describe briefly the position of the Atlantic Coast Line Railroad geographically?

A. The Atlantic Coast Line Railroad extends from Richmond, Virginia, and Norfolk, Virginia, on the east, to Augusta, Georgia, Albany, Georgia, and Montgomery, Alabama, on the west. We also have very extensive lines in the State of Florida.

Q. You participate in traffic which comes to you at Richmond or Norfolk and which is destined to points in the South and to points in Florida?

A. Yes.

Q. And to points in Cuba?

A. Yes.

Q. Your nearest approach, at the north, to the Hoboken Shore Railroad, is at Richmond or Norfolk?

A. Richmond.

Q. Your nearest approach to the New Orleans & Lower Coast Railroad is where?

A. Montgomery, Alabama.

Q. You are not, then, a connection of either the New Orleans & Lower Coast, or the Hoboken Shore?

A. Not a direct connection of either line.

Q. Do you join with competing lines on the Atlantic coast in the publication of through joint rates to points in the Southeast?

917 A. Yes.

Q. From points in New England?

A. Yes.

Q. And Eastern Trunk Line territory?

A. Yes.

Q. Do you also join with these same Atlantic coast carriers in the publication of through rates or joint rates to points in the Southwest?

A. Yes.

Q. Your transportation of those commodities, when delivered to you, would be whether delivered at Norfolk or Savannah?

A. We receive them from the Coastwise steamship lines at Norfolk, Charleston, Savannah, and, to some extent, at Jacksonville.

Q. Those are all cargo carriers operating along the Atlantic coast?

A. So-called break-bulk steamers.

Q. Of course, they do not use your equipment?

A. No, sir.

Q. Did you notify the Hoboken Manufacturers Railroad, prior to the publication of this Car Service Rule 4, not to use your equipment for Seatrain movements?

A. Yes; that notice was given by Chairman Tilford, of the Southern Freight Association, who was acting as our agent.

Q. That was some time at or near the start of the Seatrain

918 service, at the starting point of that service?

A. Yes.

Q. On the Atlantic coast?

A. Yes.

Q. Did you permit the Seatrain to take your cars and equipment and did you permit the Overseas to take your cars for transportation between New Orleans and Cuba?

A. Yes. That permission, I might say, exisited not so much because we gave the permission; we simply did not provide, by instructions, that our cars not be delivered to them.

Q. In other words, you made no effort to restrain them from using—so using your cars which were sent from New Orleans?

A. No.

Q. And are you now making any such restrictions?

A. No; we actually, under this revised rule, permit the use of our cars from New Orleans to Havana. On the other hand, the situation as to the Atlantic Coast Line Railroad is exactly the same as that of the Louisville & Nashville Railroad, as described by Mr. Kerr.

Q. Did you listen to the testimony of Mr. Kerr?

A. Yes; a large part of it.

Q. Was there anything in that testimony that you felt as if you could not join him in, in the expressions given by Mr. Kerr?

A. I think I can correctly say that I fully concur in
919 all of his testimony.

Q. Have you any further testimony to offer in this connection, relative to the subjects that are before us?

A. I think that is about all I have, sir.

Mr. THURTELL. You may cross-examine.

Mr. MCCOLLESTER. Mr. Thurtell: Will you produce for the record, a copy of Mr. Tilford's letter to the Hoboken Manufacturers Railroad?

Mr. THURTELL. I will if you want it, and if we have it. I do not have it with me at the minute. I am quite sure I can get it.

Mr. MCCOLLESTER. Mr. Examiner, we have the letter if it was received. I should like to have leave to file it.

Mr. THURTELL. It is perfectly all right with me if you do so.

Mr. MCCOLLESTER. I will do so within 10 days, if it is permitted.

Exam. FLEMING. Leave also will be granted to, within 10 days, to file same, sending copies to all parties.

Mr. MCCOLLESTER. I will furnish copies to opposing counsel.

Cross examination by Mr. MCCOLLESTER:

Q. Mr. Doss, your road constitutes part of a route between the Northeast and Cuba via the Florida East Coast Car Ferry service: does it not?

A. Yes.

920 Q. No one of the Trunk Line railroads has ever refused to permit the movement of its cars over that route, have they?

A. Not to my knowledge.

Q. Is that route in competition with the route via the Hoboken Manufacturers Railroad and Seatrain to Cuba?

A. Yes.

Q. You testified, if I correctly understand you, that your route was—or, rather, that your road was a party to joint rates via boat lines between the South and Southeast, and the north?

A. Yes.

Q. And that those were competing lines?

A. Yes.

Q. The Eastern Trunk Line carriers are parties to through routes, even though no joint line rates for such routes exist, on the break-bulk coastwise lines?

A. To the Southeast generally, and by that, I mean the territory on and east of the Mississippi River, there are join through rates applicable in connection with the eastern and New England Lines and the coastwise steamship lines, and the southern lines. To the Southwest, the rates generally are published under what is known as the nonconcurring plan. That is, the agent of the steamship lines that serves the the North Atlantic ports publishes a through rate, and the participation or observation of the
921 local rates of the eastern Trunk Line carrier being made out of those rates.

Q. Traffic, under the latter rates, is handled on through bills of lading, is it not?

A. Yes.

Q. Do you have, or are you a party to any other rail and water route to Cuba via the Peninsular & Orient Steamship Company?

A. Yes; but that movement is very slight, indeed, at the present time.

Q. Is very what?

A. It is very slight.

Q. You have rates and routes in effect and arrangements for handling traffic via that route?

A. That is true. We handle some traffic to and from Tampa in connection with the Peninsular & Orient Steamship Company with which line we connect at Port Tampa.

Q. What rail carriers are your principal competitors?

A. Well, the Seaboard Air Line Railway is a right active competitor and touches nearly all of the points that we reach.

Q. Do you have any restrictions against the delivery of your cars to the Seaboard Airline Railway?

A. No; nor does it have any restriction against our using any of their cars; it is a reciprocal sort of arrangement.

Q. You have no restriction against the delivery of your cars to any common carrier, rail or water, in the United States or Canada except Seatrain, have you?

922 A. Well, of course, they are subject to the current per diem and other rules.

Q. But, assuming that those are complied with, you have no restrictions similar to those which you have in the case of Seatrain?

A. That is correct. Of course, the water carriers, we do not interchange any equipment with the line of the Clyde-Mallory and other steamship companies at Savannah.

Q. Were you consulted as to whether or not the Atlantic Coast Line Railroad should give its consent under Rule 4 to the delivery of cars to Seatrain?

A. I do not recall whether my views were requested or not.

Q. Was the matter considered by the traffic department of the Atlantic Coast Line Railroad?

A. Yes.

Q. When that was done, did the traffic department investigate the operation of other water lines named in the American Railway Association circular C. S. D.–143, which is Exhibit No. 8 in this case.

A. I do not know whether they made any such investigation of all of these lines. I think they probably did have in mind just what sort of lines they were.

Q. Can't you tell me just what sort of a line the Drummond Lighterage Company is and how it operates?

A. No.

923 Q. Do you know how the Foss Tug & Barge Company operates?

A. No.

Q. Do you know anything about the Yorke & Sons Barge Company operates?

A. No.

Q. I think that is all.

A. I see.

Q. You realize that your road gives consent for the delivery of its cars to these water carriers.

A. Yes.

By Mr. SPENCE:

Q. Does your line refuse to furnish these cars for loading to move via the Seatrain from New Orleans to New York?

A. Yes.

Q. It does refuse to furnish them?

A. Yes.

Q. Does it do that where no other cars are available?

A. Let me see if I understand what you mean. Not to my knowledge have we ever been asked to furnish any cars for loading, or forwarding via Seatrain from New Orleans to New York. I think

it would be a rather farfetched movement to take any shipments we could possibly originate on our lines if destined to New York, to forward them to New Orleans. It would be rather circuitous.

Q. Are you able to state, or can you draw the line that
924 Mr. Kerr said he could not draw; are you able to state how you distinguish between the non-break-bulk water carrier, which you would allow to use your equipment, and one that you would not?

A. I do not know that I could do it any better than he did.

Q. He said he could not do it.

A. That is right.

Mr. SPENCE. That is all.

Mr. MCCOLLESTER. That is all.

Mr. THURTELL. Thank you, Mr. Doss.

Exam. FLEMING. Witness excused.

(Witness excused.)

Mr. MCGEHEE. I should like to call Mr. Joseph Marks.

JOSEPH MARKS was sworn and testified as follows:

Direct examination by Mr. MCGEHEE:

Q. Will you please state your name, residence, and occupation?

A. My name is Joseph Marks. I am commerce agent for the Southern Railway system lines and I am located at Washington, D. C.

Q. How long have you been in the traffic department of the Southern Railway?

A. I have been in the traffic department of the Southern Railway for 15 years.

925 Q. Have you a map of the Southern Railway system?

A. Yes.

Q. Will you please file that as your Exhibit No. 39.

Exam. FLEMING. It will be received.

(Exhibit 39, Witness Marks, was received in evidence.)

By Mr. MCGEHEE:

Q. Mr. Marks, as appears from this map, the Southern Railway System extends from the Potomac River, on the north, to New Orleans, Louisiana, on the South; does it not?

A. Yes. The Southern Railway System extends on the north from Washington, D. C., to Atlanta and Birmingham to New Orleans, on the south, and also from Cincinnati, Ohio, on the north, to New Orleans via Chattanooga and Birmingham and Meridian.

Q. In the past has the traffic moving between Eastern Trunk Line territory and New Orleans and points beyond been of extreme importance to the Southern Railway system lines?

A. Yes; it is very important traffic.

Q. Take the Southern Railway, for example, in 1932; how was traffic on your main line from the east, was it relatively heavy or light from the Potomac River to New Orleans?

A. 1932?

Q. Yes.

A. Light.

Q. Did you earn your fixed charges in 1932?

A. No.

926 Q. How much did you fall below?

A. Sixteen million dollars.

Q. Take the New Orleans & Northeastern Railroad extending north, how is the traffic on that line?

A. Extremely light.

Q. Is it earning its fixed charges today?

A. No.

Q. Mr. Marks, I wish you would please locate Martinsville, Virginia, on this map.

A. Martinsville is on the Danville & Western Railroad, 43 miles from Danville, Virginia.

Q. Has the Seatrain solicited traffic from Martinsville through New York and through New Orleans to a point like Meridian, Mississippi?

A. Yes; we have been so informed.

Q. Has there been an actual movement of traffic?

A. Yes.

Q. Tell us how they happened to get that movement of traffic; how did it come back?

Mr. McCollester. How does he know?

Mr. McGehee. How did he find out?

Mr. McCollester. Yes.

Mr. McGehee. We happened to have a car loaded at that point and going to Seatrain; that is what I am talking about.

By Mr. McGehee:

Q. Proceed.

927 A. The investigation disclosed that a furniture factory called for a car for—furniture car, and that they asked that the car be placed on the track to be loaded, and stated that the car was going to—first, we asked them where the car was going to and they said Meridian, Mississippi. And, thereafter, shortly thereafter the car was delivered to us by those people and instead of being billed from Meridian the way bill called for delivery at Hoboken; that is, the bill of lading called for delivery at Hoboken to the Hoboken Manufacturers Railroad. The car was turned over by the Hoboken to Seatrain.

Q. What is the distance that car moved from Martinsville, Virginia, to New York?

A. A distance from Martinsville to New York of 498 miles.

Q. That is the distance—it then moved by water on Seatrain from New York to New Orleans?

A. Yes.

Q. Then it moved back over the rails of the Southern Railway, back inland for a distance to Meridian of how much?

A. From New Orleans to Meridian, 202 miles, or a total rail haul of 700 miles.

Q. What is the rail distance from Martinsville to Meridian?

A. The rail distance via the Southern Railway is 849 miles.

Q. Mr. Marks, what is your schedule on a car of freight from Martinsville, Virginia, to Meridian, Mississippi, via the Southern Railway Lines?

928 A. To Meridian, Mississippi, we make a third morning delivery and to New Orleans we would make a fourth morning delivery from Martinsville.

Q. Take that car coming from Martinsville to New York; what is the schedule of that car?

A. Second day delivery, a two-day movement.

Q. Take the car from New Orleans up to Meridian?

A. One day.

Q. A total of 3 days for the line haul?

A. Yes, 3 days for the haul on the rails.

Q. How many days do we have for the movement of a car from New York to New Orleans via the Seatrain, as given here in the testimony?

A. Six days.

Q. If the Colonel, Colonel Ballantine, instead of illustrating the sixth day cars, had used this situation of an actual movement, the economy and so forth as compared with the one which he did, which was a theoretical one——

A. Yes.

Q. He would have had quite a different effect?

A. There is no doubt about it. If he had used as an illustration the situation which I have just stated, instead of the hypothetical and theoretical situation which he did state, the situation would have been considerably different.

Q. From this territory in Virginia to points in Missis-
929 sippi beyond Meridian, for example, do you have any joint rates through New Orleans in connection with the Morgan line?

A. Yes.

Q. Do you have any joint rates with the Mallory lines from points in southern Maryland?

A. No.

Q. Where do you have rates with the Morgan Line, from and to what territory?

A. From Eastern Trunk Line territory, Eastern Seaboard territory, to points in Mississippi south of the Yazoo & Mississippi Valley Railroad.

Q. Mr. Marks, when you said south of the Yazoo & Mississippi Valley Railroad, that is south of the Alabama & Vicksburg?

A. That is correct. I meant south—the road of the Yazoo & Mississippi Valley south of Meridian.

Q. Mr. Marks, is the Southern Railway system lines refusing to deliver their cars or the cars of any other carriers on the rails of the Southern Railway, for movement via Seatrain from New Orleans to New York?

A. Yes, such notice has been furnished.

Q. In other words, if they ship on the Southern Railway ordered a car that we know is to be loaded at Laurel, Mississippi, and to be delivered to the Seatrain at Belle Chasse for movement to New York or points beyond we have refused to furnish them a car for movement to New York?

930 A. That is correct.

Q. Not only if we had a car of the Missouri Pacific or any other railroads we have consistently refused to furnish cars for that loading when we knew it?

A. Yes.

Q. So far as you know, has any car of the Southern Railway been on the Seatrain service between New Orleans and New York?

A. I have heard that one or two of our cars have made the trip.

Q. Have you been able to find them?

A. No, I have not.

Q. Mr. Marks, at the time that the Southern Railway determined that it would not allow, if it could help it, the use of its cars by Seatrain between New Orleans and New York, did it know what was going to be the policy of the other lines in the Southeast?

A. Positively not.

Q. The truth of the matter is that that policy is not uniform today, is it?

A. That is correct.

Q. The Southern Railway System lines gave notice before the notice referred to by Mr. Tilford?

A. Yes.

Mr. McGehee. I might say, Mr. McCollester, I know that we can get copies of them and I will be glad to furnish all of them.

931 Mr. McCollester. Will you agree that it is the truth that the notices given were the same as those given by the other roads, and the same as the one which I had Mr. Kerr identify here?

Mr. MARKS. I do not think it is. I think our first notice was by telegram.

Mr. MCCOLLESTER. Followed by a written notice identical with the letter from Mr. Lawrence?

Mr. MCGEHEE. It may have been. I cannot say about that.

Mr. MCCOLLESTER. We will furnish it.

Mr. MCGEHEE. That is all right. We have no objection to that.

By Mr. MCGEHEE:

Q. As to these matters, generally, you have heard the testimony of Mr. Kerr?

A. Yes.

Q. Do you concur in his testimony?

A. I think his statement is correct.

Q. As to all items?

A. So far as I know.

Q. Do you have anything else you care to submit?

A. I have one or two things I would like to state: I think only one or two items should be brought up at this time; the Southern Railway system, at the present time, has 63,000 freight cars that we have in serviceable condition. We have no surplusage of
932 cars on our system. As a matter of fact, we have just about enough equipment to take care of our own business.

In that connection, I would like to state that the Southern Railway has an average of 6,431 cars on foreign lines per day, while there are 8,763 foreign cars on the Southern Railway system lines per day. In other words, we are paying per diem of $2,424 per day, or approximately $900,000 per year, per diem for car hire. Certainly, unless we have control of our own cars the per diem is going to run so heavy that it is going to be a serious problem in connection with the Southern Railway.

Q. That is also true of the Southern Railway system under present-day conditions and at the present time, we are not anxious to go out and build news cars for somebody to use.

A. That is correct.

Q. Proceed.

A. In other words, on traffic going from New York to New Orleans the Southern Railway system makes fifth morning delivery, the train arrives at 2:20 o'clock a. m., on the fifth morning and of course is ready for delivery on that business day.

Q. I will ask you another question in connection with this: Colonel Ballantine gave, as an illustration, and drew comparisons based on this sixth-day traffic generally between New York and New Orleans.

A. Yes. He drew his figures and comparisons and aver-
933 ages based on the traffic being handled during that period of time.

Q. Would this traffic which goes all rail between New York and New Orleans move in through trains or in local trains?

A. It would move in through trains.

Q. The movement of a car or cars in through train service is much faster than any local train service?

A. Yes.

Q. In any event, Mr. Marks, if his calculations were based upon the average of six days for the rail service between New York and New Orleans that would not give you a true picture of the through service as to the time of arrival at New Orleans. by one day, would it?

A. That is correct. We actually make delivery at New Orleans on 2:20 o'clock in the morning of the fifth day. That car may be switched and ready for unloading at the beginning of that business day and on the tracks of the industry to which it is sent.

Mr. McGehee. You may cross-examine.

Cross-examination by Mr. McCollester:

Q. If I correctly understand your testimony the Southern Railway is using 2,424 of other people's cars than it is furnishing to other railroads, is that right?

A. That is correct.

Q. You have to do that to maintain traffic on your road and handle it?

934 A. Well, that is the situation that has existed.

Q. If other railroads whose cars you are using declined to let you handle their cars the Southern Railway would be in a pretty bad situation.

A. We have enough equipment to handle our own business at the moment.

Q. How about the 2,000 more cars that you have to borrow from other roads?

A. We are not borrowing them, that is just the flow of traffic.

Q. You are in competition with other rail lines between New York and New Orleans?

A. Yes.

Q. Do you prohibit the delivery of your cars to carriers participating in this competing for this business, other railroads?

Q. Our cars freely move with all carriers that are members of the American Railway Association Rules.

Q. You have no restriction at all upon the delivery of your cars to any other common carriers save Seatrain, have you?

A. No other restriction that I know of.

Q. On this shipment of furniture from Martinsville, Virginia, to Meridian, Mississippi.

A. Yes.

Q. What is your rate on furniture from Martinsville to Meridian via your all-rail rate?

A. I did not check the rate, Mr. McCollester, but I will
935 say that it takes the rate that was fixed by the Interstate Commerce Commission in the furniture investigation involving rates to, from and between points on the Southern Railway and in Southern territory generally.

Q. You mean to, from and between points in southern territory?

A. That is right.

Q. You do not know what that rate was?

A. No.

Mr. McGehee. We will be glad to furnish it.

The Witness. Yes.

Mr. McCollester. It is understood that that will be done within 10 days?

Mr. McGehee. Yes.

Exam. Fleming. Leave is accorded to furnish that within 10 days, with copies to all parties.

By Mr. McCollester:

Q. Do you have a rail-water rate in which the Southern Railway participates from Martinsville, Virginia, to Meridian, Mississippi?

A. Rail and water?

Q. Rail, water and rail.

A. Not as far as I know.

Q. Any rates through Norfolk or any other gateway?

A. No, sir; I know of no other route.

Q. How much per diem did you receive for that car that went by Seatrain?

936 A. We did not receive any per diem. It was not a Southern Railway car.

By Exam. Fleming:

Q. Do you happen to know whose car it was?

A. Yes. It was an Illinois Central car because we were given information and advice that the car was going to Meridian, and that would be the home loading of the car.

By Mr. McGehee:

Q. In other words, when you placed the car and the car was so loaded you thought it was going to go all rail like it should go, and that you were sending it home?

A. Yes.

By Mr. McCOLLESTER:

Q. But it turned out that it went to Hoboken?

A. Yes.

Q. But it showed up at Meridian just the same?

A. Yes.

Q. Has your railroad ever refused to furnish for loading of a shipment via Seatrain a car of a railroad that has given its consent to the movement of its equipment via Seatrain?

A. That is my understanding that they so refused to furnish such a car.

Q. You have so refused, even if you had a car on hand?

A. I do not know of an actual instance, but I know that instructions are out to refuse to give such a car. I do not know personally.

Q. Even if it is a car of a railroad that has consented?

937 A. That is correct, sir.

Q. Are those instructions in writing?

A. They are.

Q. Will you furnish me with a copy of them?

A. I will.

Mr. McCOLLESTER. That is all.

By Mr. SPENCE:

Q. Do you know of any actual incident where one of your cars has been refused when there were any other cars available?

A. I do not know of an actual instance.

Q. I meant to say when there were no other cars available.

A. I do not know of any instance of that kind.

Q. All you know is that instructions are out?

A. Yes.

Mr. McCOLLESTER. And I believe you said you would furnish us a copy of such instructions?

The WITNESS. Yes.

Exam. FLEMING. Leave will be accorded to do that within 10 days, furnishing opposing counsel with copy of such instructions.

Mr. McGEHEE. I think he asked me for those a moment ago.

Mr. McCOLLESTER. Perhaps I did. I had forgotten.

By Mr. McCOLLESTER:

Q. Was the traffic department of the Southern Railroad consulted on the question of whether consent should be given

938 under Car Service Rule 4 for the delivery of their cars to Seatrain?

A. The matter originated with the operating department. Of course, there was a conference in the executive offices between the traffic and the operating department also.

Q. The operating department asked the traffic department what it should do about it?

A. No; I would not say that.

Q. How do these things go? Did the traffic department ask the operating department what it should do?

A. Wait a minute. Let me answer that and give you the facts. The question came up and the operating department executives came to the traffic department and they conferred.

Mr. McCollester. Nothing further?

Mr. Spence. I have no further questions.

Redirect examination by Mr. Knowlton:

Q. Is that illustration you gave from Martinsville, it is obvious that the Southern Railway was short-hauled; is it not?

A. Yes.

Q. If the Car Service Rules had been observed you would not have been short-hauled?

A. That is correct.

Mr. Knowlton. That is all.

Exam. Fleming. Anything further for this witness?

Witness excused.

939 (Witness excused.)

Mr. McCollester. Mr. Examiner, I think the record shows the fact that I am afforded leave to furnish for the record a copy of the notice received from the Southern Railway by the Hoboken as to the use of Southern Railway cars?

Mr. McGehee. Certainly, and as I understand it, he wanted in addition to that, the notices sent to the other lines at New Orleans. I am perfectly willing to furnish that.

Mr. McCollester. I will undertake to furnish the notices that the complainant, Hoboken Manufacturers Railroad receives.

Mr. McGehee. Do you want me to furnish the notices that the lines of complainants at New Orleans receive?

Mr. McCollester. Yes.

Mr. McGehee. You see, we gave notice as soon as we knew about this. In other words, we gave notice as soon as we heard about this situation.

Mr. McCollester. When you received a notice from the Trunk Line Association?

Mr. McGehee. When we received notice from the trunk lines or knew what their policy was, you mean; no, it was before we had received any notice from the trunk line, or had any idea what their policy would be.

Exam. Fleming. Any other testimony?

Mr. Muckley. Mr. Examiner, Mr. McCollester and I have agreed that the portions of the testimony of Colonel Bal-

940 lantine to which Mr. Muckley and Mr. Lehman took exception with reference to the general situation and the non-observance of the car service rules—that portion of the testimony will either be withdrawn by Mr. CcCollester or Mr. — by agreement, Mr. Kendall of the American Railway Association will be given opportunity to file a written reply to that testimony, whichever he may see fit to do.

Mr. McCollester. Oh, no; I did not understand that it was agreed that all of Colonel Ballantine's testimony would be withdrawn going into the result of his investigation but only his remarks concerning the fact that the rules are more honored in the breach than in the observance.

Mr. Muckley. That is what I said, in reference to the general situation. I made my objections at that time, as I have stated. My further understanding is that we are to take the matter up with Mr. McCollester as to which method we will pursue.

Mr. McCollester. I have the highest regard for Mr. Kendall and I would be glad to have in the record, if Mr. Muckley wants to put it in, any statement on that point that Mr. Kendall might want to make in writing. I will agree to that.

Mr. Muckley. I will submit it to you before long, after it is determined as to which method we will pursue.

(Discussion off the record.)

941 Exam. Fleming. As I understand you Gentlemen you an agreement to this effect: That, subsequent to the hearing, and within 10 days after receipt of the record, Mr. McCollester is to advise Mr. Muckley, representing the defendants, of what, if any portions of certain testimony offered in connection with the Car Service Rules, he is willing to withdraw.

Mr. Muckley. That is not correct.

Exam. Fleming. What is your understanding?

Mr. Muckley. My understanding is what I was to do and what Mr. McCollester agreed to do were these:

After we had an opportunity to go over Colonel Ballantine's testimony, and see what portions of Colonel Ballantine's testimony we would request you to withdraw, we would so advise him and ask whether or not he was agreeable to withdrawing that testimony; if he was not agreeable to withdrawing that testimony then we would have the opportunity of filing a statement in writing shortly thereafter.

Mr. McCollester. That is correct.

Mr. Muckley. That is your understanding?

Mr. McCollester. Yes.

Exam. Fleming. And such rebuttal statement should be filed within what period?

Mr. MUCKLEY. Within 5 days, or 10 days, whatever time the Examiner may desire to fix, after Mr. McCollester's notice to us that he will not withdraw the testimony.

Exam. FLEMING. Make it 10 days.

942 Mr. MUCKLEY. That is satisfactory.

Mr. MCCOLLESTER. That is satisfactory.

Exam. FLEMING. This course to be pursued with the——

Mr. MUCKLEY. "Using the form as may seem best;" can we put it that way?

Exam. FLEMING. Yes. In which event you would have leave to file such supplemental statement as may be proper, in the form as may seem best, under the circumstances.

Mr. MUCKLEY. Of course, if this method is complied with, it will relieve us of the necessity of asking for an adjourned hearing.

Exam. FLEMING. Is there any rebuttal testimony?

Mr. MCCOLLESTER. No, Mr. Examiner.

Mr. SPENCE. No, Mr. Examiner.

Exam. FLEMING. Before closing the case, I would like to ask that the complainants, in briefing the case, point out very clearly what specific rules, regulations, practices, and instructions are assailed and are relied upon in support of the alleged violations of the different sections of the Act, and the same in connection with the alleged violations of Sections 3 and 7 of the Act.

(Discussions off the record.)

Exam. FLEMING. Let the record show that briefs of all parties will be due December 15, 1933.

Free copies of the transcript will be delivered to Mr. C.

943 M. Spence, Missouri Pacific Building, St. Louis, Missouri, for the complainants and to Mr. Roland Lehman, Trunk Line Association, 143 Liberty Street, Manhattan, New York City, for the defendants.

Hearing close.

(At 12:30 o'clock p. m., November 4, 1933, the above-entitled hearing was closed.)

944 *Exhibit 1*

Interstate Commerce Commission

No. 25565

INVESTIGATION OF SEATRAIN LINES, INC.

Submitted June 22, 1933. Decided July 11, 1933.

Upon investigation and hearing, found:

1. That Seatrain Lines, Inc., is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act.

2. That Seatrain Lines, Inc., is a common carrier by water engaged in the transportation of property partly by railroad and partly by water under a common control, management or arrangement for a continuous carriage, and is therefore subject to all the provisions of the act applicable to such a carrier.
3. That Seatrain Lines, Inc., is not a "carrier" within the meaning of section 20a of the act.
4. That Hoboken Manufacturers Railroad Company does not and may not compete for traffic with Seatrain Lines, Inc., and, therefore, neither is subject to the provisions of section 5 (19)-(21).

Parker McCollester and Frank J. Clark for respondents.

W. P. Levis, J. C. Whiteford, A. J. Brannen, Alfred S. Knowlton, Roland J. Lehman, Joseph F. Eshelman, Bronson Jewell, Francis R. Cross, Henry Thurtell, Charles Clark, D. B. Green, H. W. Schaffer, Harvey Allen, C. S. Burg, M. G. Roberts, B. H. Stanage, B. F. Batts, Wm. Burger, J. G. Kerr, J. R. Bell, G. H. Muckley, S. G. Reed, Carl Giessow, J. B. Campbell, C. E. Hochstedler, J. P. McGill, H. W. Wagner, Chas. R. Seal, William Simmons, Frank S. Davis, W. A. Lockyear, H. W. Wills, S. H. Williams, W. T. Hughes, J. H. Tallichet, Edward L. Hefron, W. H. Day, Norris W. Ford, R. C. Fulbright, A. G. T. Moore and A. L. Reed for interveners.

REPORT OF THE COMMISSION

BRAINERD, Commissioner:

On October 4, 1932, the commission, on its own motion, instituted an investigation into the lawfulness of the operation of vessels and transportation of property in interstate commerce by Seatrain Lines, Inc., the acquisition of control by Seatrain of the Hoboken Manufacturers Railroad Company, and of the
945 issue of securities, by Seatrain, with a view to determining whether such operation and transportation, acquisition, and issue of securities are in conformity with the provisions of sections 1 (18), 5 (2), 20a, and of other provisions of the interstate commerce act. The Seatrain Lines, Inc., and the Hoboken Manufacturers Railroad Company were made respondents to the proceeding.

Prior to the institution of the investigation the Missouri Pacific Railroad Company and the Texas & Pacific Railway Company had filed an application, No. 25546, under section 5 of the act as amended by section 11 of the Panama Canal act with respect to continuance of their interest in Seatrain Lines, Inc. A hearing to develop a joint record of the two proceedings has been had. Intervening petitions in the two proceedings were filed on behalf of certain Gulf steamship lines, South Atlantic steamship lines, and Southern, Southeastern, and New England carriers, the Eastern Trunk Line carriers, other than the Chesapeake & Ohio Rail-

way Company, the Southern Pine Association, the Manufacturers Association of Connecticut, and certain commercial organizations of Boston, New York, Philadelphia, Baltimore, Norfolk, Portsmouth, Chicago, St. Louis, Dallas, and Fort Worth. The Manufacturers Association of Connecticut, the Southern Pine Association, the Boston Chamber of Commerce, the New England Traffic League, and the Dallas and Fort Worth organizations intervened on behalf of Seatrain. The only interest of the St. Louis Chamber of Commerce is the stabilization of rates, which they think would result from a finding that Seatrain's operations are subject to our jurisdiction. The other interveners, hereinafter designated as the interveners, oppose the continued operation of Seatrain, urging that its operations are in violation of various provisions of the act. A field investigation as to alleged unlawful practices and
946 policies of the Seatrain and as to matters relating to questions of competition and public interest involved in the application of the railroad companies is in progress. Pending the completion of this investigation and further hearing, the record so far as it relates to jurisdictional questions in the Seatrain investigation has been closed, briefs on these questions have been filed on behalf of the respondents and most of the interveners, and oral argument had. Any findings made on the record thus far developed will be without prejudice to such other findings as to the lawfulness of the operation of Seatrain as may be dependent upon the determination of issues involved in No. 25546.

The issues presented are (1) whether Seatrain is a "railroad" within the meaning of section 1 (3) of the act, (2) whether Seatrain is a common carrier engaged in the transportation of property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment under section 1 (1) (a) of the act, (3) whether Seatrain is a corporation organized for the purpose of engaging in transportation by railroad subject to the act, and (4) whether the Hoboken has such an interest in Seatrain as is contemplated in section 5 (19)–(21) of the act, and, if so, whether there is competition or possibility of competition between the Hoboken and Seatrain. The lawfulness of Seatrain's operation and transportation, its acquisition of control of the Hoboken, and the issue of securities by it, are dependent upon the determination of these issues.

The Seatrain type of vessel was developed by Graham M. Brush and Joseph Hodgson formerly of the Ward Line. They and
947 their associates have organized four corporations, namely, Railway Transports, Inc. (Transports), Over-Seas Railways, Inc. (Overseas), Over-Seas Steamship Company, Limited,

of Canada (Over-Seas Steamship Co.), and Seatrain Lines, Inc. (Seatrain), and through the Seatrain have acquired control of two other corporations, namely, Hoboken Terminal Properties, Inc. (Terminal Properties), and Hoboken Manufacturers Railroad Company (Hoboken).

The Transports, a New York corporation, owns the Seatrain patents and is controlled by Brush and Hodgson. Overseas, a Delaware corporation, owned and operated the original Seatrain vessel. Some of its stock is owned by Transports. The amount was not shown, but it was stated that Brush and his family and friends own over 51 per cent of the stock of Overseas, which has outstanding 7,475 shares of preferred stock and 11,212½ shares of common stock, the preferred stock having voting rights if dividends are passed for two consecutive years. Over-Seas Steamship Co., a Canadian corporation, which was organized in the interest of Overseas for the purpose of building the first Seatrain vessel, has been dissolved. All its capital stock was owned by Overseas, but was transferred to Seatrain before the Over-Seas Steamship Co. was dissolved.

Seatrain, a Delaware corporation, was organized in 1931. It has issued and has outstanding 24,500 shares of class A stock and 16,000 shares of class B stock, the latter having one-third of the voting rights in the corporation. In addition it has issued other securities, some of which are still outstanding. All the class B stock and 10,110 shares of the class A stock are owned by Overseas, which received the class B stock from Seatrain as consideration for the transfer to the latter of the exclusive
948 right to use the patents owned by Transports, and the class A stock as consideration for $11,000 cash and other assets valued at $1,000,000 and consisting of the original Seatrain vessel, two terminals and other things, except the patent rights. Overseas owns no physical property, its holdings being confined to stock of Seatrain.

Terminal Properties, a New Jersey corporation, is now a holding company, and the Hoboken, also a New Jersey corporation, operates a terminal switching road consisting of about 1½ miles of main track and about 10 miles of yard and side tracks along the water front at Hoboken, N. J., on the west side of New York Harbor. Seatrain owns all the capital stock of Terminal Properties except directors' qualifying shares, and Terminal Properties owns all the capital stock of the Hoboken except directors' qualifying shares. The stock of the Hoboken and Terminal Properties was acquired by Seatrain in 1932, in order to provide terminals and railroad connections on New York Harbor. For the purpose of straightening out certain intercorporate debts and accounting problems existing between the two companies, Seatrain trans-

ferred the stock of the Hoboken to the Terminal Properties. Seatrain, Overseas, and Transports have various directors, officers, and stockholders in common, and the principal executives of the Hoboken, the Terminal Properties, and Seatrain are the same, and some of the directors of these corporations are common to all of them, Seatrain having 15 directors and the Hoboken seven, of whom five, including Brush and Hodgson, are also directors of Seatrain.

The Missouri Pacific owns 863 shares and the Texas & Pacific 862½ shares of each class of stock of Overseas. The
949 two companies respectively own 1,674 shares and 1,673 shares of class A stock of Seatrain.

Seatrain owns three vessels designed to transport by water freight brought to or moved from ports by railroads without transferring the freight from the cars, thereby avoiding delays and expenses incident to ordinary steamship operation. The first vessel was build in England for Overseas, and in January 1929, was placed in operation by that company in foreign commerce between New Orleans (Belle Chasse) and Havana. In 1931 Overseas decided to add another vessel to its service and, after investigating the cost of constructing the new vessel here and abroad, entered into negotiations with the Post Office Department for a mail contract if the vessel should be build in his country. Overseas was advised by the committee on mail contracts that an application to build two new vessels would be received with more favor. Subsequently Seatrain was organized, took over the assets of Overseas, and after securing a mail contract from the Post Office Department and a construction loan from the Shipping Board, built two new vessels.

The contract with the Shipping Board provided that the new vessels should "be operated in maintaining service on lines between New Orleans, Louisiana, and Havana, Cuba, and in other exclusive foreign service between Atlantic and/or Gulf ports and Cuba, or in such other service or services as the Board may by resolution hereafter authorize, and not otherwise." By resolution adopted October 8, 1932, the Shipping Board granted Seatrain permission to operate the new vessels in coastwise service for a period of six months, and on that date Seatrain started operation of one of the new vessels between Hoboken and New Orleans via Havana in foreign and domestic service, the other new vessel being placed in operation in the same service at a later date.

950 Seatrain vessels are approximately 480 feet long, with 63-foot beams, and have a speed of 16½ knots, or better. They are ocean-going vessels built to specifications of Lloyds-Register and the American Bureau for World Wide Trade. While

the original vessel has tank space for 2,200 tons of liquid cargo, and the new vessels have tank space for 4,000 tons of liquid cargo, each vessel is designed primarily for transportation of cargo only when loaded in railroad cars. Each vessel has four decks, and each deck has four sets of railroad tracks of standard gauge, the aggregate length of tracks on each vessel being approximately 1 mile. The original vessel has a capacity of 95 cars, and each of the new vessels has a capacity of 100 cars. These vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided. Such facilities have been provided at only three ports, namely, Hoboken, New Orleans, and Havana.

The loading facilities consist of a combination elevator and crane, the elevator shaft being erected on the dock, and the stationary arms of the crane extending from the frame of the elevator shaft out over the slip. The floor of the elevator is a movable platform called a cradle on which is laid a single track of standard gauge. The cradle when in place on the dock forms a section of the railroad track, over which cars are moved to and from the cradle. The loading facilities at Havana and New Orleans are owned by Seatrain. Those at Hoboken are owned by the Hoboken, and together with the pier and necessary supporting tracks are leased by Seatrain. Those at New Orleans are located on the property of the New Orleans & Lower Coast Railroad Company, a subsidiary of the Missouri Pacific, and those at Hoboken are located on the property of the Hoboken.

In loading a Seatrain vessel a car is moved by locomo-
951 tive over the railroad tracks of the Hoboken or the New Orleans & Lower Coast, as the case may be, and stopped on the section of track laid on the cradle where it is blocked and secured. The four corners of the cradle are connected to bails which in turn are attached to an overhead crane. The crane through the bails and cradle lifts the car vertically until the car and cradle are higher than the bulwark of the vessel. Car and cradle are then moved along the arms of the crane to a position over one of the four hatchways of the vessel and lowered through the hatchway, which forms another elevator shaft, to one of the four decks on which the car is to be stowed. The cradle for the time being becomes a part of that particular deck, the tracks on the cradle articulating with the tracks on the deck to form a continuous track over which the car is moved from the cradle by a car puller to the desired position on the deck track where it is secured and made fast to take care of motion of the ship while at sea. When a deck has been loaded the cradle is left in place and serves as a hatch cover for that deck. Unloading is the reverse

of the process of loading. Often cars may be loaded and unloaded at the same time. That is, the cradle instead of being hoisted out empty is loaded with a car, lifted out of the ship, moved along the crane arms to the elevator shaft over the dock, and lowered to position in the railroad track over which the car is moved from the cradle by a locomotive.

Seatrain vessels and loading devices are not patented, but the idea embodied by the Seatrain vessels for carrying cars and for transferring cars from railroad tracks or from the deck of another ship to tracks laid on Seatrain vessels is patented. Seatrain has the exclusive right to use these patents.

Seatrain in literature which it has issued describes itself as "a sea-going railroad, running hundreds or even thousands of miles across the ocean to some far distant port with a
952 train of freight cars a mile long. * * * Although it is an ocean carrier, a Seatrain ship is actually a floating bridge—a connecting link for all railroads. In the case of Cuba, Seatrain has literally added to North American railroads, 2,626 miles of standard gauge Cuban track. * * * Thus, it may be said that the function of Seatrain is essentially that of an intermediate rail carrier; it extends the rails out across the sea." In the preliminary application to the Shipping Board for a construction loan, the type of vessel to be constructed is described as follows: "This vessel might be termed an improved 'car ferry'."

Interveners contend that the vessels operated by Seatrain are ferries used by or operated in connection with railroads, and therefore that Seatrain is a common carrier by railroad subject to our jurisdiction.

Section 1 (3) provides in part as follows:

"The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

It is evident that Seatrain vessels are not car floats. The New York Harbor Case, 47 I. C. C. 643, 670. Wharfage Charges at Atlantic and Gulf Ports, 157, I. C. C. 663, 673. Whether Seatrain vessels are "ferries" within the meaning of that term as used in the act is a more difficult question.

In Peninsular & Occidental S. S. Co., 37 I. C. C. 432, 435, we held that the ferry of the Florida East Coast Railway Company

operating between Key West and Havana was embraced
953 within the term "railroad" as defined in the act, and that it should be viewed simply as an extension of the line of the railway of the East Coast. In many respects the service performed by Seatrain vessels is similar to that performed by the East Coast ferry. Both transport by water freight in railroad cars in connection with railroads without transfer of lading at the ports. Both operate between fixed termini on regular schedules. Special facilities must be used by both in transferring cars from the tracks of the railroad to the tracks on the vessels and for securing the cars and holding them in place while they are on board the vessel. A car ferry is designed primarily to handle freight cars, and cooperation of the railroads at each end of the ferry is essential to its operation. It is admitted that the Seatrain vessels could not operate as they are intended to operate and as they are now operated without the loading devices that make possible the transfer of cars between the tracks on the vessels and the tracks of the Hoboken and of the New Orleans & Lower Coast, or without the use of railroad cars, or without the cooperation of a railroad at each of these terminals.

There are, however, a number of distinguishing characteristics between the Seatrain vessel and the ordinary type of vessel called a ferry. Seatrain vessels are ocean-going ships and could operate to any port in the world. They could not operate as they are intended to operate and as they are now operated to any port not having the special type of elevator and crane unless the vessels were equipped with suitable crane and elevator. In the ordinary type of ferry cars are carried on only one deck, the so-called strength deck, while in Seatrain vessels cars are carried not only on the strength deck, but on three decks in the hold. In loading the ordinary type of ferry, cars are pushed by
954 locomotive directly from the tracks of the connecting railroad, or over a ramp, onto the deck of the ferry as contrasted with the method used in loading Seatrain vessels. Generally ferries operate for short distances, not more than about 100 miles according to illustrations given in the record, as across the Great Lakes or the Florida Straits; frequency of service is a usual feature. Seatrain vessels operate between Hoboken and Havana, a distance of 1,200 nautical miles, and between Havana and New Orleans, a distance of 600 nautical miles, making the total distance of the trip from Hoboken via Havana to New Orleans 1,800 nautical miles.

The vessel used by Seatrain is far larger and of a different type than the vessel envisaged when the word "ferry" or "car ferry" is mentioned. Its method of operation is not the method used in operating any other ferry here or elsewhere in the world. The

nature of service rendered, while similar, is not the same as that rendered by ferries. The word "ferry" was used in the act entitled "An Act to Regulate Commerce" approved February 4, 1887; Congress reexamined its use of the word in Transportation Act, 1920, Sec. 400. We assume that Congress in including and maintaining ferries in the term railroad had in mind the type of vessel then currently commonly known as a ferry, and not a vessel which, as we have seen, is of a type then unknown and which is still unique in function (Bridge Proprietors of Bridges v. Hoboken Land & Improv Co., 1 Wall. 116).

It is suggested that Seatrain service may be considered as an extension of the lines of railroad of the Hoboken and of the Missouri Pacific. Unless Seatrain vessels are ferries used by or in connection with a railroad, and therefore to be included in the term "railroad," they do not constitute an extension of a railroad.

955 At the beginning of its operations between Hoboken and New Orleans, Seatrain employed Terminal Properties under contract to load and unload cars handled by Seatrain vessels. On November 21, 1932, Seatrain and the Hoboken entered into a contract whereby it was agreed that Seatrain would for the account of the Hoboken place cars for shipment via Seatrain vessels on the cradle of the car elevator and perform such handling of the cars as might be necessary for such purpose, and would remove from the cradle cars unloaded from Seatrain vessels and place them on a convenient track in the vicinity of the elevator. The contract was made retroactive to October 1, 1932, and superseded Seatrain's contract with Terminal Properties.

The service to be performed by Seatrain under the contract includes the classifying of cars on the tracks of the Hoboken for shipment via Seatrain vessels and the moving of cars to and from the cradle of the elevator and over the Hoboken's tracks for distances up to 2,000 feet. It is recited in the contract that it is the duty of the Hoboken under its tariffs and those of its connections to perform this service. The contract provides that the Hoboken shall pay Seatrain at the rate of 40 cents a ton of freight, other than coal, and 27 cents a ton of coal, loaded into or discharged from Seatrain vessels in cars. For the purpose of performing the service Seatrain has leased from the Hoboken a locomotive which is operated two days a week in moving from the cradle of the elevator cars unloaded from Seatrain vessels, and in classifying on the Hoboken's tracks and moving to the cradle of the elevator cars for shipment via Seatrain vessels. The Superintendent of the Hoboken stated that Seatrain was operating the engine over the Hoboken's tracks in per-
956 forming the service pursuant to the agreement. His testi-

mony shows, however, that the actual work of classifying and moving cars over the tracks of the Hoboken is being performed by regular employees of the Hoboken who receive their instructions from and are paid by the Hoboken, which is reimbursed by Seatrain for the portion of the time they are engaged in the service, and that the only thing done by Seatrain is to issue instructions to the Hoboken as to the manner in which the cars are to be classified and the order in which they are to be moved from the tracks of the Hoboken to the cradle of the elevator. The facts do not warrant a finding that Seatrain is engaging in transportation by railroad.

Since October 6, 1932, Seatrain in addition to carrying traffic in railroad cars between Hoboken and Havana and New Orleans and Havana has been engaged in transporting freight in railroad cars between Hoboken and New Orleans via Havana. The cars moving between Hoboken and New Orleans remain on the vessels at Havana. Most of the traffic that has moved via Seatrain between Hoboken and New Orleans had its origin or destination at interior points in New England and Trunk Line terri-
957 tories. The traffic handled by Seatrain with the exception of a relatively small amount of liquid cargo handled in the tanks of the vessels, was handled in freight cars from origin to destination without transfer of lading at the ports, and was necessarily handled in connection with either the Hoboken at Hoboken, or with the New Orleans & Lower Coast at New Orleans, or with both of these companies.

The Hoboken and the New Orleans & Lower Coast are common carriers by railroad. The Hoboken has direct rail connection with the Erie and through switching over the Erie has connection with all trunk lines reaching New York Harbor. The New Orleans & Lower Coast connects directly or indirectly with all rail lines at New Orleans.

The Hoboken participates in joint rates with other carriers and receives a division out of such rates. It is, however, primarily a switching and terminal railroad (Hoboken Mfrs. R. R. Co. v. A., T. & S. F. Ry. Co., 132 I. C. C. 579). Some traffic handled by Seatrain has its origin or destination at points on the rails of the Hoboken. All traffic shipped by Seatrain in railroad cars originating at or destined to points on rails of other railroads in Eastern Trunk Line or New England territories must pass over the rails of the Hoboken. On port-to-port traffic to and from points in the port of New York area the Hoboken receives a switching charge which is absorbed by Seatrain. Where the shipment has its origin or destination at some interior point Hoboken receives a divison of the rate. The same situation exists

in connection with the New Orleans & Lower Coast at New Orleans.

Seatrain has filed with the Commission tariffs naming numerous joint and proportional rates to cover the movement of traffic from Hoboken to various points in Louisiana, Arkansas,
958 and Texas in connection with the Missouri Pacific and the Texas & Pacific and some of their short-line connections. It has participated in no joint rates applying to interior points located in Trunk Line, Central Freight Association, and New England territories. There are only a few northbound rates applying from the southwest in which Seatrain participates. Most of Seatrain's coastwise traffic has been handled on what Seatrain claims to be a strictly port-to-port basis, namely, on local ships' bills of lading between Hoboken and New Orleans.

Freight moving from interior points in New England and Trunk Line territories does not move on through bills of lading. The originating rail carrier issues a bill of lading covering the movement to Hoboken. The eastern trunk lines have refused to join in through rates with Seatrain and to issue through bills of lading. They have also refused to issue through export bills of lading covering shipments of traffic to Cuba. Complaints filed by Seatrain, the Hoboken, and the New Orleans & Lower Coast, Nos. 25727, 25728, and 25878, respecting the use of railway equipment and the establishment of through routes, and through rates, proportional rates, etc., are pending.

Rail bills of lading provide for delivery of freight at Hoboken to a specified consignee, and in most instances in care of Seatrain. After the shipment arrives at Hoboken, Seatrain under instructions from the shipper or consignee issues a bill of lading covering the remainder of the movement. Freight cars to be delivered to Seatrain are received by the Hoboken along with other cars destined to some point on the Hoboken tracks. The cars
959 routed via Seatrain are segregated and classified in accordance with the requirements of Seatrain as to port of destination, weight of car, kind of car, and commodity contained in the car. After the cars are classified they are switched one by one from the classification yard and placed on the cradle of the car elevator alongside the vessel.

With respect to traffic originating at New Orleans, Seatrain follows the same practice in billing shipments as it does in billing the shipments from Hoboken, such traffic, if originated in the New Orleans district, being handled entirely on ships' bills of lading. A shipment moving from New Orleans via Seatrain to an interior point in New England or Trunk Line territory would move to Hoboken on a ship's bill of lading, and from Hoboken to

the interior on a separate rail bill of lading issued by the railroad connecting with the Hoboken, which issues no bills of lading.

In case of practically all shipments handled as port-to-port shipments, Seatrain has knowledge at the time the shipment starts from the interior point that it is destined for through movement. When cars from interior New England and Trunk Line territories are received by the Hoboken, consigned care of Seatrain, it is assumed by the Hoboken that the cars are to be placed aboard Seatrain without transfer of lading. They are classified in accordance with the requirements of Seatrain and placed on the pier alongside the vessel. The function of classifying the cars and moving them to a position alongside the vessel is performed as hereinbefore described. The Hoboken places less-than-carload freight for Seatrain in cars which are moved to the vessels for loading. It has held cars for Seatrain as long as six days prior to sailings. The average time the Hoboken held cars for Seatrain on the first two voyages was 1.576 days.

960 Seatrain has a contract with the Hoboken covering the interchange and supply of freight cars and the payment by Seatrain for the use of the cars, for insurance, and for settlement of loss and damage claims. This agreement also provides for the return by Seatrain of empty cars. Seatrain leases from the Hoboken certain property at Hoboken, including the car elevator and crane, the lease giving Seatrain the right to operate locomotives or cranes over the tracks of the Hoboken to the extent that such operation is necessary to load and discharge the vessels. Seatrain has a contract with the American Refrigerator Transit Company for the lease of refrigerator cars to be handled on its vessels, it being stipulated in the contract that a car shall be considered in the service of Seatrain from the date it is delivered to the Hoboken or the New Orleans & Lower Coast, until it is returned by one of those companies to a trunk line or terminal railroad.

Seatrain, as successor in interest of Overseas, has a contract with the New Orleans & Lower Coast whereby it was agreed that Overseas would construct and maintain a suitable car carrying vessel for the purpose of handling and carrying loaded and empty freight cars between New Orleans and Havana, to and from a terminal at or near New Orleans to be provided by the New Orleans & Lower Coast; would provide all necessary equipment and proper and adequate facilities for handling the cars at Havana; would load and unload its vessels at the terminals to be furnished by the New Orleans & Lower Coast; would erect suitable facilities on the terminals of the New Orleans & Lower Coast for loading and unloading cars carried on its vessels; would provide all necessary labor for handling, moving, and securing cars in the vessels,

and would provide an operator for the crane in loading
961 and unloading, together with dock labor; would pay for electric power used in operating the crane and for lighting the berth, and also for water and telephone service; and would properly maintain certain structures and equipment supplied by the railroad for berthing and mooring the vessels and for delivering and receiving freight cars to and from the vessels.

By the contract last mentioned the railroad company agreed to build and equip the necessary berth for the vessels, together with proper approaches thereto for the receipt and delivery of freight cars from and to the berth, to build and maintain a properly equipped yard as close as practicable to the berth for the accumulation of freight cars to be moved to and received from the vessels; to cooperate with Overseas by receiving and delivering freight cars from and to the loading gear on the vessels at such times as the Overseas might be might be loading and discharging the vessels and in such manner that the loading and unloading would not be unreasonably delayed by the operations of the railroad company in receiving and delivering the cars from and to the loading gear.

Overseas further agreed to be responsible for all equipment delivered to it by the railroad until returned to the latter, the M. C. B. rules to govern the physical interchange and the Overseas to pay per diem in accordance with the A. R. A. code of per diem rules, with some exception as to the time when responsibility of each party should begin. The railroad agreed to establish and maintain rates, rules, regulations, and practices that would encourage shipments via Belle Chasse (New Orleans). Other matters such as the provision of insurance, payments of car mileage and wharfage, supplying of cars, settlement of loss and damage claims, and solicitation of traffic for through movement were covered by the contract.

962 The foregoing contracts were entered into by Seatrain or its predecessor, the Overseas, for the purpose of perfecting arrangements for the continuous transportation of freight in cars without transfer of lading at the ports. Seatrain bases its right to use railroad cars on these contracts. For the use of the cars the railroads connecting with Seatrain pay per diem to the owning railroads and are reimbursed by Seatrain.

Interveners urge that if we find that Seatrain is a water carrier and not a railroad, Seatrain is nevertheless subject to our jurisdiction under section 1 (1) (a) of the act because of common control with the Hoboken, the Missouri Pacific, and the Texas & Pacific, and because of the foregoing agreements and arrangements which they claim constitute common arrangements for a continuous carriage or shipment of property.

Section 1 (1) is in part as follows:

"That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *"

Respondents admit that so far as corporate relations are concerned, common control and management exist between Seatrain and the Hoboken, but deny that such control and management exist between Seatrain and the other rail carriers mentioned. They also admit that where Seatrain handles freight under a through bill of lading covering both its own transportation and a rail movement at either or both ends of its route to or from a point or points beyond the port limits, its rates for such transportation must be filed with us whether the movement is under a joint through rate to which Seatrain as well as a rail carrier is a party, or whether the through charges for the through transportation are combination rates made up of rail rates to and
963 from the ports and the port-to-port rates of Seatrain.

Interveners argue that the admitted common control and management of Seatrain and the Hoboken is sufficient to bring the so-called port-to-port transportation of Seatrain within our jurisdiction. Respondents contend that to subject a water carrier to the provisions of the act, both the rail and water carrier must be used under a common control or management for a continuous carriage of shipment, and that the Hoboken and Seatrain are not so used. It also seems to be the contention of respondents that unless there is a joint contract of carriage, i. e., unless there is an arrangement for carriage under joint through rates or proportional rates, there is no common arrangement for a continuous carriage or shipment.

It appears from the facts recited that Seatrain and the Hoboken are used under a common control and management for a continuous carriage of property by rail and water, and that the two carriers must also be held to have established a common arrangement for such carriage within the meaning of section 1 (1) (a). It is unnecessary, therefore, to decide whether or not common control and management of the Hoboken are alone sufficient to bring the Seatrain within our jurisdiction. It is also clear from the facts recited that Seatrain and the New Orleans & Lower Coast are used under a common arrangement for a continuous carriage. There is nothing in the record to indicate common control or management between Seatrain on the one hand and the Missouri Pacific, Texas & Pacific, or New Orleans & Lower Coast on the other.

The existence of a common arrangement for through carriage is not dependent on the method of billing. As was said in Cin. N. O. & Tex. Pac. Railway *v.* Int. Com. Com., 162 U. S. 184, 193:

964 "When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."

See also Jurisdiction Over Water Carriers, 15 I. C. C. 205, Baer Bros. v. Denver & R. G. R. R., 233 U. S. 479, 490, and United States v. Munson S. S. Line, 283 U. S. 43, 47.

Nor, as is the contention of the respondents, are the arrangements between Seatrain and the connecting rail carriers for the continuous carriage the ordinary arrangements for the interchange of traffic between rail carriers and steamship companies, e. g., where a steamship company leases from a railroad a pier served by that railroad, or docks its ships at such pier on payment of a dockage, or enters into a contract with the railroad for stevedoring services. The arrangements between Seatrain and the Hoboken and between Seatrain and the New Orleans & Lower Coast are not limited to the establishment of a simple connection between rail and water carriers, and the placing of property within reach of the ship's tackle. Extra services are required by the rail carriers such as the classifying of the cars in accordance with instructions from Seatrain, the assembling of less than carload shipments into cars for transportation by Seatrain, the provision of yards suitable for the accumulation of freight cars to be delivered to Seatrain vessels, the expeditious movement of these cars to or from the loading gear in such manner as not to be unreasonably delayed by the operation of the railroad company in receiving and delivering the cars from and to the loading gear. The arrangements involve added responsibility for the rail carriers. They must stand sponsor for the safe return of the cars by Seatrain and for the payment of per diem while the cars are in possession of Seatrain. The arrangements also include a provision for insur-

965 ance, the supplying of cars, the settlement of loss and damage claims, and the solicitation of traffic for through movement in connection with Seatrain.

So far as appears, none of the traffic transported by Seatrain in railroad cars can be handled without the intervention of the Hoboken or the New Orleans & Lower Coast, or except in accordance with some of the extraordinary arrangements with those companies. Except as to the transportation of a comparatively small amount of liquid cargo in the ships' tanks, it is impossible for Seatrain to operate as it is intended to operate and as it is operated without the special arrangements with connecting railroads for

the continuous carriage of freight in railroad cars and without cooperation of such connecting railroads, or to keep its carriage of property in railroad cars distinct and independent from that of the railroad carrier as was found in the Munson Line case, supra, had been done by the water carrier.

The suggestion is made, although not urgently pressed, that even if Seatrain is not now engaged in operations as a common carrier by railroad, it is nevertheless a corporation "organized for the purpose of engaging in transportation by railroad subject to the act," and is therefore subject to the provisions of section 20a of the act.

The term "carrier" as used in this section means not only a common carrier by railroad, with certain exceptions, which is subject to the act, but also any corporation "organized for the purpose of engaging in transportation by railroad subject to the act." Section 20a makes it unlawful for such a carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier, or to assume any obligation or liability in respect of the securities of any other person, natural or artificial, unless and until, upon application by the carrier and after investigation, we shall by order authorize such issue or assump-
966 tion as for a lawful object within the corporate purposes of the carrier, and compatible with the public interest. After describing the procedure before us, and declaring our jurisdiction to be plenary and exclusive, the section enacts that securities or obligations not issued or assumed pursuant to its terms shall be void, and imposes civil and criminal liability upon directors, officers, attorneys, and agents participating in their creation.

In addition to its capital stock in the amount stated above, Seatrain has issued and now has outstanding $2,379,374 of notes evidencing loans from the Shipping Board. It has also issued from time to time other notes aggregating approximately $800,000, all of which, with the exception of one note for $90,000, have been paid. Seatrain has also guaranteed certain notes of the Hoboken. All these securities were issued subsequent to the effective date of section 20a, and with the exception of the Hoboken's notes were issued without our authorization, and obligation and liability in respect of the Hoboken's notes were assumed without our authorization.

If Seatrain is a carrier within the meaning of section 20a, all of its outstanding securities, with the possible exception of some of its notes, and its assumption of obligation and liability in respect of the Hoboken's notes, are void, and the directors, officers, attorneys, and agents of Seatrain who assented to or concurred in the issue of the securities and in the assumption of obligation and liability are subject to the penalties provided by the act.

The status of a common carrier is determined by its actions and not by reference to authority conferred in articles of incorporation. United States v. Brooklyn Terminal, 249 U. S. 296. So, also, whether a carrier is organized for the purpose of engaging in transportation by railroad subject to the act must be determined, not alone by the provisions of its charter, but by any
967 other evidence of its purpose. In the certificate of incorporation of Seatrain appear the following provisions:

"To engage generally in the business of transportation of all kinds on land and water; to transport anybody and anything anywhere by vessels of any kind, or by any other form of conveyance, or by any mode or means whatsoever; to act as a common carrier and as a private carrier by land and by water; * * *

"To build, make, construct, design, erect, remodel, repair, fit out and equip, and to purchase, lease, hire, and otherwise acquire, and to sell, transfer, convey, mortgage, lease, let, and otherwise dispose of, and to own, operate, maintain, manage, and otherwise use, terminals, docks, basins, piers, bulkheads, quays, warehouses, storehouses, elevators, sheds, repair shops, dry docks, railway yards, cranes, loading gear, and apparatus, equipment, and machinery of every kind and description, necessary or convenient for carrying on the business of the Corporation; * * *"

Those provisions leave no doubt that the articles of incorporation comprehend transportation by railroad as well as by water. But beyond those provisions in the charter this record is devoid of any evidence that Seatrain was organized for the purpose of engaging in transportation by railroad. Such a purpose is specifically disavowed by Seatrain, and there is convincing evidence that such was not and is not its purpose. It states that its only purpose was and is to engage in the operation of steamships as a common carrier by water, and no action taken by either its directors or its stockholders since incorporation, so far as revealed upon this record, indicates that such was not its sole purpose. To the contrary, all of its activities since the issuance of its certificate of incorporation show that it was its intention to engage in transportation by water and not by railroad. It is true that indirectly, through stock ownership, Seatrain does control the Hoboken, which is a terminal carrier by railroad, but it does not operate the Hoboken. The provisions contained in the Seatrain's certificate of incorporation do not grant to it under the laws of Delaware authority to engage in transportation by railroad in that state and so far as the evidence shows it has no authority to engage in transportation by railroad in New Jersey, or elsewhere.

968 We are here dealing with a penal statute, and the well established principles of law require that the statute shall

be strictly construed and not enlarged by implications or extended to persons or cases not plainly within the meaning of the language employed. We are of the opinion that Seatrain was not organized for the purpose of engaging in transportation by railroad subject to the act.

Section 5 (19) of the act provides that it shall be unlawful

"* * * for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic;"

Seatrain urges that the fact that it owns the capital stock of Terminal Properties, which in turn owns the capital stock of the Hoboken, does not bring it within these provisions of the act for two reasons: First, because the provisions are directed to the ownership or control of a steamship company; and second, because there is no competition or possibility of competition between Seatrain and the Hoboken.

It will be noted that the interest prohibited is "any interest whatsoever * * * by stockholders or directors in common, or in any other manner." The evidence shows that the Hoboken owns no stock in Seatrain and that there are no stockholders in common, but that Seatrain and the Hoboken have directors in common. Respondents urge, however, that the existence of directors in common is to enable Seatrain to control the Hoboken and in no way to enable the Hoboken to control Seatrain.

If there is no competition or possibility of competition between the Hoboken and Seatrain it will be unnecessary for us to decide whether the community of interest between the Hoboken and Seatrain is such as is contemplated in the Panama Canal Act.

969 Numerous industries are located alongside the tracks of the Hoboken. The Hoboken provides the only direct rail terminal connection between trunk line railroads entering the Port of New York area on the New Jersey side and eleven piers at which a number of internationally known steamship lines load export and discharge import freight having its origin or destination at interior points in the United States. The Hoboken publishes its own tariffs and is a party to joint rates with other rail-

roads. It receives divisions of such rates. Through its rail connections the Hoboken connects with all railroads in the United States, Canada, and Mexico. Fast freight service is maintained through the Hoboken and connecting Trunk Line Railroads and ocean steamship lines to and from all parts of the world. The Hoboken handles all-rail shipments moving between the industries located on its rails and practically all points in the United States, and receives divisions of the rates on such traffic. It has handled via all-rail routes traffic to points in the United States served by Seatrain through its connections at New Orleans.

In Application S. P. Co. in re Operation S. S. Co., 32 I. C. C. 690, and in S. P. Co. Ownership of Oil Steamers, 37 I. C. C. 528, it was stated:

"The words 'may compete for traffic' do not mean a vague, possible though improbable competition, but mean a probable, potential competition, as when the water line is entirely divorced from the railroad. We must, therefore, look at the conditions as they will exist if this divorce is effected."

And in Application of United States Steel Products Co., 57 I. C. C. 513, 516, we said:

"* * * it may be seriously questioned that even the selfish interests, either of the railroads serving the steel manufacturing sections of the east and middle west or of the transcontinental carriers, would lead them to offer competition or to take steps to discourage the forwarding via rail-and-ocean routes, through the eastern ports, of steel products hitherto moving all-rail to the Pacific Coast."

970 We can not conceive of any circumstance that would lead the Hoboken to take steps to discourage the forwarding of freight by Seatrain, or to seek to move via all-rail routes traffic that might move via Seatrain.

Upon consideration of the evidence, we are of the opinion and find: (1) that Seatrain Lines, Inc., is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act; (2) that Seatrain Lines, Inc., is a common carrier by water engaged in the transportation of property partly by railroad and partly by water, that Seatrain Lines, Inc., and the Hoboken Manufacturers Railroad Company are used under a common control, management, and arrangement for continuous carriage or shipment of property in railroad cars in interstate and foreign commerce, that Seatrain Lines, Inc., and the New Orleans & Lower Coast Railroad Company are used under a common arrangement for such continuous carriage, and, therefore, that Seatrain Lines, Inc., is subject to all the provisions of the act applicable to such a carrier; (3) that Seatrain Lines, Inc., is not

a "carrier" within the meaning of section 20a of the act; and (4) that the Hoboken Manufacturers Railroad Company does not and may not compete for traffic with Seatrain, and therefore neither is subject, because of any community of interest between them, to the provisions of section 5 (19)–(21) of the act.

We do not consider it necessary to point out more specifically in what respects we consider that the respondents have violated various provisions of the act, or to make an order that they shall cease and desist from such violation. However, the respondents will be expected to take such steps within sixty days from the date hereof as may be necessary to harmonize their operations and relations with the various provisions of the act.

971 MEYER, Commissioner, concurring in part:

The vessels of Seatrain are the most recent improvement in an old mechanism—the car ferry. No doubt the future will bring further improvements. Mankind is entitled to the benefits of these improvements. It is also entitled to protection against their possible abuse.

If the Seatrain vessels are merely ocean-going ships, it is clear that we have no jurisdiction over them. If they are car ferries used by or operated in connection with any railroad, it is equally clear that they are railroads within the meaning of section 1 of the interstate commerce act and that we do have jurisdiction over them. If merely ocean-going vessels enjoying the freedom of the seas and not amenable to the fundamental rules which govern railroads, they may speedily develop into raiders and prey upon railroad transportation after the fashion of the sea raider in war. If car ferries, as I believe they are, we may control them to the same extent that railroads are controlled and keep their activities within the bounds of the general public interest and thereby promote the general economic interests of the country and especially the transportation interests of the Nation.

For many years car ferries have been operating on the Great Lakes, and many of our harbors and coastal waters teem with them. The public interest has required that they be dealt with as an integral part of our railroad system of transportation when used by or operated in connection with any railroad. Section 1 of the act provides that they shall be so dealt with and our jurisdiction over such ferries is unquestioned. The service performed by these car ferries is the movement of loaded and empty freight cars from one line of railroad to another. That is exactly the service that is performed by the Seatrain vessels. Neither they nor the older type of car ferry can be operated except in connection
972 with a railroad at each terminus. It is the service that is and necessarily must be performed by a particular vessel that determines whether it is a car ferry, not its size, seaworthi-

ness, method of loading and storing cars, the length of its voyage, or method of its financing.

I concur in the conclusion of the majority that the Seatrain and Hoboken Manufacturers Railroad, also the Seatrain and the New Orleans & Lower Coast Railroad, are used under common control, management, and arrangement for continuous carriage or shipment of property in interstate and foreign commerce and that Seatrain is subject to all of the provisions of the act applicable to such a carrier. This finding is a step in the right direction. I would go farther and find that the vessels of Seatrain are car ferries and in all respects subject to the provisions of the interstate commerce act.

I am authorized to state that Commissioner MILLER joins in this expression.

MAHAFFIE, Commissioner, dissenting:

I am unable to agree with the conclusion of the majority that the vessel here in question is not included within the definition of a "railroad" in *section 1 (3) of the act:*

"The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, * * *."

The Seatrain operates between the rails of the Hoboken and the New Orleans & Lower Coast. It takes cars from one to the other as part of a longer journey. It and the former are in common ownership and control and the owner of the latter holds part of its stock. Its operations are necessarily dependent on these railroads. To me it seems entirely clear that it is both "used by" and "operated in connection with a railroad."

973 Nor do I find anything in the variations in the precise method of operation or distances traversed, relied on by the majority, that justifies differentiating this from other car ferries. "An improved car ferry," I think, describes it accurately.

In my judgment, both sections 1 (18) and 20a are applicable.

I am authorized to state that Commissioner MCMANAMY concurs in this expression.

By the Commission:

[SEAL] GEORGE B. MCGINTY, *Secretary.*

974 *Exhibit 2*

AMERICAN RAILWAY ASSOCIATION

ARTICLES OF ORGANIZATION

ARTICLE 1. The name of this organization is the "American Railway Association," with headquarters in New York City.

ARTICLE 2. Its object is, by recommendation, to harmonize and coordinate the principles and practices of American railroads with respect to their construction, maintenance and operation.

ARTICLE 3. Its membership shall consist of carriers which operate American steam railroads. No carrier operating less than one hundred miles of road, including trackage rights, or which operates primarily as a plant facility, shall be eligible for membership; except, that the Board of Directors may admit to membership switching or terminal companies with annual operating revenues above one million dollars.

Each carrier shall be entitled to exercise the right of one membership for each one thousand miles of road, or fraction thereof, including trackage rights, operated by it.

The Board of Directors may admit to the Association as associate members carriers which, in the judgment of the Board, are not eligible for membership.

ARTICLE 4. Each membership shall be entitled to one vote, which vote shall be cast only by the chief executive officer of the member voting or by the officer designated by him. Associates shall not be entitled to vote, but otherwise shall have the same standing as members.

ARTICLE 5. Representation in the Association shall be restricted to the chief executive officer of each carrier holding membership therein, or to an officer designated by him.

Members may be represented in each Division by their officers in charge of matters coming within the scope of the Division.

ARTICLE 6. A carrier may terminate its membership by formal withdrawal after the payment of assessments due; or if it shall fail to pay its dues and assessments for two consecutive years its membership may be terminated by the Board of Directors.

975 ARTICLE 7. Its officers shall consist of a President, a First Vice President, a Second Vice President, and a General Secretary and Treasurer. The term of any such officer shall terminate with the appointment of his successor. These officers shall receive such salaries, if any, as shall be determined by the Board of Directors.

The work of the Association shall be conducted by a Board of Directors, of twenty-one elected members, one of whom shall be selected by the Board as Chairman, and an Executive Committee, constituted as hereinafter prescribed. The Chairman of the Eastern, Southeastern and Western Presidents' Conference Committees shall, unless otherwise elected, be ex-officio members of the Board of Directors. The Board shall select from among its number one member to represent it in the work of each of the Divisions into which the Association is divided. The members of the Board of Directors so selected become the Executive Committee.

There shall be also a Committee on Nominations of five elected members.

ARTICLE 8. It shall be the duty of the President to preside at all meetings of the Association and to exercise general supervision over the affairs of the Association. He shall be ex-officio a member of the Board of Directors and of all Committees.

In the absence of the President his duties shall devolve upon the First Vice President. In the absence of the First Vice President the Second Vice President shall perform the duties of President.

ARTICLE 9. It shall be the duty of the General Secretary to keep a full and complete record of the proceedings of each regular and special session, to notify members of the date and location of, and to provide printed copies of the proceedings of each session, and of each meeting of the several Divisions, to issue all circulars and to compile information for the use of the Association and of the various Divisions thereof. He shall act as Secretary of the Board of Directors, the Executive Committee, and the Committee on Nominations. He shall either act as Secretary of the Divisions and of the several Sections and Committees thereof, or in connection with the Chairman and Vice Chairman of any Division or Section he may appoint a Secretary thereof, and shall see that the minutes of the sessions of the Divisions, the Sections and of the several Committees are properly kept, and from time to time shall attend their sessions. He shall be the custodian of the Library and of all records of the Association, and under the direction of the Board of Directors shall authorize all disbursements on account thereof. He shall select an Assistant General Secretary and such other assistants as the business of the Association may require, subject to the approval of the Board of Directors, and shall perform such other duties as may be assigned to him.

ARTICLE 10. The Treasurer shall receive, disburse, and account for all monies received or expended, and shall deposit the funds of the Association in such banks or places of deposit as may be approved by the Board of Directors. He shall make a semi-annual report of the finances in detail to such Board, and, with its consent, may select an Assistant Treasurer to act in his absence.

976 ARTICLE 11. The powers and duties conferred on the American Railway Association by these Articles of Organization are subject to the resolution adopted by the Association of Railway Executives, July 1, 1920, viz: The Association of Railway Executives shall have at all times executive control of all railway and railroad associations.

ARTICLE 12. These articles may be amended on the recommendation of the Board of Directors, if approved by a two-thirds vote of the members of the Association.

BY-LAWS

1. A regular session of the Association will be held on the third Wednesday of November of each year at such place as the Board of Directors may determine. Special sessions shall be called by the President at the request of the Board of Directors, or on the written request of ten members. The Board of Directors may change the date of a regular session when in its judgment the best interests of the Association will be thereby conserved.

2. In addition to the Board of Directors, the Executive Committee, and the Committee on Nominations, the organization includes the following Divisions:

Division I—Operating.
Division II—Transportation.
Division III—Traffic.
Division IV—Engineering.
Division V—Mechanical.
Division VI—Purchases and Stores.
Division VII—Freight Claims.
Division VIII—Motor Transport.

Each Division shall be presided over by a Chairman and one or more Vice Chairmen, who shall be elected by the Division.

Each Division shall arrange for the selection of a "General Committee" to harmonize and coordinate the work of such Division and for the proper transmission of recommendations of the Division, and such other Committees as may be necessary to facilitate the handling of the matters with which the Division is charged, subject to the approval of the Executive Committee. Any Committee of any Division may appoint such sub-committees as it may find desirable for the advancement of its work, subject to the approval of the "General Committee."

The time and place of holding sessions of Divisions, the method of selecting committees, and the members thereof, and of conducting its business shall be decided upon by the representatives of the members in each Division, subject to the approval of the Executive Committee. The officers and committees of Divisions shall be so chosen as to fairly represent geographically all carriers of the country.

Any Division may, with the approval of the Board of Directors, permit others than representatives of members to become affiliated members of such Division and to serve on and vote in Committees. Qualifications for affiliated membership shall be fixed by each Division.

977 3. Seven members of the Board of Directors shall be elected each year to serve for three years. Three members

and two members of the Committee on Nominations, each to serve for two years, shall be elected alternately. These elections shall be by letter ballot in advance of the regular sessions of the Association.

4. The Board of Directors shall exercise general supervision over the affairs of the Association and pass upon applications for membership.

It shall appoint the President, the Vice Presidents, and the General Secretary and Treasurer, and prescribe their salaries, if any.

It shall nominate nine persons and six persons, in alternate years, as candidates for the Committee on Nominations. Such nominations shall be so made as to fairly represent geographically all carriers.

It shall report to the Association at each regular session the action it has taken and its recommendations on matters of importance.

In addition to the duty of supervising the activities of the several Divisions, the Board of Directors may assign to the Executive Committee such other duties as it deems advisable.

Whenever the Committee on Nominations shall cease to have a quorum in its membership, the Board of Directors shall make such appointments as are necessary to fill the vacancies.

5. The Committee on Nominations shall nominate each year the names of twenty-one executive officers as candidates for the Board of Directors. Such nominations shall be so made as to fairly represent geographically all carriers.

6. It shall be the duty of Division I—Operating, to consider and report upon questions affecting operating practices.

7. It shall be the duty of Division II—Transportation, to consider and report upon questions affecting the efficient use and interchange of equipment.

8. It shall be the duty of Division III—Traffic, to consider and report upon rules, regulations and practices (not including rates, fares, or classifications for rating) which affect the operation of the railroads in relation to the public.

9. It shall be the duty of Division IV—Engineering, to consider and report upon methods affecting the location, construction, and maintenance of railroads.

10. It shall be the duty of Division V—Mechanical, to consider and report upon methods of construction, maintenance, and service of the rolling stock of railroads.

11. It shall be the duty of Division VI—Purchases and Stores, to consider and report upon methods for purchasing, storing, distribution, and selling of materials and supplies.

12. It shall be the duty of Division VII—Freight Claims, to consider and report upon methods for the settlement of freight

claims of shippers, consignees, and carriers; also to study claim causes and preventive measures.

978 13. It shall be the duty of Division VIII—Motor Transport, to consider and report upon questions affecting the development of motor transportation by railroads.

14. Reports, except the report of the Board of Directors, shall be prepared at least thirty days prior to the date of the session at which they are to be considered by the Association and copies forwarded to the members by the General Secretary with the call for the meeting.

15. A person who becomes a member of the Board of Directors or of a Committee shall continue to perform the duties thereof to the end of his term, so long as he is an official of a member of the Association, whether in the service of the original member or of another. A vacancy on the Board of Directors or on a Committee caused by resignation or disability shall be filled by the vote of its remaining members except as provided in By-Law 4.

When a member of the Board of Directors or of a Committee shall be absent three times consecutively from regularly called meetings of the Board of Directors or of the Committee his membership ceases ipso facto, and the Board or Committee shall act as in the case of a vacancy from any other cause.

16. Any officer of a member when properly accredited by his chief executive officer will be admitted to the sessions, and may join in the discussions or serve on the Committees of the Association, except the Board of Directors and the Committee on Nominations.

17. Thirty members shall constitute a quorum for the transaction of business, but a lesser number may adjourn from time to time.

18. Each membership shall pay an annual fee of $10, and such other sums as are assessed by the Board of Directors for conducting the affairs of the Association. Each associate shall pay annual dues of $40, but shall not be subject to assessments. Annual dues shall be payable on April 1st. Assessments shall be based upon the number of miles of road operated, leased, or controlled by each member at the time the assessment shall be payable or on such other basis as may be prescribed from time to time by the Board of Directors.

19. A member shall not be entitled to vote if in arrears to the Association.

20. Each member shall have the privilege of voting for any seven candidates for membership on the Board of Directors, and for any two (or three) candidates for membership on the Committee on Nominations. The seven persons receiving the highest

number of votes cast for membership on the Board of Directors and the two (or three) persons receiving the highest number of votes cast for membership on the Committee on Nominations, shall be declared elected. All such votes shall be by letter ballot on forms prepared by the Committee on Nominations. A member may cast such ballot for any eligible representative of a member of the Association for membership on the Board of Directors, or on any Committee.

978 21. A vote in the regular sessions of the Association may be taken viva voce, by rising, by roll-call or by ballot, in any of which members only shall participate.

Letter ballots other than for elections may be ordered to be taken in such manner and under such conditions as the Board of Directors may from time to time direct.

22. In all letter ballots for members of the Board of Directors and of Committees, the following form of voting shall be adhered to:

An envelope shall be provided on which there shall be a blank space for the name of the member, the name of the official voting, and the number of votes which he casts. In these envelopes the ballots shall be placed by those voting them, and they shall then be forwarded to the General Secretary, and by him presented to three tellers to be appointed by the President. Such tellers shall be so selected as to fairly represent geographically all carriers of the country.

23. At all regular sessions of the Association the regular order, unless otherwise directed by a majority of the members present, shall be as follows:

1. Announcement of members present.
2. Approval of minutes of previous meeting.
3. Reports.
4. Unfinished business.
5. Miscellaneous business.

24. The members of the Board of Directors and of Committees shall serve for the periods designated or until their successors are elected and qualified. Any member of the Board of Directors may resign by giving notice to the Board; any member of a Committee may resign by giving notice to its Chairman.

25. The proceedings of this Association shall be governed by "Roberts' Rules of Order," except as otherwise herein provided.

26. These By-Laws may be amended by the Board of Directors at any regular meeting or at a special meeting called for the purpose, provided two-thirds of all the members constituting the Board vote in favor of said amendment.

980 *Exhibit 3*

Circular DII—385

AMERICAN RAILWAY ASSOCIATION

TRANSPORTATION DIVISION

Code of Car Service Rules—Code of Per Diem Rules

Regulations Governing Placing and Handling of Embargoes

In Effect April 1, 1933

981 CAR SERVICE AND PER DIEM AGREEMENT

The subscribing railroad company promises and agrees with each railroad company severally which subscribes and files a counterpart hereof with the Secretary of the American Railway Association, that the subscriber will abide by and enforce the rules prescribed for the handling of and settlement for freight cars and included in the Codes of Car Service and Per Diem Rules promulgated by the Association.

Further, That the subscribing railroad company agrees to the creation of a Car Service Division with plenary powers, as provided in Per Diem Rule 19, and which Division shall be established and maintained at Washington, and shall co-operate with the Interstate Commerce Commission in all car service matters on and between all railroads; and generally to act for the subscriber as its Agent in all such car service matters as fully and as effectively as could the subscriber.

Further, That the said Car Service Division is hereby designated and appointed as the agent of the subscribing railroad company, upon which service of all orders and directions with respect to car service, in accordance with the provisions as to car service of the Act to Regulate Commerce in force at the time, may be made by the Interstate Commerce Commission for and in the subscriber's behalf; a duplicate original of this agreement being filed by the subscriber with the Interstate Commerce Commission to evidence such designation.

This agreement to continue until withdrawn by three months previous notice in writing to the Secretary of the Association.

DEFINITIONS

Home Car.—A car on the road to which it belongs.

Foreign Car.—A car on a road to which it does not belong.

Private Car.—A car having other than railroad ownership.

Home.—A location where a car is in the hands of its owner.

Home Road.—The road which owns a car, or upon which the home of a private car is located.

Home Junction.—A junction with the home road.

Subscriber.—A road which is a subscriber to the Car Service and Per Diem Agreement.

Nonsubscriber.—A road which is not a subscriber to the Car Service and Per Diem Agreement.

982 Circular No. D. II–385A

AMERICAN RAILWAY ASSOCIATION

TRANSPORTATION DIVISION

Officers of Association: R. H. Aishton, Chairman, Board of Directors. M. J. Gormley, President. W. G. Besler, First Vice President. Hale Holden, Second Vice President. R. V. Fletcher, General Counsel. H. J. Forster, Secretary and Treasurer.

Officers of Division: J. J. Bernet, Chairman. W. A. Worthington, Vice Chairman. G. C. Randall, Chairman, General Committee. G. W. Covert, Secretary.

Office of the Secretary, 59 E. Van Buren Street, Chicago

ANNOUNCEMENT RESULT LETTER BALLOT NEW RULE 7—APPENDIX "B"—CODE OF PER DIEM RULES

CHICAGO, *September 30, 1933.*

To the Members:

Referring to Circular D. II—406 dated September 12, 1933, submitting new Rule 7 to Appendix "B" of the Code of Per Diem Rules to become effective October 1, 1933, if approved by a majority of the membership, that majority representing two-thirds of the freight cars owned or controlled by the members of the Association:

The total membership of the Association is 384 and the number of freight cars owned or controlled 2,296,877. The majority requisite for approval is 193 memberships owning or controlling 1,531,251 cars.

The vote on the proposition to adopt new Rule 7 of Appendix "B" submitted in Circular D. II—406 is as follows:

Yes, 341 Memberships, representing 2,236,337 cars.

No, 6 Memberships, representing 15,882 cars.

Not voting, 37 Memberships, representing 44,658 cars.

Please therefore take notice that new Rule 7 of Appendix "B" to the Code of Per Diem Rules is approved effective October 1, 1933.

Rule 7, Appendix "B" is presented herewith.

By direction of the General Committee, Transportation Division.

Respectfully,

G. W. COVERT, *Secretary.*

983 CODE OF CAR SERVICE RULES

Rule 1

Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable.

Rule 2

Foreign cars at home on a direct connection must be forwarded to the home road loaded or empty.

If empty at junction with the home road and loading at that point via the home road is not available, they must, subject to Rule 6, be delivered to it at that junction, unless an exception to the requirement be agreed to by roads involved. When holding road has no physical connection with the home road and is obliged to use an intermediate road or roads, to place the car on home rails under the provisions of this paragraph and the car has record rights to such intermediate road or roads, it may be so delivered.

If empty at other than junction points with the home road, cars under this rule may be—

(a) Loaded via any route so that the home road will participate in the freight rate, or

(b) Moved locally in the direction of the home road, or

(c) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road, if to be loaded for delivery on or movement via the home road, or

(d) Delivered empty to home road at any junction point, subject to Rule 6, or

(e) Delivered empty to road from which originally received under load at the junction where received if such road is also a direct connection of the home road, or

(f) Returned empty to the delivering road when handled in switching service.

INTERPRETATIONS

Question: Under Rule 2 can a car, empty at junction with home road, be loaded via the home road via any junction point?

Answer: Yes. (April 30, 1924.)

Question: Does the word "moved" as used in Rules 2 and 3 mean "loaded or empty"?

Answer: Both. "Loaded or empty." (April 30, 1924.)

984

Rule 3

Foreign cars at home on other than direct connections must be forwarded to the home road loaded or empty. Under this rule cars may be—

(a) Loaded via any route so that the home road will participate in the freight rate, or

(b) Loaded in the direction of the home road, or

(c) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road if to be loaded for delivery on or movement via the home road, or to a point in the direction of the home road, beyond the road on which the cars are located, or

(d) Delivered empty to road from which originally received, at the junction where received, if impracticable to dispose of them under paragraph (a), (b), or (c) of this rule.

INTERPRETATION

Question: Does the word "moved" as used in Rules 2 and 3 mean "loaded or empty"?

Answer: Both. "Loaded or empty." (April 30, 1924.)

NOTES TO CAR SERVICE RULES 1, 2, AND 3

(A) Car Service Rules 1, 2, and 3 do not apply to cars reconsigned with original lading under duly filed and published tariffs.

(B) 1. All roads interchanging cars at a common point, or within switching limits over their own lines, or an intermediate line or lines, or a car ferry or float within such limits, shall be considered Direct Connections under Rule 2.

2. This information should be published in The Official Railway Equipment Register, and when the interchange is other than over their own rails, the channel through which the interchange is effected must be shown.

(C) The Board of Directors of the American Railway Association shall decide as to roads which may be classified as "short line" roads under these rules.

985

Rule 4

Cars of railroad ownership must not be delivered to a steamship, ferry, or barge line for water transportation, without permission of the owners, filed with the Car Service Division.

Rule 5

Empty cars of indirect ownership (Rule 3) to the road requesting the service, may be short-routed at a reciprocal rate of six cents (6c) per mile, plus bridge and terminal arbitraries, with a minimum of one hundred (100) miles for each road handling the car, the road requesting the service to pay the charges.

NOTE A.—Empty cars, other than those specified in the above rule, may be short-routed by mutual arrangement between the interested roads.

NOTE B. "Empty cars, when short-routed in accordance with car service rules, should be moved on empty car waybill, the road arranging for the service to pay the charges through bill and voucher plan. Under no circumstances, should revenue waybill be issued with charges for such movement." (Railway Accounting Officers Association Rule.)

INTERPRETATIONS

Question: Does Rule 5 contemplate that a road performing short haul service at the established per mile rate shall assume per diem while such cars are in its possession?

Answer: Yes. (April 30, 1924.)

Question: Does the loading or use of a car being handled under Rule 5 nullify the right of road performing the service to collect for all or any portion of the service rendered?

Answer: Yes. (October 1, 1925.)

Rule 6

If a movement of traffic requires return of empty cars to home road via the junction at which cars were delivered in interchange under load, the home road may demand return of empty cars at such junction, except that cars offered a home road for repairs, in accordance with Division V—Mechanical (M. C. B.) Rules, must be accepted by owners at any junction point.

NOTE TO RULE 6.—Notice of an intent on the part of any road to invoke the provisions of this rule should be issued by the designated transportation officer to the designated transportation officer of the road to which the notice is addressed, such notice to specify the type of cars and particular junction points involved.

Such notice may not limit acceptance to the individual cars previously delivered, but may require the return of an equivalent number of home cars of the type specified, at junction point where delivered loaded.

986 INTERPRETATIONS

1. The words "Movement of Traffic" in Car Service Rule 6 mean the movement regularly through any junction point of any kind of traffic in (or on) the same class of car.

2. Car Service Rule 6 gives to a railroad which may deliver regularly, to a connection through any junction, traffic of any kind in (or on) its cars of the same class, the right to require connection participating in the handling of traffic from the junction point, to use that point of interchange for the return of the class of empty cars engaged in the service, instead of returning them at some other junction less favorable to the receiving (owning) railroad. (April 25, 1923.)

Rule 7

Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents, and per diem after receipt of the proper data* for forwarding and to in-

sure delivery, and until they have been accepted by its inspector or returned to the delivering road.

*NOTE.—The character of the necessary data will be determined by each receiving road in accordance with the conditions of its service.

INTERPRETATIONS

Question: After a car has been accepted by the inspector of the receiving road, is the delivering road relieved from responsibility for damage to car and contents?

Answer: Yes. (June 20, 1921.)

Question: Where a car has been accepted by the inspector of the receiving road, but is not accompanied or preceded by proper data for forwarding and to insure delivery, is the receiving road relieved from responsibility for damage to the car and contents?

Answer: No; but the rule gives the right to receiving road to refuse to accept in interchange cars which are not accompanied or preceded by proper data for forwarding and to insure delivery, and when such cars are not accepted in interchange they are still in the possession of the delivering road. (June 20, 1924.)

987 *When a loaded freight car containing a shipment destined to a non-agency station (a station at which there is no freight agent), billed collect or insufficiently prepaid, is offered in interchange, it shall be accepted from the connecting carrier and forwarded to destination. (January 25, 1926.)

*NOTE.—Freight Claim Rules and Railway Accounting Officers' Rules make provision for the adjustment of freight charges between the originating and the delivering carrier.

Rule 8

The following rates* for the use of passenger equipment shall be in force unless otherwise arranged between the roads concerned:

Section A—Joint Service Rates

Class of cars	Basis of rate		Rate per mile of actual distance	
	Seating capacity	Length of car***	Other than electric	Electric lighted
Coaches	Under 70		$0.05	$0.05½
Chair cars	70 to 86		.06½	.07
	Over 86		.08	.08½
Tourist	All		.05	.05½
Cafe-observation				
Dining				
Cafe	All		.08	.08½
Club				
Parlor				
Combination baggage and passenger		Under 65 ft	.05	.05½
Baggage and mail		65 ft. and under 70 ft	.06½	.07
Postal		70 ft. and over	.08	.08½
Baggage		Under 60 ft	.02½	.03
Express		60 ft. and under 70 ft	.03	.03½
Baggage-express		70 ft. and over	.04	.04½
Mail-storage				
Baggage-mail		Under 60 ft	.03	.03½
Baggage-mail-express		60 ft. and under 70 ft	.05	.05½
		70 ft. and over	.06½	.07

*These rates do not apply to cars equipped for other than steam operation.
***Definition: "Length of Car" shall be outside measurement of car body.

These rates are to apply when the owners of the cars participated in the business and not when the cars are hired to other lines:

988 Section B—Per Diem Rates

These rates are to apply when cars are hired at other than mileage rates and when the owners of the cars do not participate in the business; but are subject, however, to agreement between the parties interested.

Class of cars	Basis of rate		Per diem rate	
	Seating capacity	Length of car***	Other than electric	Electric lighted
Coaches	Under 70		$8.00	$8.50
Chair cars	70 to 86		11.00	11.50
	Over 86		13.00	13.50
Tourist	All.		8.00	8.50
Colonist				
Dining				
Cafe	All.		13.00	13.50
Club				
Parlor				
Comb. pass. and bagg. or pass.		Under 60 ft.	8.00	8.50
Bagg. and mail		60 ft. and under 70 ft.	11.00	11.50
Postal		70 ft. and over	13.00	13.50
Baggage		Under 60 ft.	5.00	5.50
Express		60 ft. and under 70 ft.	6.50	7.00
Bagg. express		70 ft. and over	8.00	8.50
Mail storage				
Bagg. mail		Under 60 ft.	6.50	7.00
Bagg.-mail ex.		60 ft. and under 70 ft.	9.50	10.00
		70 ft. and over	11.00	10.50

***See page 455.

Section C

A mileage allowance of two and one-half (2½) cents per mile will govern in the settlement as between railroads, and also as between the railroads and the Railway Express Agency, Inc., for the use of Passenger Express Refrigerator cars (A. R. A. Mechanical Division designations "BP," "BR," and "BS").

989 Section D

Settlement for the use of railroad owned passenger train box express cars (A. R. A. Mechanical designation "BX")—listed as such in the Official Railway Equipment Register or other official publication, shall be made as follows: If owner delivers such a car to a connection in freight train service, settlement shall be made at the established per diem rate applicable to freight cars until it is returned to owner. If owner delivers such a car in passenger train service, settlement shall be made by the roads handling it in such service at the applicable rate named in Car Service Rule 8,

Section A. If such a car leaves home in passenger train service and it is diverted to freight service by another road, the roads handling such diverted car in freight service shall pay to the owner the per diem rate of $1.00 per day for its use and the road which diverted it shall be responsible to the car owner for the difference between the earnings of the car at the applicable mileage rate named in Car Service Rule 8 and the $1.00 per diem rate for freight cars. The car owner shall ascertain the mileage made in freight service and shall present claim for the amount due under this rule, to the road which diverted the car from passenger to freight service.

NOTE.—"All claims covering errors on omissions in allowances on passenger train cars shall be presented after five months and within eight months from the last day of the month in which the mileage or per diem was earned."

Rule 9

When a per diem rate is charged for the use of passenger equipment as provided for in Rule 8, the total number of hours of all cars of the same class shall be calculated on a basis of 24 hours for each day and the charge made accordingly; any fraction of a day over the aggregate number of days of 24 hours each to be counted as one day; it being understood that the minimum charge shall be one day for each car.

When necessary to haul a car empty over the road owning it, or intermediate roads for delivery to a borrowing road, unless otherwise arranged between the roads concerned, the borrowing road shall pay a reciprocal rate of 10 cents per mile for hauling the car, plus bridge and terminal arbitraries, to the point of connection with the borrowing road and return; the charge for the empty haul to be named to the borrowing road at the time the agreement to loan the car is made.

990 INTERPRETATIONS

Question. In paying per diem for cars under Rule 9, should the aggregate number of hours of all cars hired to another line from time to time during a current month or any other period for which bill is rendered be taken and divided by the aggregate number of hours by 24 to find the number of days and fractions thereof for a basis of settlement, or should settlement be made on a basis of each individual car?

Answer. It is not the intention to have charges and settlement made on basis of each individual car, but Rule 8 (B) contemplates an agreement between the parties interested for each transaction, and settlement should be made for each transaction in accordance with Rule 9 unless there is an agreement to the contrary. (October 23, 1901, amended June 20, 1924.)

Question. If out of a lot of passenger equipment loaned, one or more cars are returned in less than 24 hours, should a full day be specially allowed for each car so returned?

Answer. Yes. (October 30, 1907.)

Rule 10

Each railroad shall adopt the "National Car Demurrage Rules" as approved by the American Railway Association.

Rule 11

(A) New Cars—Light-Weighing and Stenciling:

(1) All freight cars must be light-weighed and stenciled when new.

(2) The following provisions must be incorporated in contract covering purchase of new equipment:

(a) The accuracy of scale must be certified by authorized scale inspector appointed by car owner.

(b) Each car must be weighed separately and stenciled at car works under the supervision of owner's inspector.

(B)—Periodic Light-Weighing:

All freight cars, except as otherwise provided in Section (C), must be relight-weighed and restenciled periodically as follows:

991 (1)

Type of car	First reweighing at expiration of—	Subsequent reweighing	
		At expiration of	Permissible after
Wood	12 mo.	24 mo.	21 mo.
Composite wood and steel underframe	12 mo.	24 mo.	21 mo.
Steel underframe, with wood, steel, or composite superstructure frame	12 mo.	24 mo.	21 mo.
All-steel open-top cars, including all-steel flat cars	24 mo.	24 mo.	21 mo.
All-steel house and all steel stock cars	36 mo.	36 mo.	33 mo.
Refrigerator cars	36 mo.	36 mo.	33 mo.

(2) Tank cars and live poultry cars must be reweighed and restenciled only by owners or their authorized representatives:

(a) When car bears no light-weight markings.

(b) When weight is changed 300 lbs. or more by alterations or repairs.

(C)—Other Than Periodic Reweighing and restenciling:

(1) Freight cars (other than tank and live poultry cars), without light-weight markings should be immediately weighed and stenciled, or when materially changed by repairs or alterations, should be immediately reweighed and restenciled.

(2) When any freight car (except refrigerator, tank and live poultry cars), is reweighed and found to vary 300 pounds or more from the stenciled light-weight, stenciling should be immediately corrected.

(3) When any refrigerator car is reweighed and found to vary 500 pounds or more from the stenciled light-weight, stenciling should be immediately corrected.

(4) Tank cars and live poultry cars must be reweighed and restenciled only as provided in Paragraph (2) of Section (B).

(D)—Preparation for Reweighing:

Before reweighing:

(1) The accuracy of scale must be certified by an authorized scale inspector.

(2) Cars must be dry and free from snow and ice.

(3) Floor and hoppers must be clean.

(4) Brine tanks and ice bunkers of refrigerator cars must be empty.

(5) Temporary fixtures, which affect the weight of car, must be removed.

(E)—Method of Light-Weighing:

Cars *must* be uncoupled and free at both ends.

992 (F)—Stenciling:

(1) Should be in accordance with A. R. A. Standards for Marking and Lettering of Cars.

(2) Station symbol and date (month and year), must be stenciled on cars when new and each time reweighed and restenciled. On new cars the word "new" may be substituted for station symbol.

(3) When cars are restenciled after reweighing, all old stenciling to be renewed must be obliterated with quick-drying paint. It will be necessary only to renew all light-weight numberals, station symbol, date (month and year), and load limit numerals except as provided in Paragraph 6, Section (f). The capacity numerals and letters "CAPY," "LD LMT" and "LT WT," when indistinct, must be renewed. Light-weight stenciling on ends of cars is not permitted and when shown must be obliterated.

(4) The light-weight stenciling shall be the multiple of 100 lbs. nearest the scale weight, except that when the scale weight indicates an even 50 lbs. the lower multiple shall be used.

(5) The Load Limit, which is the difference between the light-weight and the maximum weight on rail, as shown in Column A of table in A. R. A. Interchange Rule 86, shall be initially stenciled on all cars (except tank and live poultry cars), by car owner. The "load limit" is the permissible weight of lading, including weight of temporary fixtures, also brine and ice in refrigerator cars.

Stenciled load limit must not be less than the nominal capacity.

(6) When account structural limitations or other reasons, car owner has reduced the load limit of a car, a star symbol (*), the size of which shall conform to standard lettering for "LD LMT," shall be placed at immediate left of words "LD LMT," and when thus designated the load limit shall be changed only by car owner.

(7) The Nominal Capacity in multiples of 1,000 pounds, shall be initially stenciled on car by car owner and must not exceed the stenciled load limit.

(8) The Cubic Capacity shall be initially stenciled on cars, by car owner, except that such markings are not required on flat, tank, and live poultry cars.

(G)—Reports:‡

When a car is reweighed and restenciled the owner must be promptly notified of the old and of the new light-weights and load limits, and the place and date reweighing and restenciling was performed. The proper officer to whom these reports should be made will be designated in "The Official Railway Equipment Register."

Rule 12

The placing of advertisements or banners of any kind upon any freight or passenger car or locomotive (including permanent stakes which are a part of open-top cars), is prohibited, except that they may be placed thereon for photographic purposes only, while such equipment is at rest on private tracks or on service
993 tracks of the railroad, and when so placed must be removed

‡NOTE.—A Form "A" is provided for general use and a Form "B" for use at points where so many cars are weighed that it is desirable to provide the weighmaster with an indexed report.

prior to movement of the equipment; the placement and removal to be by and at the expense of the shipper or consignee.

This does not prohibit the placing of advertisements or banners on the lading or attaching them to temporary stakes used to secure the lading on open-top cars.

NOTE.—See Mechanical Interchange Rule 36 for car cards.

Rule 13

When private tank cars are unloaded, the owner will issue instructions for empty movement to the agent at point of unloading either direct or through consignee. The agent will bill* each car to final destination showing name of the consignee and full route, using standard form of Revenue Waybill; the word "consignee" in this connection signifies the party to whom the empty tank car is forwarded.

Rule 14

§ Unless otherwise agreed, the cost of transferring the lading of freight cars or rearrangement of lading at junction points shall be settled as follows:

First—The delivering road shall pay cost of transfer or rearrangement—

(a) When transfer is due to defective equipment that is not safe to run according to Division V, Mechanical (M. C. B.)‡ Rules, except where the repairs can be made under load as per Division V, Mechanical (M. C. B.) Rule 2.

(b) When transfer or rearrangement of load is due to contents being improperly loaded or overloaded, according to Division V, Mechanical (M. C. B.) Rules, or the Interstate Commerce Commission Regulations for the Transportation of Explosives and Other Dangerous Articles by Freight and by Express, or when dimensions of the lading of open cars are in excess of the published clearances of any of the roads covered by the routing.

(c) When transfer is due to delivering line not desiring its equipment to go beyond junction points.

(d) **When cars can not pass the approved clearances of the American Railway Association.

Second—The receiving road shall pay cost of transfer or rearrangement—

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*The word "bill" in this connection covers non-revenue billing, which must be on the standard form of waybill.

**Resolution adopted November 20, 1912:

Resolved, That Railways must publish third rail clearances in the publication Railway Lines Clearances before they can claim the right to charge cost of transfer under Car Service Rule 15 (present Rule 14), First Section, Paragraph (d), to delivering road on cars which can not pass approved third rail clearances of The American Railway Association.

‡See Mechanical Interchange Rule 2.

(e) When cars* cannot pass clearances (except as provided in paragraph (d) or when cars* and lading exceed load limit* or cannot be moved through on account of any other disability of receiving line.

994 (f) When receiving road desires transfer to save cost of mileage or Per Diem.

(g) When receiving road refuses to accept cars requiring transfer or adjustment of load under Item (e), the delivering road may effect transfer or adjustment and render bill to receiving road, unless otherwise agreed. Bills for transfer or adjustment under this Item (g) will include Per Diem incident to delay in acceptance and transfer.

(h) Per Diem for time cars are delayed for transfer or adjustment of load made under this rule, will not be reclaimed or billed for except as provided by Item (g) unless otherwise agreed.

NOTE A.—Charges for actual labor and material, also for use of wrecking outfit, hoist, derrick, traveling crane or similar facilities used in the transfer or adjustment of lading under this Rule, shall be as provided for in American Railway Association Interchange Rule 2, and interpretations thereto.

NOTE B.—Bills for work performed under this Rule may be declined if not rendered within one year from the date work is completed.

Rule 15

Private freight cars must be marked with the full name of the owner and proper reporting symbol, or initials and with the number of the car. Mileage settlements must be made with the owner as indicated by the marks on the car, and in accordance with the provisions of published tariffs.

Rule 16

Empty cars containing refuse must not be offered in interchange.

Rule 17

When trains of one railroad use the tracks of another in avoiding washouts or other obstructions, unless other arrangements exist between the roads concerned, the detour shall be made under the terms of the Detour Contract approved by the Association, which terms are made part of this rule.**

The road for which the train is detoured shall pay the regular per diem (or mileage), to the owners of the cars in the train, including the road owning the track, if any of its cars shall be in the detoured train. All mileage charges shall be at actual distance over the route used.

*See Mechanical Division Loading Rule 10.

**NOTE.—When such contracts are entered into they should be executed on behalf of each company party thereto by an executive officer thereof.

995 CODE OF PER DIEM RULES

GOVERNING SETTLEMENT FOR THE USE OF RAILROAD OWNED FREIGHT CARS BETWEEN ALL COMMON CARRIER RAILROADS, EXCEPT AS PROVIDED FOR IN APPENDIX "B"

Rule 1

The rate for the use of freight cars shall be $1.00 per car per day, which shall be paid for every calendar day and shall be known as the per diem rate; except that when per diem is not reported to car owner within four months from the last day of the month in which it is earned, the rate shall be increased fifteen (15) cents per car per day for each six months' period or fraction thereof that report of such per diem is thereafter withheld; provided that the aggregate increase in the rate shall not exceed 60 cents per car per day.

NOTE.—A. R. A. Circular 1991, issued May 29, 1920, and 2020, issued August 25, 1920, apply only to standard refrigerator cars under A. R. A. Mechanical Division designations R. A. and R. S., and provide in part as follows:

"* * * Third.—Railroads owning refrigerators may place them under mileage instead of per diem on 30 days' notice to each carrier, and such arrangement must stand at least one year and then can be changed only on 30 days' notice. * * * Railroads deciding to take this action are requested to notify the General Secretary of the Association of the intention to place their refrigerator cars under mileage instead of per diem. On receipt of such advice, it will be transmitted to all carriers interested."

INTERPRETATIONS

1 (c) Question. Per diem is reported in error to the wrong road, and is not reported to the road owning the car in question within four months from the last day of the month in which the per diem is earned. Does the penalty rate apply in this case?

Answer. Yes.

996 1 (d) Question. Under Per Diem Rules 1 and 11 does the penalty rate apply in the case of per diem earned during the month of January which is reported in the Per Diem Report for April when the April report is dated to indicate it was rendered in accordance with Per Diem Rule 11, but which was actually mailed by the reporting road after the 40 days allowed by Per Diem Rule 11, that is, after June 9th?

Answer. Yes.

Rule 2

Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt shall be disregarded, and payment made for day of delivery.

A road receiving and delivering a car on the same date shall not pay the per diem for that day.

Records of receipt and delivery under this rule shall be those obtained from the reports provided for in Rule 9.

Rule 3

Freight cars must be handled as prescribed by Rules 1 to 6, inclusive, of the Code of Car Service Rules of the American Railway Association.

Rule 4

Each railroad, including ferry lines, shall be responsible to the car owner for amounts accruing for the use of a car at the established per diem rate, whether such car is in road or switching service.

INTERPRETATIONS

4 (a) Question. Should new or newly acquired cars en route to owner, empty, under revenue billing be exempt from per diem?

Answer. Yes.

4 (b) Question. Should new or newly acquired cars moving direct to owner, loaded, be exempt from per diem?

Answer. No; except when moving under a tariff provision which covers a charge for the transportation of the car itself.

997 4 (c) Question. Must per diem be paid by a road for the "use" of a car, when it is out of repair, unfit for service, or lying idle?

Answer. Yes; except as provided in Rule 8.

4 (d) Question. When foreign railroad owned freight cars are used in the service of circus or carnival companies, should the roads over which they moved make settlement with car owners in accordance with Per Diem Rules?

Answer. Yes.

Rule 5

(a) An amount for each car in switching service, including a trap or ferry car, may be reclaimed by each individual switching road from the road for which the service was performed. This amount shall be based upon the average number of days, not to exceed five (5), for cars handled in Terminal Switching Service.

including trap or ferry cars, except as otherwise provided in paragraph (b), actually required in such switching service to be determined annually, or at such other periods as may be agreed upon by the roads interested, by an examination of the records* of each individual switching road, by the roads interested, for each local territory, except that roads in any local territory may agree to the settlement of terminal switching reclaims on the basis of actual time involved in handling the cars during the month for which the reclaim is made, subject to an agreed maximum number of days on any one car, the reclaim on pick-up and diverted cars shall be determined by a plan to be agreed upon by the interested roads, and the total reclaim for any month shall not exceed an average of five (5) days per car.

(b) An amount equal to the actual per diem accruing on each car loaded with live stock handled in switching service (but not including cars loaded with emigrant movables or exhibition live stock, which are subject to Section (a) of this rule) may be reclaimed by each individual switching road from the road for which the service was performed, provided that such reclaim shall not exceed one (1) day on any one car.

(c) Except as provided in paragraph (d), an intermediate switching road may reclaim one (1) day's per diem only from the delivering road on any car on which per diem accrues while in intermediate switching service; however, a car handled in intermediate switching service which is delayed on the intermediate switching road over midnight of the date received on account of being held under Rule 15 is not subject to intermediate reclaim.

A terminal switching road delivering a car to an intermediate switching road for delivery to a carrier road shall pay the reclaim to the intermediate switching road and may reclaim such amount from the carrier road for which the service was performed.

998 (d) No reclaim shall be allowed for an interterminal switching movement.

(e) Unless otherwise unanimously agreed to by the interested roads, the Code of Switching Reclaim Rules of the American Railway Association shall govern in determining switching reclaim allowances.

INTERPRETATIONS

5 (a) Question. Does Rule 5 apply when switching charge is assessed on a ton instead of a car basis?

Answer. Yes.

*NOTE.—The examination of records, to determine switching reclaim allowances applicable between short line railroads less than one hundred miles in length, and connecting carriers, shall be supervised by the General Committee, Transportation Division, American Railway Association, and that Committee may initiate these examinations.

5 (g) Question. Carrier road "A" delivers a loaded car to road "B" to be switched by the latter to industry on its line for unloading. Before the car is unloaded and without changing the load in any manner, it is ordered to road "C" where it is unloaded at an industry located on road "C" within the same switching limits. Road "B" receives two switching charges for handling the car, and road "C" also receives a switching charge. Is road "B" entitled to a reclaim from road "A" in view of the fact that the car was not unloaded? If not, is road "C" entitled to reclaim from road "A"?

Answer. Road "B" is entitled to reclaim from road "A." The movement from road "B" to road "C" comes within the definition of interterminal switching service and no reclaim should be allowed.

5 (h) Question. Carrier road "A" delivers a loaded car to road "B" for switching movement to consignee. Consignee refuses car on account of quality and car is returned to road "A" to await disposition. Shipper orders car to an industry on road "C" within same switching limits, at which point it is unloaded. Is this an intermediate switch and reclaim due road "C," or should road "B" collect reclaim?

Answer. Road "B" is entitled to reclaim from road "A" for the original inbound movement. The return movement from road "B" to "A" to "C" was interterminal switching and no reclaim should be allowed.

999 5 (i) Question: Carrier road "A" delivers a loaded car to road "B" for switch movement to consignee. After car is placed for unloading, carrier road "A" instructs road "B" to recard car to a point beyond the switching limits via road "C." Is road "B" entitled to a reclaim from road "A" on the inbound movement and another reclaim from road "C" for the outbound movement?

Answer. Yes.

5 (j) Question 1. If a check of the records to establish the reclaim allowance under Rule 5 has not been made within a period of one year and one of the interested roads makes a request for such check, is it the intention of the rule that the check shall be made?

Answer. Unless there is an agreement to the contrary, a road may demand a check of the records to determine the arbitrary reclaim under Per Diem Rule 5 when such check has not been made within a period of one year, and the other roads interested at that point are obligated under the rule to participate in such check. The rules provide that the reclaim made by each switching road shall be based on the average time required by such switching road to switch cars for all roads considered as a whole.

Question 2. If one or more of the roads involved does not agree to join in such check, what action is necessary to secure compliance with the rule?

Answer. (a) If a road performing switching service does not agree to have its records checked, the road making the request may give notice that it will not pay reclaims accruing after the date of such notice. The switching road will have no right to present further reclaims until a check has been made in accordance with the Code of Switching Reclaim Rules and the revised reclaim allowance established, which shall then apply to reclaims presented in accordance with Rule 13 (a).

(b) If a carrier road does not agree to join in a check to establish a revised reclaim allowance, the switching road may give notice that it will check its records in accordance with the Code of Switching Reclaim Rules and thereby establish its revised reclaim allowance. After the date of such notice, the switching road will have the right to present reclaims in accordance with Rule 13 (a) at such established reclaim allowance.

5 (k) Question. Is the intermediate switching road entitled to reclaim when the car is not handled on a switching charge?

Answer. Reclaim may be made on any car, loaded or empty, on which per diem accrues while in intermediate switching service, except on cars handled under Car Service Rule 5, cars on which the intermediate switching road participates in the freight rate and cars in interterminal switching movement.

1000 5 (l) Question. When is an empty car, moving over an intermediate switching road, considered as in interterminal switching service?

Answer. An empty car is considered in interterminal switching service—

(a) When, after having been received loaded in interterminal switching service, and without having been diverted to other service, it is returned to intermediate road for movement, to the originating road, to the owner, or to another road under proper authority.

(b) When furnished and used for loading in interterminal switching service.

5 (m) Question. A car moving into a junction point over Road "A" is delivered to Road "B" for handling in terminal switching service in connection with stop or milling-in-transit tariff authority, Road "B" not participating in the freight rate, and the shipment is subsequently delivered by Road "B" to Road "C" for outbound road movement. Should Road "A" pay to the terminal switching road the unloading reclaim and Road "C" pay to the terminal switching road the loading reclaim?

Answer. Yes. However, unless otherwise agreed, adjustments should be made whereby the carrier road for which the service was performed as indicated by its tariff will assume the terminal switching reclaim paid by the other carrier road; the method of settlement to be determined by local agreement.

5 (n) Question. When a car stopped in transit under tariff authority is delivered to a switching road to partly unload or to complete loading, the switching road being allowed two terminal switching charges, i. e., one for the inbound and one for the outbound movement, is the terminal switching road entitled to two terminal switch reclaims?

Answer. Yes.

Question. In case the shipment moves into the "stop-in-transit" point via one road and out via another road, does Interpretation 5 (m) apply?

Answer. Yes.

Rule 6

NOTE.—Rule 6 applies only to cars interchanged within Canada, Cuba, or Mexico.

In case a subscriber to the Car Service and Per Diem Agreement delivers a railroad-owned freight car to a nonsubscriber, it shall be responsible to the owner for the per diem accruing on the car while on such nonsubscriber road. The owner will accept settlement for the use of the car only from the delivering subscriber.

6 (a) Question. If a road is suspended or withdraws from the Car Service and Per Diem Agreement effective December 1st, is it responsible to the car owner for per diem accruing on and after December 1st on cars delivered to such road prior to December 1st?

Answer. Yes; the delivering subscriber road is responsible only for per diem on cars delivered on and after the effective date of withdrawal or suspension.

Rule 7

1. When a car has been destroyed and reported under Mechanical Division Interchange Rules, the per diem shall cease from the date of notice to owner.

2. If, upon receipt from owner of valuation statement provided for by Mechanical Division Interchange Rules showing settlement value of destroyed car, the holding road rebuilds the car, per diem on such car shall cease from the date of notice to the owner of its destruction to date valuation statement is mailed by the owning road.

INTERPRETATIONS

7 (a) Question. Should per diem be allowed on freight cars in July that were totally destroyed in June but not reported to car owners until after July 1?

Answer. Yes.

7 (b) Question. Should per diem be paid for the date on which notice is given and begin again on the day following the date on which a valuation statement is mailed by the owning line?

Answer. Yes.

7 (c) Question. Must notice to owner, of destruction of car, be made by the Mechanical Department?

Answer. No. Notice by Transportation Department is also valid.

7 (d) Question. Does Section 2 of this rule apply to any car reported under Mechanical Division Interchange Rule 112 for which settlement value of car has been requested of owner and the car is repaired and restored to service by the holding road after settlement value is received?

Answer. Yes.

1002 Rule 8

(a) When a car is detained awaiting the receipt of repair material, which under Mechanical Division Interchange Rules must be obtained from the owner, the per diem shall cease from the date the necessary material is ordered from the owner until the date on which it is shipped in the manner prescribed by Mechanical Division Interchange Rule 122, as evidenced by carrier's shipping receipt.

(b) When a car is reported to its owner under Mechanical Division Interchange Rule 120, per diem shall cease from date of such report.

If owner authorizes the repair of such car, and no repair material is required from owner, per diem shall begin after repairs are completed, but in no case to exceed 60 days from the date such authority is given. If repair material must be obtained from the owner under Mechanical Division Interchange Rules, per diem shall begin after repairs are completed, but in no case to exceed 60 days from date such authority is given, plus the number of days intervening between the date necessary material is ordered and the date on which material is shipped in the manner provided by Mechanical Division Interchange Rule 122, as evidenced by carrier's shipping receipt.

(c) Under paragraphs (a) and (b), if more than one order for material is made, the first order only shall stop the per diem.

In case all or any part of the material is duplicated by car owner on account of the original shipment becoming lost before delivery to the road holding the car, or while in the possession of the express company, per diem shall cease from the date of the original order until the date on which the duplicate shipment is made as evidenced by carrier's shipping receipt.

INTERPRETATIONS

8 (a) Question. When repair material is ordered, should the car number be sent to owner of the car if per diem is to be waived?

Answer. Yes.

8 (b) Question. Should per diem be paid for the day on which material is ordered and begin again on the day following the date on which material is shipped?

Answer. Yes.

8 (c) Question. Material is ordered from owner under Mechanical Division Interchange Rules, but instead of shipping the material requested the owner authorizes the holding road to substitute other material or to weld old parts. Should per diem cease from the date material was ordered until the date on which authority was given to substitute other material or to weld old parts?

Answer. Yes.

1003 Rule 9

(a) The Interchange Reports shall be made for each calendar day on the prescribed form (B-1)†. Columns 2, 3, 4, 5, and 9 shall be filled. They shall close as of midnight and shall include all cars delivered on the date for which made. For days on which no cars are interchanged the reports shall read "No cars interchanged."

(b) Corrections to Interchange Reports shall be made on the prescribed form (Q) immediately upon the discovery of errors in reports which have already been forwarded to Car Service Officers; otherwise corrections to be made on all copies of Interchange Reports before forwarding.

(c) Both Interchange and Correction Reports shall be made in quadruplicate by the use of carbon paper, two copies for each road involved, and shall be numbered consecutively for each connecting line, commencing with the first of each month; a separate series of numbers to be used for each form of report.

(d) The report shall be signed by the proper representative of the delivering road and certified to by the proper representative of

the receiving road after checking. The original with one copy shall be returned to the road making the report.

(e) Car Service Rule 7 governs the delivery of cars. The date and time of delivery of cars upon interchange tracks of connecting line shall, prima facie, be the date and time given by the delivering road. In cases where there are different standards of time at a junction, the time of the more easterly reckoning shall govern.

†Resolution adopted May 20, 1914; amended April 8, 1925:

Resolved, That two weights of paper be used for the Interchange Report, Form No. B–1, as follows:

First.—That the main report, which is filed intact, be printed on a good quality of bond paper of the basis of 14 lbs. to the ream of 500 sheets of the size, 17 by 28 in.

Second.—That the sheets which are to be cut up, be printed on a good quality of bond paper of the basis of 25½ lbs. to the ream of 500 sheets of the size, 17 by 28 in.

†Recommendation approved February 15, 1932:

"With a view to economy, it is recommended by the Committee on Records, and approved by the General Committee, Transportation Division, that a form (B–1) providing spaces for eight (8) cars be adopted for use at interchange stations where but few cars are interchanged, retaining the present form (B–1) which provides spaces for twenty-two (22) cars for use at the large interchange points."

1004 Rule 10

The Junction Report for each day shall be made to car owners on the prescribed form (D) or on the cut-up interchange slips, as promptly as possible after the receipt of the Interchange Report for that day, but not later than the close of the second working day following the receipt of the Interchange Report.

INTERPRETATION

10 (a) Question: Must junction reports be made to car owners daily?

Answer: Yes.

Rule 11

(a) Within forty (40) days after the end of each calendar month, car owners shall be furnished for that month with a Per Diem Report on form (G) showing the number of days each per diem car has been in possession of the road making the report. Only one report shall be furnished for each month. A car earning 0 days need not be reported. Errors and omissions must be adjusted in the report for a subsequent month.

A report shall be made on form (H) showing the total mileage and earnings accruing on railroad owned freight refrigerator cars operated on a mileage basis and the total passenger equipment car mileage earnings.

(b) Claims covering errors or omissions in Per Diem Reports shall be presented after five (5) months and within eight (8) months from the last day of the month in which the per diem was earned, but such claims shall not be presented until all amounts previously reported have been properly credited. Per diem allowed in error may be deducted in per diem reports within five (5) months from the last day of the month for which the per diem was reported as having been earned, without requesting authority from car owner, but such deduction shall not be made after that period except by presentation of claim in accordance with this rule.

A claim presented in accordance with this rule, including a claim presented to wrong road, may be continued after the period named even though the claim should eventually rest upon some road other than the one originally addressed, except that the privilege of continuance shall cease when claimant fails to return claim or present it to another road within a period of two (2) months from the last day of the month in which such claim is last received by claimant.

Per diem reported and subsequently deducted in accordance with this rule, cancels such per diem and leaves the owner road in the same position as if the per diem had never been reported.

Claims covering errors or omissions in reports of mileage earnings of railroad owned freight refrigerator cars shall be presented within two (2) years from the last day of the month in which the mileage was earned.

1005 (c) The road receiving a claim shall promptly adjust, or handle in accordance with the provisions of OM 30.*

Claims handled under OM 30 shall not be transmitted by the road which delivered the car to connecting road until the interchange record has been established.

(d) When per diem has been reported to other than car owner under incorrect initials or number or for the wrong month, which fact is developed in the investigation of a claim, the reporting road shall be responsible to car owner for per diem earned at the increased per diem rate in accordance with Rule 1, and shall have the privilege of continuing such claim for refund of per diem (excluding penalty) from the road to which it was incorrectly reported.

When per diem has been reported to car owner on a car under incorrect initials or number, or for the wrong month, which fact is developed in the investigation of a claim, the reporting road

shall have the right to transfer such allowance from the incorrect initials or number to the correct initials or number, or from the wrong month to the correct month, as an offset to the claim, but will allow to the car owner the penalty rate accruing in accordance with Rule 1.

*OM 30

1. All records shown in a claim for per diem shortage should be verified by claimant before presentation, and when claim is made against a direct connection reference to interchange, sheet and line number should be shown.

2. If complete junction reports have not been received, claim should be filed against the road having apparently failed to furnish a report, and claimant should show in proper column that such information has not been received.

3. If complete junction reports have been received, claim should be filed against the road which apparently owes the per diem, as indicated by the claimant's record.

4. A claim covering On Hand car should show date of preceding junction movement instead of "OH."

5. A road receiving a claim indicating a difference between its records and that quoted by claimant, or road from which claim is received, should verify its records by reference to interchange reports.

6. If a comparison of the records shown in a claim with the verified records of the road receiving same indicates a difference between its record and that of the claimant as to date of Delivery to connection, claim should be forwarded direct to the claimant and correct information given.

7. If a comparison of the records shown in a claim with the verified records of the road receiving same indicates a difference between its record and that of the claimant as to date of
1006 Receipt from connection, its record should be entered and claim forwarded to such connection attached to Transmittal Form N–1, together with such other information as may be of each Transmittal Form N–1 should be forwarded to the claimant.

8. If a comparison of the records shown in a claim with the verified records of the road receiving same indicates a difference between its record and the record of the road with which the car was interchanged, the claim should be handled to a conclusion by such roads and a copy of each Transmittal Form N–1 forwarded to the claimant.

9. If a comparison of the records shown in a claim with the verified records of the road receiving same indicates that it owes a part of the per diem and it is necessary to forward the claim to

connecting line for further handling, the acknowledgment of the indebtedness and the month in which allowance will be made should be shown on the Transmittal Form N–1, and copy sent to claimant.

"Resolved, That the road to which a per diem claim is addressed must take up all necessary questions relating thereto with its connections and in case of dispute as to date of interchange, determine the responsibility for the per diem due, the road acknowledging responsibility to advise claimant direct. In case of dispute in date of interchange the receiving road will accept the delivering road's date or furnish proof to the contrary.

"Resolved, That when a road claims no record the responsibility for establishing the fact of delivery shall rest upon the delivering road."

Rule 12

The settlement of amounts accruing for the use of cars shall be made monthly without regard to reclaims pending.

Rule 13

(a) Terminal and Intermediate Switching Reclaim Statements under Rule 5 shall be prepared separately and presented within three (3) months from the last day of the month in which the per diem accrued, except that supplementary reclaim statements covering errors and/or omissions shall be presented within six (6) months from the last day of the month in which the per diem accrued. Original and supplementary switching reclaim statements shall be allowed as presented within thirty (30) days after receipt.

The road paying a terminal or an intermediate switching reclaim may present a counter reclaim to cover errors or adjustments therein, provided it is presented within three (3) months from the last day of the month in which the reclaim on which counter reclaim is in order, was received.

1007 The privilege of continuance of the counter reclaim shall cease when either road interested fails to return it to the other road within two months from the last day of the month in which it was last received, the delinquent road to be responsible for the unadjusted amount.

NOTE.—Under this rule an intermediate reclaim shall not be supplementary to an original terminal reclaim, nor a terminal reclaim supplementary to an original intermediate reclaim.

(b) Reclaim under Rule 14 shall be presented within six months from the last day of the month in which disposition of car is received by the holding road, except where demurrage adjustment is involved, in which case reclaim shall be presented within six (6) months from the last day of the month in which the demurrage

is cancelled or refunded. The road receiving reclaim shall present exceptions to the claimant within four months from the last day of the month in which reclaim was received or allow the amount claimed in the next open per diem report.

The privilege of continuance of reclaim thereafter shall cease when either road interested fails to return it to the other within two months from the last day of the month in which it was last received, the delinquent road to be responsible for the unadjusted amount.

(c) Reclaim under Rule 15 shall be presented within six months from the last day of the month in which cars were delivered by the holding road. The road receiving reclaim shall check and present exceptions to the claimant within four months from the last day of the month in which the reclaim was received and shall allow in the next open Per Diem Report the amount not covered by exceptions.

The privilege of continuance of reclaim thereafter shall cease when either road interested fails to return it to the other within two months from the last day of the month in which it was last received, the delinquent road to be responsible for the unadjusted amount.

(d) The provisions of paragraphs (a), (b), or (c) will not prevent the continuance of any reclaim after the period named if it has been previously opened when the reclaim eventually rests upon some road other than the one originally addressed, except that the reclaim shall be presented to such other road within two months from the last day of the month in which it was last received by claimant. Further handling shall be subject to the provisions of paragraphs (a), (b), and (c).

(e) Reclaims shall be made by the designated officer of the road which pay the per diem to the designated officer of the road from which the allowance is reclaimed, unless specifically agreed by the interested roads to permit the presentation and acceptance of such reclaims by local representatives.

1008 INTERPRETATION

13 (a) Question. Does a blank or "nil" reclaim statement filed by a road with its connection constitute an original switching reclaim?

Answer. No.

Rule 14

Unless otherwise agreed, reclaim for per diem on a car held by reason of a railroad error or shipper's cancellation of order shall be settled as follows:

SECTION 1. On a car held at any point en route to a billed destination, or customs port. (Billed destination or customs port, means any point within the switching limits thereof.)

(a) When a freight car is held at any point en route to billed destination or customs port by reason of a railroad error which prevents proper forwarding or proper tender or delivery, notice to secure disposition of car (see Section 8), shall be sent or given by the holding road prior to midnight of the second day after receipt of or arrival of car. Upon doing this, the holding road may reclaim against the erring road for an amount at the established per diem rate from receipt of car to and including receipt of proper data. The return of the car to the delivering road prior to midnight of the second day after receipt, instead of holding car and notifying the delivering road, constitutes notice under this rule. If holding road neglects to send or give notice prior to midnight of the second day after receipt of or arrival of car, it will be entitled to reclaim only from the date such notice is sent or given.

(b) If the holding road receives necessary data to enable it to dispose of the car before taking action prescribed in paragraph (a), it is entitled to the same reclaim as though such action had been taken on the date the necessary data is received.

(c) When a loaded car is held en route on order received from another railroad, and such detention is due to railroad error, the holding road will be entitled to reclaim against the erring road, an amount equal to the established per diem rate from the date such care was received at the station where held to and including the date on which disposition is received by the holding road.

NOTE.—Cars delivered contrary to existing embargoes, empty cars delivered for home route in error, empty cars delivered for return loading in error, and cars delivered as empty which contain load or part load are subject to reclaim only when held within the switching limits of station where received.

1009 SECTION 2. On a loaded car held at any point within the switching limits of billed destination or customs port.

(a) When a loaded freight car is held at any point within the switching limits of billed destination or customs port by reason of a railroad error which prevents proper tender or delivery, notice to secure disposition of car (see Section 8), must be sent or given by the holding road prior to midnight of the fifth day after receipt of or arrival of car. Upon doing this, the holding road may reclaim against the erring road for an amount at the established per diem rate from date such car was received at the station where held to and including the date on which disposition is received by the holding road.

(b) If holding road neglects to send or give notice as outlined in paragraph (a), but does send or give notice subsequent to mid-

night of the fifth day after receipt of or arrival of car, it will be allowed per diem for the first five (5) days, and in addition thereto, per diem for each day from date notice is sent or given to and including the date on which disposition is received.

(c) If the holding road receives necessary data for tender or delivery of car before taking action prescribed in paragraph (a) or (b), it is entitled to the same reclaim as though such action had been taken on the date the necessary data is received.

SECTION 3. Errors involving nonsubscriber railroads in Canada, Cuba, and Mexico.

(a) When detention is caused by error of a nonsubscriber, responsibility for per diem involved shall be assumed by the subscriber accepting the car from the nonsubscriber.

The nonsubscriber road shall be responsible to its subscriber connection for the per diem involved.

(b) When a car is held on nonsubscriber railroad because of railroad error on the part of a subscriber the delivering subscriber shall relieve the nonsubscriber of the per diem involved and may reclaim under this rule from the erring road.

NOTE.—Under this section the procedure covering notification, etc., prescribed in Sections 1, 2, and 8 shall govern.

SECTION 4. Errors involving railroads subject to per diem settlement as prescribed in Appendix "B":

(a) When detention is caused by error of such railroad, per diem involved shall be paid by the carrier responsible for the settlement of per diem with the car owner and billed against the erring road.

(b) When a car is held on such railroad because of an error not its own, the carrier responsible for the settlement of per
1010 diem with the car owner shall relieve such railroad of the per diem involved and may reclaim under these rules against the railroad responsible for the per diem.

NOTE.—Under this section the procedure covering notification, etc., prescribed in Sections 1, 2 and 8 shall govern.

SECTION 5. Empty cars rejected by shipper:

When a car is delivered empty to a switching road for return loading and is returned empty by reason of shipper's cancellation of order or rejection by shipper because unsuitable for loading as specified by the switching road, the switching road may reclaim against the road which furnished the car, for an amount at the established per diem rate accruing from receipt of car to its return, but not to exceed three (3) days.

SECTION 6. On a car handled in terminal switching service:

The reclaim accruing under this rule on a car handled in terminal switching service, can only be made for the detention in excess of the reclaim allowable under Per Diem Rule 5.

SECTION 7. On a car held by reason of an improper or improperly applied permit to an embargo.

(a) When a road laying an embargo refuses to accept a car account improper or improperly applied permit to its embargo, it shall notify holding road, stating its exception to the permit, prior to midnight of the second day from date the car is delivered or tendered with necessary data for forwarding. If it neglects to give such notice, it shall be responsible for per diem for the number of days the car is held.

(b) When such notice of exception is sent or given to the holding road, it shall be sent or given by the holding road to the road on which the shipment originated, or was reconsigned or rebilled, prior to midnight of the second day after notice of exception is received. Upon doing this the holding road may reclaim against the road responsible for detention to the car, account improper or improperly applied permit, an amount at the established per diem rate, from date car is originally tendered, under paragraph (a) of this rule or under Per Diem Rule 15, to and including the date authority for delivery or disposal order is received.

(c) If the road holding car receives notice of exception from the road laying an embargo and neglects to send or give notice of exception to the road on which the shipment originated, or was reconsigned or rebilled, prior to midnight of the second day after notice of exception is received, it will only be entitled to reclaim from the date on which the notice of exception is sent or given to the road on which the shipment originated, or was reconsigned or rebilled.

SECTION 8. Notices.

(a) Under Sections 1, 2, 3, or 4 when a notice is sent or given to other than the erring road, or under Section 7 when
1011 notice of exception to permit is sent or given by the holding road to other than the road responsible for detention to the car, and it is necessary for the road receiving the notice to transmit it to the erring road or the road from which the car was received, such notice must be set or given not later than the next calendar day following its receipt. This procedure must be followed by each road involved until the erring road has been notified. When part of the detention to the car is chargeable to the neglect of a road to so transmit notice, the erring road may reclaim from such road for the number of days in excess of one (1) that the car was delayed due to such negligence.

(b) The notice under Section 1, 2, 3, 4, or 8 (a) of this rule shall be sent or given either by telegraph, by messenger in writing, or by telephone confirmed in writing, the same or following day, either to the agent or proper officer of the delivering or erring road, or

may be sent to the agent at station where last reconsigned or rebilled, or if not reconsigned or rebilled then to the agent at point of origin as indicated by the billing. Such notice must contain sufficient information to enable the erring road or the road to which notice is sent or given to identify the car and furnish disposition.

(c) The notice under Section 7 (a) of this rule shall be sent or given either to the agent or proper officer of the delivering road. The notice under Section 7 (b) shall be sent or given either to the agent of the road at the point where the shipment originated or was reconsigned or rebilled, or to the proper officer of such road. Notices shall be sent or given either by telegraph, by messenger in writing, or by telephone confirmed in writing, the same or following day.

SECTION 9. General.

Rule 14 applies only to cars of railroad ownership handled on per diem basis, including owner's cars on owner's tracks, but it does not apply to cars bunched in transit, cars detained on account of weather interference, or cars refused by consignee due to delay or damage in transit.

Rule 15

(a) A road failing to receive promptly from a connection cars on which it has laid no embargo shall be responsible to the connection for the per diem on cars so held for delivery, including the home cars of such connection.

A road failing to receive promptly from a connection empty cars at home on its road, moving home under Car Service Rules, shall be responsible to the connection for double the per diem on such cars held for delivery after the first day for which reclaim is made.

(b) If such failure to receive shall continue for more than three days the delinquent line shall thereafter in addition be responsible for the per diem on all cars wherever in transit which are thus held back for delivery.

1012 (c) It shall be the duty of the connection intending to reclaim to notify the delinquent line daily, prior to midnight, through the designated representative at the point where cars are offered, of the total number of cars so held for it, and within 48 hours from midnight of the day cars are offered furnish the initials and numbers of the cars.

(d) The reclaim accruing under this rule on a car handled in terminal switching service can only be made for the detention in excess of the reclaim allowable under Per Diem Rule 5.

(e) When the hour at which the receiving road clears the interchange track is so late that the delivering road cannot place on

interchange track before midnight cars which it is holding for delivery the receiving road shall be responsible for the Per Diem on such cars for the following day, subject to local agreement as to time required to make delivery.

INTERPRETATIONS

15 (a) Question. In case a car held for a certain road is not delivered to that road can reclaim be made against such road?

Answer. No.

15 (b) Question. Is it necessary to furnish initials and numbers of cars held which have previously been reported by initials and numbers?

Answer. No.

15 (c) Question. When a road cannot accept cars from a connection is it necessary for the connection to notify the delinquent line before midnight each day of the total number of cars held for which reclaim is to be made?

Answer. Yes.

15 (d) Question. When a road has invoked the provisions of Car Service Rule 6 and cars are offered to that road at another junction point is the holding road entitled to reclaim under Per Diem Rule 16?

Answer. No.

Rule 16

(a) When a road gives notice that for any reason it cannot accept cars in any specified traffic, thereby laying an embargo, it should receive cars already loaded (see note 1) with such traffic on the date such notice is issued, and cars loaded (see note 1) within forty-eight (48) hours thereafter. If it does not receive such cars the road holding them may reclaim per diem under Rule 15 from the road laying the embargo for the number of days such cars are held, not exceeding the duration of the embargo. (See note 2.)

1013 (b) Embargoes must be issued by the embargoing road in accordance with the provisions of the Embargo Regulations* as approved by the American Railway Association.

(c) Forty-eight (48) hours after 11:59 p. m. of the date of the embargo a road must not load, or permit to be loaded, cars in such traffic; nor accept orders to divert or reconsign cars already loaded.

(d) An embargo may not be laid on empty cars returning home in accordance with the Car Service Rules.

NOTE 1.—The date of loading, diversion or reconsignment to be determined from the data accompanying the car.

NOTE 2.—For per diem reclaim regulations applying to cars refused account improper or improperly applied permits to embargoes—See Rule 14, Section 6.

*See page 43.

Rule 17

To interpret these rules and to settle disputes arising under them an Arbitration Committee of five members shall be appointed by the General Committee, Division II—Transportation. Three members of the Arbitration Committee shall be a quorum.

In case any question or dispute arises under these rules it may be submitted to the Arbitration Committee through the General Secretary of the Association in abstract. The abstracts shall briefly set forth the points at issue and each party's interpretation of the rules upon which its claim is based. The Arbitration Committee shall base its decisions upon the rules and the abstract submitted, and its decisions shall be final. Should one of the parties refuse to furnish the necessary information the Arbitration Committee shall use its judgment as to whether it can properly decide. All decisions shall be reported to the Association through the General Committee, Division II—Transportation.

In case a question shall arise not covered by the rules the roads disagreeing may by mutual consent submit such questions to the Arbitration Committee.

The General Committee, Division II—Transportation, may appoint a Secretary for the Arbitration Committee, who shall be paid by the Association. The other expenses of the Arbitration Committee shall be divided equally between each of the parties to the dispute and the Association. The minimum charge to each road shall be $10, payable in advance. The expenses shall be first paid by the Association, and then billed to the parties concerned by the Treasurer of the Association.

1014 Rule 18—Blank

Rule 19

The Board of Directors of the American Railway Association shall appoint a Car Service Division composed of a Chairman and the requisite number of members, territorially representative, invested with plenary power to—

(a) Supervise the application of Car Service and Per Diem Rules.

(b) Suspend or permit departures from Car Service Rules 1 to 6, inclusive, except as provided in Rule 20.

(c) Exempt when necessary cars of any type from the provisions of Car Service Rules 1 to 6, inclusive, and provide other regulations under which such cars shall be handled.

(d) Transfer cars from one railroad or territory to another when necessary to meet traffic conditions, with due regard to car ownership and requirements. (See Note.)

(e) Conduct investigations, including examination of car records as may be necessary to insure the observance of Car Service and Per Diem Rules and of any orders issued by the Car Service Division, and in the event that they are unable to adjust such matters with the individual railroads report all the facts with a recommendation to the Board of Directors.

(f) Obtain car location statements and other car performance statistics as deemed necessary.

(g) Take necessary action to bring about uniformity of practice among railroads by the standardization of car distribution rules, including record and report forms.

(h) Make recommendation to the Board of Directors when in their opinion a change in the per diem rate is necessary or desirable.

(i) To perform such other duties as may be assigned by the Board of Directors.

The headquarters of the Car Service Division provided for by this rule shall be Washington, D. C.

NOTE TO PARAGRAPH (d), RULE 19.—This provides an adjustment of surpluses and shortages, and is intended to suggest an equalization of service so far as practicable and consistent with car ownerships. By the latter is meant that if one railroad has, in its good judgment, provided amply for its coal-loading patrons, for example, while another has not, and the demand is generally equal to supply, the mines of the first will not necessarily be depleted in order that the mines on the improvident road may be the better served. Generally, as between the provident and improvident roads, it must be recognized that if in time of great car demand, the latter has to be assisted for the benefit of its patrons and its territory at the expense of the former, there
1015 must necessarily be set up some method of compensation for the former, and this of necessity, may go beyond mere car hire. In treatment of short "Feeder" railroads, without any appreciable car ownership, such railroads must be given a measure of car supply from "Trunk Lines" consistent with current distribution percentages on such trunk lines; in other words, they must be treated as industries on the trunk line connection.

Rule 20

Departure from Car Service Rules 1 to 6, inclusive, affecting Canadian Railway Cars on United States Railroads, or United States Railroad cars on Canadian Railways, shall be only by agreement as between the American Railway Association and the Railway Association of Canada.

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APPENDIX A

CODE OF SWITCHING RECLAIM RULES

DEFINITIONS

Switching Roads, Carrier Roads, Switching Service, and Trap or Ferry Cars are defined as follows:

Terminal Switching Road

A terminal switching road is a road on whose rails, or on private tracks connecting therewith:

(a) A car, including a trap or ferry car, received from a carrier road, either direct or through an intermediate road, is unloaded, reconsigned or reshipped.

(b) A car, including a trap or ferry car, is loaded, reconsigned or reshipped, and delivered to a carrier road, either direct or through an intermediate road.

The service performed being within the designated switching limits and at a switching charge.

Intermediate Switching Road

An intermediate switching road is a road handling a car, including a trap or ferry car, from one railroad to another railroad within the designated switching limits, the road performing the service not participating in the freight rate.

Carrier Road

A carrier road is:

(a) A road which, participating in the freight rate on the inbound shipment, delivers a car, including a trap or ferry car, to a terminal switching road, either direct or through an intermediate switching road, for unloading, reconsigning or reshipping.

(b) A road which, participating in the freight rate on the outbound shipment, receives a car, including a trap or ferry car, from a terminal switching road, either direct or through an intermediate switching road, that has been loaded, reconsigned or reshipped by the terminal switching road.

Terminal Switching Service

The service performed by a terminal switching road, as defined in these rules.

Intermediate Switching Service

The service performed by an intermediate switching road, as defined in these rules.

NOTE.—An empty car returned in home route to a switching road, previously loaded, reconsigned or reshipped in terminal switching service by such road, which is
1917 then delivered empty to another road within the same switching district, will not be considered as handled in intermediate switching service.

Interterminal Switching Service

The service performed in handling a car, except a trap or ferry car, which has been loaded or reshipped within the switching limits on one road for unloading or reshipping within the same switching limits on another road and at a switching charge.

Trap or Ferry Car

A car, containing less than carload freight (including cotton), destined or originating beyond the switching limits or station at which loaded or unloaded on a switching road, the contents of which may or may not have been rehandled wholly or in part at freight house or platform located on carrier road within the switching limits of the station at which car is received from or delivered to the switching road.

1018 RULES

(Subject to such changes as may be required to meet local conditions.)

Rule 1

The carrier road will allow the switching road a reclaim in accordance with Per Diem Rule 5 at the current per diem rate.

Rule 2

No reclaim shall be allowed for an interterminal switching movement.

Rule 3

Rule 1 of this Code will not apply to cars which are delivered empty to switching road for loading, and are returned empty to carrier road by reason of shippers' cancellation of order, or error on the part of carrier road, and to cars which are rejected by shippers account of being unsuitable for specified loading when received from the carrier road. (See Per Diem Rule 14.)

Rule 4

The right of reclaim is not affected by the fact that in switching service the switching road may collect its charges from the shipper or consignee.

Rule 5

These rules apply only to cars subject to per diem basis of settlement, including cars owned by the switching road, except that they shall not apply to cars loaded with company material (including company coal) for the use of the switching road.

Rule 6

SECTION 1. When the average number of days is used as the basis for settlement of terminal switching reclaims, the arbitrary

to be allowed shall be based on the average time required by the switching road to switch cars for all the roads, considered as a whole, in the switching district involved. Such arbitrary shall be obtained from the records of the switching road as follows:

(a) A check covering twelve consecutive months shall be made under the direction of the American Railway Association, or otherwise as may be agreed upon between the roads interested.

(b) The check shall cover the loaded cars interchanged, that are included in terminal and trap or ferry car switching reclaim statements for the months to be checked, except that, by unanimous agreement, the check may be confined to any ten-day period, which must be the same for each month checked.

1019 The check shall not include:

(1) Cars loaded with livestock, but not excepting cars loaded with emigrant movables or exhibition livestock;

(2) Cars delivered loaded on or after the first day of the ten-day period, which were received loaded prior to that date, when a ten-day period is agreed upon;

(3) Cars used in local, inter or intra plant and/or interterminal switching services;

(4) Cars on which the required records are incomplete.

NOTE.—The exception applicable to cars loaded with live stock and cars used in local, inter or intra plant, and/or interterminal switching services, means that the car and detention thereto in such services, as well as while in terminal switching service, shall be excluded, except cars owned by or which are at home on the switching road, which will be checked in accordance with Section 2, paragraphs (g) and (h) of this rule.

SECTION 2. In figuring detention, the days shall be computed as follows:

(a) Cars received loaded and returned empty to the road from which received or delivered empty to another road within the same switching district, and cars received empty and returned loaded to the road from which received or delivered loaded to another road within the same switching district, count from date received to date of delivery.

(b) Cars received loaded and returned loaded to the road from which received or delivered loaded to another road within the same switching district, count from date received to date of delivery.

(c) Cars picked up from road haul service and placed in terminal switching service, count from date placed for loading as evidenced by the demurrage records to date delivered to outbound carrier as evidenced by the interchange reports, except when cars are shown placed between midnight and following 7 A. M., inclusive, count from next preceding date.

(d) Cars diverted from terminal switching service to road haul service, count from date of receipt as evidenced by the interchange reports to date released from inbound load as evidenced

by the demurrage records. When 7 A. M. release date is shown, count car released as of 6 P. M. next preceding date.

(e) On cars handled in terminal switching service and subsequently reconsigned or reshipped in road haul service, count from date of receipt, as evidenced by the interchange reports, to date released, as evidenced by the demurrage records.

(f) On cars received in road haul service and subsequently reconsigned or reshipped in terminal switching service, count
1020 from date of release as evidenced by the demurrage records, to date delivered to outbound carrier, as evidenced by the interchange reports.

(g) Cars owned by, or which are at home on, the switching road, which are loaded in terminal switching service, count from date placed for loading as evidenced by the demurrage records to date delivered to outbound carrier as evidenced by the interchange reports, except when cars are shown placed between midnight and following 7 A. M., inclusive, count from next preceding date.

(h) Cars owned by, or which are at home on, the switching road, which are unloaded in terminal switching service, count from date of receipt as evidenced by the interchange reports, to date released from inbound load, as evidenced by the demurrage records. When 7 A. M. release date is shown count car released as of 6 P. M. next preceding date.

(i) Where an intermediate switching road is involved in the terminal switching movement, the receipt from or delivery to the intermediate road shall be considered as receipt from or delivery to the carrier road.

SECTION 3. In computing detention in accordance with this rule, the detention of any car beyond eight (8) days shall be eliminated, except if a car received loaded is made empty, reloaded and returned to the road from which received or delivered to another road, the detention beyond sixteen (16) days shall be eliminated.

SECTION 4. The terminal switching reclaim allowance shall be determined by dividing the total detention, computed in accordance with this rule, by the total number of cars included in the check, cars received loaded which are made empty, reloaded and returned to the road from which received, or delivered to another road, to be counted as two (2) cars. The quotient to be expressed in two decimals, the second decimal to be increased by one (1) when the third (3rd) decimal is five (5) or more.

Rule 7

An Arbitration Committee may be appointed by interested roads in any local territory. All questions arising under these

rules shall be submitted to such committee through its secretary, who shall briefly set forth the points at issue and each party's interpretation of the rule on which the claim is based. Should one of the parties to the dispute refuse to furnish information, such Arbitration Committee shall use its judgment as to whether or not it can properly decide the question at issue, and shall base its decision upon these rules or as modified under agreement between the roads interested and the abstract submitted, and its decision shall govern, except that either party to the dispute may appeal to the Per Diem Rules Arbitration Committee of the American Railway Association.

1021 APPENDIX B

RULES GOVERNING SETTLEMENT FOR THE USE OF FOREIGN RAILROAD-OWNED FREIGHT CARS BY SHORT LINE RAILROADS, LOCATED WITHIN THE UNITED STATES, WHICH ARE LESS THAN 100 MILES IN LENGTH AND WHICH RETURN RAILROAD-OWNED EQUIPMENT TO THE ROAD FROM WHICH RECEIVED, EXCEPT AS PROVIDED IN RULE 6

Rule 1

The Code of Per Diem Rules shall apply, except as hereinafter modified or amended.

Rule 2

When each and every foreign railroad owned freight car is returned to the road from which received, or is still on hand at the close of the month, settlement for the use of such equipment shall be made at the regular per diem rate with the connecting carrier from which such cars are received.

Settlement under this rule is not applicable, even though each and every car is returned to the road from which received, if, in the meantime, any such car has been delivered to another railroad; except that the delivery and return of a car in terminal switching service (the car not moving outside of the terminal switching district), shall not be considered to be a delivery to another railroad under this rule, provided a report of such movement is made to the delivering carrier road.

Rule 3

Settlements under Rule 2 shall be made promptly after the close of each calendar month and shall include all per diem accruing during that month.

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Rule 4

The connecting carrier with which settlements are made under Rule 2 shall report all per diem accruing on such cars to the car owner, in accordance with the Code of Per Diem Rules.

Rule 5

Junction reports prescribed by Per Diem Rule 10 need not be made for cars subject to Rule 2.

1022 Rule 6

On cars for return coal loading, delivered to short lines customarily dependent on connecting carriers for coal car supply, the short line may reclaim against the delivering carrier for per diem accruing while such cars are held under load with coal on mine sidings until billing is furnished, excluding the date of loading.

This Rule will not apply to cars which are not returned under load with coal, to the road from which received.

INTERPRETATION

Question. If a railroad-owned refrigerator car, which under the provisions of A. R. A. Circular No. 1991, is operated on a mileage instead of per diem basis, is delivered a short line, is such car to be compensated on a per diem basis while in the possession of the short line?

Answer. No. Mileage rate will apply.

1023 REGULATIONS GOVERNING PLACING AND HANDLING OF EMBARGOES

Effective January 1, 1930

1. An embargo is a method of controlling traffic movements when accumulations, threatened congestions or other interferences with operation of a temporary nature compel restrictions against traffic movements.

(a) Embargoes should be placed against consignees who fail to unload or otherwise dispose of freight promptly upon arrival.

(b) Embargoes must not be placed at request of consignees.

2. An embargo shall not be used to control the routing of traffic to or via any particular gateway or line when for the purpose of giving the embargoing road a longer haul.

3. A railroad shall promptly place its own embargo restrictions rather than to wait for such action by its connection when such

connection is offering traffic in excess of ability of such receiving road to currently accept.

(a) "Hold" orders shall not be placed against connections (except in cases of sudden physical disability) to control general movements of traffic for a period longer than twenty-four (24) hours and shall not be extended. When necessary to restrict the movement of traffic for periods in excess of twenty-four (24) hours, this should be accomplished by means of an embargo.

4. An embargo shall not be used as a permanent measure to control traffic movements when possible to regulate by tariff.

5. An embargo against less than carload freight which specifies minimum weight limits per car is prohibited. Shipments subject to minimum carload rates under the governing classification must not be accepted at less than carload rates and forwarded in face of embargoes against carload freight.

6. In placing embargoes, and when other than a complete embargo is placed, there shall be uniformity in exemptions. These exemptions shall include, so far as practicable, the items listed in memorandum* (a) to (h) inclusive, and in the order named.

NOTE TO ITEM 6.—When other than an absolute embargo is placed, exemptions should include as many of items quoted below as circumstances, warrant, and in the order named so far as practicable.

7. Permits: Congestions, or interference with normal movement of traffic, at terminals, or in areas where difficulty is found in the prompt release of freight car equipment by reason of an abnormal flow of traffic, it is believed may best be relieved by an embargo, which shall be promptly issued and continued in effect so long as necessary to reduce the volume awaiting delivery to a normal amount. Such embargoes shall exempt only those actual commodities which are necessary to meet the public need at the point involved.

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Where a permit system is used, it shall be established in such a way as to protect the shipping public against undue discrimination and should be confined:

(a) To the acceptance of grain and other freight for export or water movement when to meet definite steamer commitment.

(b) To the control when and where necessary of the flow of perishable traffic to markets subject to congestion, and

(c) To such other emergency situations as may arise when there is no question as to the public necessity for special transportation relief. Copies of permits issued under this rule shall be sent promptly and currently to the Chairman of the Car Service Division, Washington, D. C., with information to show reasons for the issuance of such permits.

*See pages 44 and 45.

8. An embargo shall be given effective distribution by carriers to the extent necessary to stop further loading or forwarding of traffic in conflict with intent of embargo.

9. An embargo when transmitted to the Zone Chairman then becomes the embargo of all roads in the district within which such Zone Chairman has jurisdiction over embargo distribution.

10. Embargoes and extensions of embargoes will become effective forty-eight (48) hours after 11:59 p. m. of date of issue, in accordance with Per Diem Rule 16.

11. Interchange of embargoes between railroads will be handled in accordance with instructions issued by the Car Service Division, who shall also supervise the application of the rules, regulations and instructions governing the handling of embargoes.

Code Word

Embank (a) Livestock, live poultry, perishable. NOTE: Perishables shall be listed by the Car Service Division for uniform understanding and application.

Embassy (b) Coal, coke, and charcoal. Petroleum and its products.

Ember (c) Food, domestic (not export), for human consumption (as listed by the Car Service Division); including wheat, corn, oats, rye, barley, rice, cereal products, salt, canned goods, sugar, and lard substitutes. Feed, domestic (not export), for animals and poultry, not including hay and straw.

1025 Emblem (d) Printing paper and printing ink.

Embody (e) Railroad material and supplies (other than coal or coke) consigned to an officer of the purchasing road at a point on such road.

Materials and supplies consigned to locomotive and car manufacturers for the construction and repair of locomotives and freight and passenger cars.

Embold (f) Fluxing stone and materials for blast furnaces.

Supplies for coal mines, oil refineries, and oil and gas wells.

Emboss (g) Field and garden seeds, seed grain, nursery stock.

Spraying materials, insecticides and implements for use thereof.

Agricultural implements and farm machinery required for preparing the soil.

Canning machinery.

Fertilizer or fertilizer materials, including agricultural lime, pulverized limestone and phosphate rocks.

Embrace (h) Acids, alcohol, ammonia, ammoniacal liquor.

Empty tank cars, empty metal, glass or jacketed oil, acid, gas or ammonia containers, ink drums; food and medicine containers.

Liquid chlorine, alum, sulphate of iron, and similar chemicals when to be used for purification of water supply and when consigned to municipal authorities.

Medicines, drugs, surgical instruments and surgical dressings, hospital and sick room supplies.

Tin plate for the manufacture of food containers.

Heating apparatus

1026 *Exhibit 4*

Circular No. 2951

AMERICAN RAILWAY ASSOCIATION

OFFICE OF THE SECRETARY

30 Vesey Street

NEW YORK, *October 29, 1932.*

Proposed New Car Service Rule

To the Members:

Attention has been called to the inauguration of "Seatrain" service on a weekly basis beginning October 6, 1932, handling traffic by boat—both contents and cars—between New York and New Orleans, boats having a capacity of one hundred cars each, call being made at Havana in either direction.

Cars are delivered to the Seatrain at New York by the Hoboken Manufacturers Railroad, a switching line on the Jersey Shore of New York Harbor. At New Orleans interchange to the Seatrain is made through the New Orleans & Lower Coast Railroad at a point about five miles south of the city on the west bank of the River.

The Hoboken Manufacturers Railroad and the New Orleans & Lower Coast Railroad are members of the Car Service and Per Diem Agreement. The executive officers of Seatrain Lines, Inc., and the Hoboken Manufacturers Railroad are identical. It is understood that the Seatrain Lines, Inc., own the Hoboken Manufacturers Railroad.

A conference with officers of the Hoboken Manufacturers Railroad determined that they understand and expect to fulfill their obligation in connection with Car Service and Per Diem Rules both as to per diem payments on railroad owned cars and mileage payments on private line cars while such equipment is in the possession of "Seatrain Lines."

Certain roads object to their equipment being delivered to the "Seatrain" by the Hoboken Manufacturers Railroad. Question has been raised as to whether or not there are existing car service and per diem rules which in any way prohibit or which can be changed to prohibit the delivery of railroad owned equipment to Seatrain Lines, Inc., also as to whether such interchange shall be made a matter for the connecting railroads to decide.

The Committee on Car Service, Transportation Division, after giving careful consideration to the subject, has recommended the adoption of a new Car Service Rule 4, together with necessary concurrent changes in Per Diem Rule 3, and present Car Service Rules 4, 5, 6, and 7 and the Notes to Car Service Rules 1 to 5, inclusive. This recommendation has been approved by the General Committee, Transportation Division, for submission to the membership for letter ballot vote as follows:

Proposed Revision of Car Service Rules and Per Diem Rules

PRESENT FORM	PROPOSED FORM
None.	New Car Service Rule 4. Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owners filed with the Car Service Division.
Car Service Rule 4.	Car Service Rule 5. (No other change.)
Car Service Rule 5.	Car Service Rule 6. (No other change.)
Car Service Rule 6.	Car Service Rule 7. (No other change.)
Car Service Rule 7.	Car Service Rule 17. (No other change.)
Notes to Car Service Rules 1 to 5, Inclusive. Notes. — (A) Car Service Rules 1 to 5, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.	Notes to Car Service Rules 1 to 6, Inclusive. Notes. — (A) Car Service Rules 1 to 6, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.

(No other changes)

Per Diem Rule 3.	Per Diem Rule 3.
Freight cars must be handled as prescribed by Rules 1 to 5, inclusive, of the Code of Car Service Rules of the American Railway Association.	Freight cars must be handled as prescribed by Rules 1 to 6, inclusive, of the Code of Car Service Rules of the American Railway Association.

In the application of new Car Service Rule 4, it will be necessary for a railroad wishing to deliver cars to a steamship, ferry, or barge line for water transportation to make prompt application for such permission to the Car Service Division. Such application should include the following information:

(a) Cars (ownerships) which it is desired to deliver;
(b) Name of water transportation carrier;
(c) Points between which water carrier will transport cars.

Application for such permission should be made promptly, so that delay or confusion may be avoided when the rule becomes effective.

The Car Service Division will handle with the owner railroad.

In the case of water carriers operating between more than two points, a car owner may grant permission for cars to be used between certain points and refuse permission between certain other points. For example, services are now operative on the Atlantic Seaboard between New York and New Orleans, New York and Havana and New Orleans and Havana. A car owner may permit its cars to be used between New York and Havana and refuse such permission between New York and New Orleans, etc.

Permission shall not be required for movements which are entirely within harbor or switching district limits.

In the event the proposed new Car Service Rule 4 is adopted, the Car Service Division proposed to issue a special car order addressed to all roads reaching the termini of water transportation lines, so that the transportation of railroad owned equipment via such water carriers may not cause rail lines serving such ports to make excessive empty mileage in the disposition of equipment.

The proposed revised rules are submitted for a vote by letter ballot in the usual manner, to become effective as of November 15, 1932, if approved by a majority of the membership, that majority to represent two-thirds of the freight cars owned or controlled by members of the Association.

A form of ballot is enclosed herewith. This ballot must be used if the vote is to be recorded and must be in the hands of the

Secretary, 30 Vesey Street, New York City, on or before noon, Eastern Standard Time, November 14, 1932.

On behalf of the General Committee, Transportation Division.

Respectfully,

H. J. FORSTER, *Secretary.*

1027 *Exhibit 5*

Circular No. 2953

TRANSPORTATION DIVISION CIRCULAR NO. D. II–376

OFFICE OF SECRETARY

30 Vesey Street

NEW YORK, *November 15, 1932.*

New Car Service Rule 4

To the Members:

Referring to Circular No. 2951, dated October 29, 1932, submitting recommendation of the Transportation Division covering the adoption of new Car Service Rule 4; revision of Per Diem Rule 3; renumbering of present Car Service Rule 4 to read Rule 5; renumbering of present Car Service Rule 5 to read Rule 6; renumbering of present Car Service Rule 6 to read Rule 7; renumbering of present Car Service Rule 7 to read Rule 17; changing Notes to Car Service Rules 1 to 5, inclusive, to read Notes to Car Service Rules 1 to 6, inclusive, to become effective November 15, 1932, if approved by a majority of the membership, that majority to represent two-thirds of the freight cars owned or controlled by the members of the Association.

The total membership of the Association is 385 and the number of freight cars owned or controlled by members is 2,373,849. The majority requisite for approval is 193 memberships owning or controlling 1,582,566.

The vote on the propositions submitted in Circular No. 2951 is as follows:

Yes, 300 Memberships, representing 2,097,322 cars.
No, 52 Memberships, representing 230,100 cars.
Not voting, 33 Memberships, representing 46,427 cars.

Please, therefore, take notice that the new and amended Rules become effective November 15, 1932.

The Rules as amended are printed herewith.

Attention is called to the fact that in the application of new Car Service Rule 4, it will be necessary for a railroad wishing to deliver cars to a steamship, ferry, or barge line for water transportation to make prompt application for such permission to the Car Service Division. Such application should include the following information:

(a) Cars (ownerships) which it is desired to deliver;
(b) Name of water transportation carrier;
(c) Points between which water carrier will transport cars.

Application for such permission should be made promptly, so that delay or confusion may be avoided when the rule becomes effective.

The Car Service Division will handle with the owner railroad.

In the case of water carriers operating between more than two points, a car owner may grant permission for cars to be used between certain points and refuse permission between certain other points. For example, services are now operative on the Atlantic Seaboard between New York and New Orleans, New York and Havana and New Orleans and Havana. A car owner may permit its cars to be used between New York and Havana and refuse such permission between New York and New Orleans, etc.

Permission shall not be required for movements which are entirely within harbor or switching district limits.

The Car Service Division will issue a special car order addressed to all roads reaching the termini of water transportation lines, so that transportation of railroad owned equipment via such water carriers may not cause rail lines serving such ports to make excessive empty mileage in the disposition of equipment.

By direction of the President.

Respectfully,

H. J. FORSTER, *Secretary.*

G. W. COVERT, *Secretary,*

Transportation Division.

1028 Proposed Revision of Car Service Rules and Per Diem Rules

PREVIOUS FORM	AMENDED FORM
None.	New Car Service Rule 4. Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owners filed with the Car Service Division.
Car Service Rule *4*.	Car Service Rule *5*. (No other change.)
Car Service Rule *5*.	Car Service Rule *6*. (No other change.)
Car Service Rule *6*.	Car Service Rule *7*. (No other change.)
Car Service Rule *7*.	Car Service Rule *17*. (No other change.)
Notes to car Service Rules 1 to 5, Inclusive.	Notes to Car Service Rules 1 to 6, Inclusive.
Notes. — (A) Car Service Rules 1 to *5*, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.	Notes. — (A) Car Service Rules 1 to *6*, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.
(No other changes)	
Per Diem Rule 3. Freight cars must be handled as prescribed by Rules 1 to *5*, inclusive, of the Code of Car Service Rules of the American Railway Association.	Per Diem Rule 3. Freight cars must be handled as prescribed by Rules 1 to *6*, inclusive, of the Code of Car Service Rules of the American Railway Association.

1029

Exhibit 6

Circular No. 2960

AMERICAN RAILWAY ASSOCIATION

OFFICE OF THE SECRETARY

30 Vesey Street

NEW YORK, *January 31, 1933.*

Proposed Revised Note (A) and Caption to "Notes to Car Service Rules 1 to 6, Inclusive"

To the Members:

Car Service Rule 4, which became effective November 15, 1932, reads as follows:

RULE 4.—Cars of railroad ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owners filed with the Car Service Division.

Note (A) of the "Notes to Car Service Rules 1 to 6, inclusive," provides:

(A) Car Service Rules 1 to 6, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.

Consideration has been given to possible nullification of Car Service Rule 4 by the provision of Note (A) in that cars may be reconsigned via Seatrain, for example, after having reached the Hoboken Manufacturers or New Orleans and Lower Coast rails. Upon recommendation of the Committee on Car Service that—

1—Note (A) to Rules 1 to 6, inclusive, should not apply to Car Service Rule 4;

2—Note (A) does not apply to Car Service Rules 5 and 6 inasmuch as these two Rules refer entirely to the handling of empty cars;

3—Notes (B) and (C) do not in any way apply to Car Service Rules 4, 5, and 6;

the following revision has been approved by the General Committee, Transportation Division, and is herewith submitted to the members for a vote by letter ballot, in the usual manner, to become effective March 1, 1933, if approved by a majority of the membership, that majority to represent two-thirds of the freight cars owned or controlled by the members of the Association.

1030

PRESENT FORM	PROPOSED FORM
Notes to Car Service Rules 1 to 6, Inclusive	Notes to Car Service Rules 1, 2, and 3
Notes. — (A) Car Service Rule 1 to 6, inclusive, do not apply to cars reconsigned with original lading under duly filed and published tariffs.	Notes. — (A) Car Service Rules 1, 2, and 3 do not apply to cars reconsigned with original lading under duly filed and published tariffs.

A form of ballot is enclosed herewith. This ballot must be used if the vote is to be recorded and must be in the hands of the Secretary, 30 Vesey Street, New York City, on or before noon, Eastern Standard Time, February 28, 1933.

On behalf of the General Committee, Transportation Division.

Respectfully,

H. J. FORSTER, *Secretary.*

1031

Exhibit 7

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building, 17th and H Streets NW.

WASHINGTON, D. C., *November 21, 1932.*

Circular No. CSD–142

To Railroads:

As provided in A. R. A. Circular No. 2953 and Transportation Division Circular No. D II–376, permission for delivery of cars of railroad ownership to steamship, ferry, or barge lines for water transportation must be filed with the Car Service Division.

Preliminary to such permission being established and to effect orderly and uniform procedure, it will be necessary for each railroad, including switching railroads, connecting with water transportation lines, to advise the Car Service Division the name or names of its water transportation connections and whether it does or does not desire that permission be granted by car owners, and filed with the Car Service Division, for interchange of cars of their respective ownerships to such water lines, thus permitting the use of railroad-owned cars in the interchange of traffic to all such water connections.

Attention is called to two paragraphs in Circular 2953 reading:

"In the case of water carriers operating between more than two points a car owner may grant permission for cars to be used be-

tween certain points and refuse permission between certain other points. For example, services are now operative on the Atlantic Seaboard between New York and New Orleans, New York and Havana, and New Orleans and Havana. A car owner may permit its cars to be used between New York and Havana and refuse such permission between New York and New Orleans, etc.

"Permission shall not be required for movements which are entirely within harbor or switching district limits."

Your application should include the following information:

(a) Cars (ownerships) which it is desired to deliver;

(b) Name of water transportation carrier;

(c) Points between which water carrier will transport cars.

A prompt reply is requested.

CAR SERVICE DIVISION,
M. J. GORMLEY, *Chairman.*

1032 *Exhibit 8*

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building, 17th and H Streets NW.

File: 619–3

WASHINGTON, D. C., *January 17, 1933.*

DEAR SIR: Your response to Circular CSD–142 stated, in part, your preference with respect to delivery of your cars to water transportation carriers in connection with new Car Service Rule 4.

That information may be recorded uniformly by the Car Service Division, you are asked to restate your wishes as outlined in Circular CSD–143, attached.

CAR SERVICE DIVISION,
M. J. GORMLEY, *Chairman.*

1033 AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building, 17th and H Streets NW.

WASHINGTON, D. C., *January 17, 1933.*

Circular No. CSD–143

To Railroads:

Based upon information received in reply to inquires made in Circular No. CSD–142 (issued in conformity with A. R. A. Circular No. 2953 and Transportation Division Circular No. D. II–

376) the attached list (in duplicate) has been prepared of those roads that make application for permission to interchange railroad-owned freight cars to water transportation carriers shown for movement between points listed.

For the purpose of complying with Car Service Rule 4, reading.

"Cars of railroad ownership must not be delivered to a steamship, ferry or barge line without permission of the owners filed with the Car Service Division."

it is required that you indicate on the attached form whether or not you wish to permit cars owned by your railroad to be interchanged to the water transport lines as listed. Space is provided for permission to be registered in any one of five ways, or to specify additional exceptions:

1. For delivery of cars to all water lines without restriction.
2. For delivery of cars to all water lines restricted only as to movement via Seatrain Lines, Inc.
3. For delivery of cars to all water lines restricted only as to movement via Seatrain Lines, Inc., between New Orleans and New York.
4. For delivery of cars to all water lines restricted only as to movement via Seatrain Lines, Inc., between New Orleans and New York, and New Orleans and Havana (permitting movement between New York and Havana).
5. For delivery of cars to all water lines restricted only as to movement via Seatrain Lines, Inc., between New York and New Orleans, and New York and Havana (permitting movement between New Orleans and Havana).
6. Opportunity is given for listing any additional exceptions which individual railroads may desire to make.

One copy of the form should be filled in and mailed promptly to the Car Service Division; the other may be retained.

CAR SERVICE DIVISION,
M. J. GORMLEY, *Chairman.*

1034 AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

WASHINGTON, D. C., *January 17, 1933.*

Water transportation lines to which connecting railroads have filed requests for permission to deliver railroad-owned freight cars, as provided in Car Service Rule 4, adopted effective November 15, 1932:

Name of water line	Connecting rail carriers	Points between which water line is operated	
1. Canadian Pacific Car & Passenger Transfer Co.	N. Y. C., C. P.	Ogdensburg, N. Y.	Prescott, Ont.
2. Drummond Lighterage Co.	C. M. St. P. & P., G. N., N. P.	Seattle, Wash.	Port Gamble, Port Ludlow and other points in Washington.
3. Florida East Coast Car Ferry Co.	F. E. C.	Key West, Fla.	Havana, Cuba.
4. Foss Tug & Barge Co.	C. M. St. P. & P.	Seattle, Wash.	Richmond Beach, Wash.
5. Grand Trunk-Milwaukee Car Ferry Co.	C. & N. W., C. M. St. P. & P., C. N., G. T. W.	Milwaukee, Wis. Muskegon, Mich.	Grand Haven, Mich. Grand Haven, Mich.
6. Mackinac Transportation Co.	D. S. S. & A., Mich. Cent., P. R. R.	Mackinaw City, Mich.	St. Ignace, Mich.
7. Ontario Car Ferry Co., Ltd.	C. N., N. Y. C., B. & O.	Coburg, Ont.	Genesee Dock, Charlotte, N. Y.
8. Pennsylvania - Ontario Transportation Co.	C. P., P. R. R.	Port Burwell, Ont.	Ashtabula, Ohio.
9. Puget Sound Navigation Co.	C. M. St. P. & P., G. N.	Seattle, Wash.	Bremerton, Wash.
10. Seatrain Lines, Inc.	Hoboken Manufacturers R. R., N. O. & L. C.	New Orleans, La. (Belle Chasse). New Orleans, La. (Belle Chasse). New York, N. Y. (Hoboken).	Havana, Cuba. New York, N. Y. (Hoboken). Havana, Cuba.
11. Toronto, Hamilton & Buffalo Navigation Co.	T. H. & B., N. Y. C.	Port Maitland, Ont.	Ashtabula, Ohio.
12. Yorke & Sons Barge.	C. N., G. N.	Vancouver, B. C.	Vancouver Island Points.

Several railroads operate water lines as extensions of their rail lines, such as the Ann Arbor and Pere Marquette across Lake Michigan. It is understood that no permission is required for delivery of cars to such water lines.

Indicate by Marking X

1. This railroad is agreeable to its cars being delivered to all steamship, ferry, or barge lines, including Seatrain Lines, Inc. (or, without exception). ☐

2. This railroad is agreeable to its cars being delivered to all steamship, ferry, or barge lines, except Seatrain Lines, Inc. ☐

3. This railroad is agreeable to its cars being delivered to all steamship, ferry, or barge lines, except Seatrain Lines, Inc., operating between New Orleans (Belle Chasse) and New York (Hoboken). ☐

4. This railroad is agreeable to its cars being delivered to all steamship, ferry, or barge lines, except Seatrain Lines, Inc., ☐

Indicate by Marking X

operating between New Orleans (Belle Chasse) and New York (Hoboken), and between New Orleans (Belle Chasse) and Havana.

5. This railroad is agreeable to its cars being delivered to all steamship, ferry, or barge lines, except Seatrain Lines, Inc., operating between New York (Hoboken) and New Orleans (Belle Chasse), and between New York (Hoboken) and Havana. ☐

6. Additional exceptions which this railroad makes of water lines to which it desires that its freight cars be not delivered:

.....

.....

.....

.....
(Railroad)

Date at..... .....
(Signed)

.....1933. .....
(Title)

1035 *Exhibit 9*

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building, 17th and H Streets NW.

WASHINGTON, D. C., *March 17, 1933.*

Special Car Order No. 30

To All Railroads:

Pursuant to the requirement of Car Service Rule 4, reading:

> "Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owners filed with the Car Service Division."

railroads owning cars have filed the following instructions with the Car Service Division respecting the delivery of their equipment to steamship, ferry or barge lines as hereinafter stated.

Railroads are hereby notified that delivery of cars contrary to these instructions will constitute a violation of Car Service Rule 4.

1. List of steamship, ferry, or barge lines:

Canadian Pacific Car and Passenger Transfer Company.
Drummond Lighterage Company.
Florida East Coast Car Ferry Company.
Foss Tug and Barge Company.
Grand Trunk-Milwaukee Car Ferry Company

Mackinac Transportation Company.
Ontario Car Ferry Company, Ltd.
Pennsylvania-Ontario Transportation Company.
Puget Sound Navigation Company.
Seatrain Lines, Inc.
Toronto, Hamilton and Buffalo Navigation Company.
Yorke and Son Barge.

g. Statement of Permission as filed by car owners:

A. Roads granting permission for their cars to be delivered to all water transportation lines without restriction:

Akron, Canton & Youngstown Ry. Co.
Chicago and Eastern Illinois Ry. Co.
Chicago, South Shore and South Bend R. R.
C., R. I. & P.
Delaware and Hudson Railroad Corporation.
Denver and Rio Grande Western R. R. Co.
Duluth, Missabe and Northern Ry. Co.
Duluth, South Shore and Atlantic Ry.
Fort Dodge, Des Moines and Southern R. R. Co.
Georgia and Florida R. R.
Lehigh & Hudson River Railway Co.
1636 Lehigh and New England R. R. Co.
Litchfield and Madison Ry. Co.
Live Oak, Perry and Gulf R. R. Co.
Minneapolis and St. Louis R. R. Co.
Mississippi Central R. R.
Missouri and North Arkansas Ry. Co.
Missouri-Illinois R. R. Co.
Missouri Pacific Lines: International-Great Northern R. R. Co., Gulf Coast Lines, New Orleans, Texas and Mexico Ry., New Iberia & Northern R. R. Co.
Missouri Pacific Railroad.
Northampton & Bath R. R. Co.
Pittsburgh and Shawmut R. R. Co.
Pittsburgh, Shawmut and Northern R. R. Co.
Texas and Pacific Ry. Co.
Texas Electric Railway.
Western Pacific R. R. Co.
Wheeling and Lake Erie Ry. Co.
Wichita Falls and Southern R. R. Co.

B. Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc. (permitting no movement via Seatrain Lines, Inc.):

Algoma Central and Hudson Bay Ry. Co.
Alton Railroad Company.

Ann Arbor R. R. Co.
Atlanta and West Point R. R. Co., Western Railway of Alabama, Georgia Railroad.
Atlanta, Birmingham and Coast R. R. Co.
Baltimore and Ohio R. R. Co.
Bangor and Aroostook R. R. Co.
Bessemer and Lake Erie R. R. Co.
Boston and Albany Railroad.
Boston and Maine Railroad.
Canadian National Railways.
Canadian Pacific Railway.
Central of Georgia Ry. Co.
Central Railway Company of New Jersey.
Chesapeake and Ohio Ry. Co.
Central Vermont Ry., Inc.
Chicago and Illinois Midland Ry. Co.
Chicago River and Indiana R. R. Co.
Cleveland, Cincinnati, Chicago and St. Louis Ry. Co.
Chicago and Western Indiana R. R. Co.
Chicago, Burlington and Quincy R. R. Co.
Clinchfield Railroad Co.
Colorado and Southern Ry. Co.
Colorado and Wyoming Ry. Co.
Columbus and Greenville Ry. Co.
Cumberland and Pennsylvania R. R. Co.
Delaware, Lackawanna and Western R. R. Co.
Detroit, Toledo and Ironton R. R. Co.
Durham and Southern Ry. Co.
Elgin, Joliet and Eastern Ry. Co.
Erie Railroad Company.
Florida East Coast Ry.
1037 Fort Worth and Denver City Ry. Co.
Grand Trunk Western R. R. Co.
Great Northern Ry. Co.
Illinois Terminal R. R. System.
Lake Erie, Franklin & Clarion R. R. Co.
Lake Superior & Ishpeming R. R. Co.
Lehigh Valley Railroad.
McCloud River Railroad Co.
Maine Central Railroad Co.
Maryland and Pennsylvania R. R. Co.
Michigan Central Railroad Co.
Minneapolis, St. Paul and Sault Ste. Marie Ry. Co.
Missouri-Kansas-Texas Lines.
Montour Railroad Co.
Nashville, Chattanooga and St. Louis Ry.

New York Central R. R. Co.
New York, Chicago and St. Louis R. R. Co.
New York, New Haven and Hartford R. R. Co.
New York, Ontario and Western Ry. Co.
Norfolk & Western Ry. Co.
Norfolk Southern R. R. Co.
Pennsylvania Railroad.
Pere Marquette Ry. Co.
Piedmont and Northern Ry. Co.
Pittsburgh and Lake Erie R. R. Co.
Pittsburgh and West Virginia Ry. Co.
Quebec Central Ry.
Reading Company.
Richmond, Fredericksburg and Potomac R. R. Co.
Rutland Railroad Co.
St. Louis-San Francisco Ry. Co.
Seaboard Air Line Railway.
Tennessee Central Ry. Co.
Toronto, Hamilton and Buffalo Ry.
Wabash Railway Co.
Western Maryland Ry. Co.
Wichita Valley Ry. Co.
Wisconsin and Michigan R. R. Co.

C. Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc., operating between New Orleans (Belle Chasse) and New York (Hoboken) (permitting movement between New Orleans and Havana, and between New York and Havana):

Atchison, Topeka and Santa Fe Ry.
Chicago Great Western R. R. Co.
Chicago and Northwestern Ry.
Chicago, St. Paul, Minneapolis & Omaha, Ry.
Fort Smith and Western Ry. Co.
Illinois Central System.
Northern Pacific Ry. Co.
Toledo, Peoria & Western R. R.
Union Pacific System.

D. Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc., operating between New Orleans (Belle Chasse) and New York (Hoboken) and between New York (Hoboken) and Havana (permitting movement between New Orleans and Havana):

Atlantic Coast Line R. R. Co.
1038 Charleston & Western Carolina Ry. Co.
Chicago, Indianapolis and Louisville Ry.

Chicago, Milwaukee, St. Paul and Pacific R. R. Co.
Chicago, Rock Island and Pacific Ry.
Denver and Salt Lake Railway Co.
Detroit and Mackinac Ry.
Gulf, Mobile and Northern R. R. Co.
Kansas City Southern Ry. Co.
Louisiana and Arkansas Ry. Co.
Louisiana, Arkansas and Texas Ry. Co.
Louisville and Nashville R. R. Co.
Mobile and Ohio R. R. Co.
New Orleans Great Northern R. R.
St. Louis Southwestern Ry. Co.
Southern Pacific Lines (Pacific).
Southern Pacific Lines in Texas and Louisiana.
Texas and New Orleans R. R. Co.
Southern Railway System.
Winston-Salem Southbound Ry. Co.

CAR SERVICE DIVISION,
M. J. GORMLEY, *Chairman.*

1039 *Exhibit 10*

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building

17th and H Streets NW.

WASHINGTON, D. C., *April 5, 1943.*

Supplement No. 1 to Special Car Order No. 30

To All Railroads:

Effective this date, Special Car Order No. 30 is amended as follows:

Under Item 2-A: Roads granting permission for their cars to be delivered to all water transportation lines without restriction.

Add: Northampton and Bath R. R. Co.

Under Item 2-B: Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc. (permitting no movement via Seatrain Lines, Inc.).

Eliminate: Chicago and North Western Ry. Co.; Chicago, St. Paul, Minneapolis and Omaha Ry. Co.

Add: Wichita Valley Ry. Co.

Under Item 2-C: Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain

Lines, Inc., operating between New Orleans (Belle Chasse) and New York (Hoboken) (permitting movement between New Orleans and Havana, and between New York and Havana).

Add: Chicago and North Western Ry. Co.; Chicago, St. Paul, Minneapolis and Omaha Ry. Co.

Under Item 2-D: Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc., operating between New Orleans (Belle Chasse) and New York (Hoboken) and between New York (Hoboken) and Havana (permitting movement between New Orleans and Havana).

Add: New Orleans Great Northern R. R. Co.

CAR SERVICE DIVISION,
W. C. KENDALL, *Chairman.*

1040 *Exhibit 11*

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building

17th and H Streets NW.

WASHINGTON, D. C., May 4, 1933.

Supplement No. 2 to Special Car Order No. 30

To All Railroads:

Effective this date, Special Car Order No. 30 is amended as follows:

Under Item 2-B: Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc. (Permitting no movement via Seatrain Lines, Inc.).

Add: Chicago River and Indiana Railroad Company; Lake Superior & Ishpeming Railroad Company.

Under Item 2-D: Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc., operating between New Orleans (Belle Chasse) and New York (Hoboken) and between New York (Hoboken) and Havana (permitting movement between New Orleans and Havana).

Add: Charleston & Western Carolina Railway Company.

CAR SERVICE DIVISION,
W. C. KENDALL, *Chairman.*

1041 *Exhibit 12*

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building

17th and H Streets NW.

File 619-3

WASHINGTON, D. C., *March 20, 1933.*

DEAR MR. BRUSH: Attached are three copies of Special Car Order No. 30 issued in connection with Car Service Rule 4:

To anticipate one question which may be raised with respect to the application of the Rule so far as the Hoboken Manufacturers Railroad is concerned, may I advise you as to what the position of the Car Service Division will be in its supervision of the Rule.

Special Order 30 gives to all railroads definite advice as to what cars may or may not be used for movement via Seatrain Lines, Inc., as contemplated in Car Service Rule 4. We shall individually deal with railroads which load cars contrary to the provisions of the Rule. If the Hoboken Manufacturers Railroad, for example, picks up an empty car which is in its possession and loads it, or permits it to be loaded, contrary to the provisions of Rule 4, the Hoboken will be held responsible for violation of the Rule. Also, if a car is received under load consigned to a party in care of the Hoboken, or to a consignee served by the Hoboken, and such car is not permitted by the owner to move via Seatrain Lines, Inc., and which car is offered to the Hoboken for diversion, reconsignment, or reshipment via Seatrain Lines, Inc., it will be considered a violation of the Rule by the Hoboken to permit such diversion, reconsignment, or reshipment in that car. It is expected that in such a case the Hoboken will obtain a car which is permitted under the Rule, as indicated in Special Car Order 30, and arrange transfer of such diverted or reconsigned shipment.

Inasmuch as the Hoboken Manufacturers is so vitally interested in Special Car Order No. 30, I will appreciate your acknowledgment.

Yours very truly,

(S.) M. J. GORMLEY.

MR. GRAHAM M. BRUSH,
President, Hoboken Manufacturers R. R. Co.,
39 Broadway, New York, N. Y.

1042 *Exhibit 13*

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building, 17th and H Streets NW.

File 619–3

WASHINGTON, D. C., *March 20, 1933.*

DEAR MR. BALDWIN: Attached are three copies of Special Car Order No. 30 issued in connection with Car Service Rule 4:

To anticipate one question which may be raised with respect to the application of the Rule so far as the New Orleans and Lower Coast Railroad is concerned, may I advise you as to what the position of the Car Service Division will be in its supervision of the Rule.

Special Order 30 gives to all railroads definite advice as to what cars may or may not be used for movement via Seatrain Lines, Inc., as contemplated in Car Service Rule 4. We shall individually deal with railroads which load cars contrary to the provisions of the Rule. If the New Orleans and Lower Coast Railroad, for example, picks up an empty car which is in its possession and loads it, or permits it to be loaded, contrary to the provisions of Rule 4, the N. O. & L. C. will be held responsible for violation of the Rule. Also, if a car is received under load consigned to a party in care of the N. O. & L. C., or to a consignee served by the N. O. & L. C., and such car is offered to the New Orleans and Lower Coast for diversion, reconsignment or reshipment via Seatrain Lines, Inc., it will be considered a violation of the Rule by the New Orleans and Lower Coast to permit such diversion, reconsignment or reshipment in that car. It is expected that in such a case the New Orleans and Lower Coast will obtain a car which is permitted under the Rule, as indicated in Special Car Order 30, and arrange transfer of such diverted or reconsigned shipment.

Inasmuch as the New Orleans and Lower Coast is so vitally interested in Special Car Order No. 30, I will appreciate your acknowledgement.

Yours very truly,

(S) M. J. GORMLEY.

MR. L. W. BALDWIN,
President, New Orleans and Lower Coast R. R. Co.,
St. Louis, Mo.

1043 *Exhibit 14*

HOBOKEN MANUFACTURERS RAILROAD COMPANY
FOOT OF FIFTH STREET

HOBOKEN, N. J., *March 29, 1933.*

File HR.

MR. M. J. GORMLEY,
Chairman, Car Service Division,
American Railway Association,
17th and H Streets NW., Washington, D. C.

DEAR MR. GORMLEY: This will acknowledge receipt of your letter of March 20th, file 619–3, enclosing a copy of Special Car Order No. 30, issued by the American Railway Association in connection with Car Service Rule 4.

You will understand, of course, that it is the position of Hoboken Manufacturers Railroad that Car Service Rule 4 and the action of the railroads thereunder are unreasonable and discriminatory and in violation of the Interstate Commerce Act. Complaint against the rule and the practices of the members of the American Railway Association has been filed with the Interstate Commerce Commission calling upon the Commission to determine the validity of the rule. Consequently, you will understand that we cannot agree that Special Car Order No. 30 issued under the rule is valid or enforceable against the Hoboken.

The position of the Hoboken Manufacturers Railroad and of Seatrain Lines is further that cars interchanged with Seatrain's ships are used for legitimate transportation purposes; that the ownership of such cars by the Trunk Lines is subject to the public character of the Trunk Lines' undertaking and their duty to the shipping public to afford reasonable means for through transportation; that so long as the delivery of a car owned by one of the Trunk Lines to Seatrain does not impair the ability of such Trunk Line to perform its public duty, and so long as Seatrain undertakes, as it does, to pay the owning Trunk Line for the use of such car at the prescribed rental basis therefor as determined by the Per Diem Rules and to handle such car only in accordance with such rules and return or secure its return to the owning road, the owning Trunk Line has no more right to object to the delivery of that car to Seatrain that it has to refuse consent to the delivery of its cars to any other common or private carrier or industry when used for transportation purposes. Especially is this so, when, as we believe, the attitude of certain of the Trunk Lines as to their cars appears to be prompted, not by any necessity of conserving equipment for their own use, but to interfere with

2044 transportation by Seatrain, to discourage shippers from forwarding freight by Seatrain and to injure Seatrain, erroneously considered as a potential competitor rather than a transportation agency beneficial to the railroads as a whole.

The foregoing statement is made for your information to indicate the position on which Seatrain Lines and Hoboken Manufacturers Railroad have acted heretofore and will continue to act, and the position which they will urge before the Interstate Commerce Commission. This merely confirms frequent statements to the same effect heretofore made to the representatives of the various Trunk Lines.

Without waiving these contentions, may I point out to you these further facts.

Regardless of Car Service Rule 4, it is not the practice of the Hoboken Manufacturers Railroad with respect to shipments made by shippers on its line to place for the loading of such shipments cars owned by railroads who have indicated objections to the delivery of their cars to Seatrain Lines. With respect to shipments originating on other railroads, the furnishing of cars for the loading of such shipments is obviously in the control of those railroads. In actual practice, we are finding that the Eastern roads, although nominally recording their objection to the forwarding of their cars via Seatrain, are spotting their own equipment for loading of shipments to be forwarded via Seatrain to Havana and to New Orleans instead of spotting equipment of Southern and Southwestern lines and of other railroads who have granted permission for the delivery of their cars to Seatrain. And they are doing this regardless of the fact that they have in their possession equipment of such consenting roads brought north by Seatrain. While furnishing their own cars for loading, they are returning empty to Seatrain cars of Southern and Southwestern lines. I cannot find a single case where the Eastern roads have availed themselves of the opportunity of relieving themselves of per diem charges on Southern and Southwestern equipment by using such equipment for handling Seatrain traffic. Nor can I find a case where they have sought to avoid the cost of hauling this empty equipment back to the owning roads by furnishing it for loading via Seatrain.

It seems to me that if any claim is to be made that Car Service Rule 4 may be justified as a means of conserving equipment and if the Eastern railroads are to avoid the charge of wasteful use of equipment, they should, before furnishing their own cars for loading via Seatrain, use reasonable efforts to place for shippers the cars of consenting and owning roads which are empty upon their lines and would otherwise have to be returned empty.

I believe further that before Eastern railroads which have indicated their unwillingness to have their own cars delivered to Seatrain furnish such cars for loading they should, if they have not reasonably available cars of consenting roads, furnish for such loading empty cars of Southern and Southwestern
1045 roads which have not given their consent, which cars would otherwise have to be returned empty. The Eastern railroads certainly have no justification under Rule 4 in refusing to furnish such cars for loading when they return these cars empty to Hoboken Manufacturers Railroad for delivery and return movement empty via Seatrain. As I read Car Service Rule 4, it prohibits the delivery to a water carrier of an empty as well as a loaded car without the consent of the owning road.

The practices of the Eastern roads in this particular appear fully to substantiafe Seatrain's position that the railroads in adopting New Car Service Rule 4 did so not to conserve equipment for their own use but as a traffic measure to discourage the movement of freight via Seatrain for the purpose of injuring it.

May I further point out that if we complied with Car Service Rule 4 by unloading at Hoboken cars of nonconsenting railroads and transferring the ladings to other cars, we would be entitled under our division arrangement with our Trunk Line connections to a greater division to cover the cost of unloading than we claim on freight deliverd to Seatrain without unloading or than the Trunk Lines have heretofore been willing to allow on such freight.

In spite of the fact that Seatrain has advised the Eastern roads that Seatrain would have equipment available for any road wishing equipment for loading in connection with Seatrain service, not one single request has been made to date for such equipment.

The above remarks apply with equal force and to an equal extent to the situation at New Orleans involving the roads reaching that port with the exception of the Texas and Pacific and the Missouri Pacific Railroads.

As the records in your possession, if examined, will bear out the above stated facts, we suggest that the American Railway Association take immediate steps to correct this uneconomic and improper situation and advise the railroads that the new rules have had the opposite effect from that claimed when the rules were proposed.

Yours very truly,

JH:D

Copy to Mr. W. C. Kendall, Manager, Car Service Division, American Railway Association, Transportation Building, Washington, D. C.

1046 *Exhibit 15*

[Copy]

NEW ORLEANS & LOWER COAST RAILROAD

E. M. Durham, Jr., Vice President.

ST. LOUIS, MO., *November 21st, 1932.*

MR. M. J. GORMLEY,
Chairman, Car Service Division,
American Railway Association,
Washington, D. C.

DEAR SIR: Without being understood to agree to the reasonableness of the rule, pursuant to requirements of new Car Service Rule 4 and Transportation Division Circular D–II–376, the New Orleans & Lower Coast Railroad Company herewith makes application for permission to deliver equipment to water carriers at Belle Chasse, Louisiana, as follows:

(a) Cars of all ownership—railroad and private line.

(b) To the Seatrain Lines, Incorporated.

(c) Bell Chasse, Louisiana, to Havana, Cuba, to Hoboken, New Jersey.

Yours very truly,

(Signed) E. M. DURHAM, JR.

1047 *Exhibit 16*

[Copy]

HOBOKEN MANUFACTURERS RAILROAD COMPANY

FOOT OF FIFTH STREET

HOBOKEN, NEW JERSEY, *November 25, 1932.*

Re: New Car Service Rule No. 4

AMERICAN RAILWAY ASSOCIATION,
30 Vesey Street, New York, N. Y.

Attention Mr. H. J. Forster, Secretary.

DEAR SIRS: It is the contention of the Hoboken Manufacturers Railroad that New Car Service Rule No. 4 is unreasonable, unlawful, and in violation of the Interstate Commerce Act and a complaint is being prepared and will be filed with the Interstate Commerce Commission so alleging.

Without waiving such contention or admitting that the Rule has any binding effect, the Hoboken Manufacturers Railroad hereby makes application to the Car Service Division of the American Railway Association for permission to deliver cars of all railroad ownerships to Seatrain Lines, a water carrier, for transportation by it between Hoboken, New Jersey, and Havana,

Cuba, and between Hoboken, New Jersey, and New Orleans (Belle Chasse), Louisiana.

The making of this application is not to be construed as an admission that the application is required or that without the permission asked for the Hoboken Manufacturers Railroad is not justified in delivering such cars to Seatrain Lines.

Very truly yours,

(Signed) GRAHAM M. BRUSH,
President.

GMB:HMD

1048

Exhibit 17

SEATRAIN LINES, INC.

RULE 4 VIOLATIONS

Dates arrived at or departed from Hoboken	Northbound			Southbound		
	Total loads	Violations		Total loads	Violations	
		Number	Percent		Number	Percent
Dec. 1-2, 1932	27	3 StLSF 2 IC 5	18.5	16	1 NH 1 CCC 1 GTW 1 B&M 3 PRR 1 N&W 1 LV 9	56.2
Dec. 7-8, 1932	24	1 C&O 2 SP 3	12.5	22	2 NH 5 PRR 1 B&O 1 CNJ 1 Erie 1 NYC 1 DL&W 12	54.5
Dec. 14-15, 1932	27	2 SP 4 IC 1 SSW 1 CMStP&P 1 L&A 9	33.3	22	4 PRR 2 NH 1 DL&W 1 Rdg 1 B&O 1 N&B 10	45.4
Dec. 21-22, 1932	33	1 T&NO 1 CRI&P 1 CB&Q 1 AT&SF 1 L&A 1 STLSF 6	18.1	26	3 NH 2 CNJ 6 PRR 1 P&LE 1 NYC 2 Rdg 1 PM 16	61.5
Dec. 28-29, 1932	35	1 T&NO 2 WFS 2 IC 2 CRI&P 7	20.0	36	6 Erie 7 PRR 2 LV 1 CBT 1 CNJ 1 C&O 1 Me C 1 NH 1 B&A 21	58.3
Total	146	30	20.5	122	68	55.7

1049 *Exhibit 18*

SEATRAIN LINES, INC.

CARS OF "RESTRICTED" OWNERSHIP WHICH ARRIVED AT HOBOKEN ON BOATS DOCKED AUG. 8, 15, 22, and SEPT. 1, 1933; AND AT BELLE CHASSE ON AUG. 1, 9, 14, 21, 26, AND 29, 1933

	Total loads	"Restricted" cars	
		Number	Percent
North-bound	258	142	55.0
South-bound	382	180	47.1
Total	640	322	50.3

"RESTRICTED" OWNERSHIPS THAT DID NOT RETURN TO SEATRAIN LINES INC.

	Total "restricted" cars handled	That did not return	
		Number	Percent
North-bound	142	22	15.5
South-bound	180	46	25.6
Total	322	68	21.1

1050 *Exhibit 19*

[Copy]

TRUNK LINE ASSOCIATION

TRAFFIC EXECUTIVE COMMITTEE

143 Liberty Street

File 51450

NEW YORK, *March 11, 1933.*

HOBOKEN MANUFACTURERS RAILROAD COMPANY,
Hoboken, N. J.

GENTLEMEN: Under date of October 3, 1932, I addressed to you a letter as follows:

"The undersigned being an agent for—
The Baltimore & Ohio Railroad Company.
The Central Railroad Company of New Jersey.
The Delaware, Lackawanna & Western Railroad Company.
Lehigh Valley Railroad Company.
The Long Island Railroad Company.
The New York Central Railroad Company.

The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company.
The Pennsylvania Railroad Company.
Reading Company.
West Shore Railroad.

has been authorized and instructed by each of those companies to sign and transmit to you the following as its individual statement:

"The attention of this Company has been called to a plan of Seatrain Lines, Inc., to operate in the near future a transportation service between New York and Havana, and between New York and New Orleans via Havana, and, in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight cars, owned or leased by common carriers by railroad. It also is understood that Seatrain Lines, Inc., has acquired the properties of your company, and that your company and Seatrain Lines, Inc., intend to cooperate with each other in the transfer of railroad equipment from rail to vessel and from vessel to rail.

'This company has notified and advised Seatrain Lines, Inc., that this company does not consent to such use by that company of railroad equipment owned or leased by this Company, and that Seatrain Lines, Inc., must therefore refrain from taking the said property of this company for the purpose in question.

'This is to notify and advise you that your company must not deliver to Seatrain Lines, Inc., railroad equipment owned or leased by this company which may be interchanged with your company.'

"It will be appreciated if you will acknowledge the receipt of this letter and give me the assurance that in view of the unwillingness of those companies to permit Seatrain Lines, Inc., to make such use of their property, your company will refrain from making delivery of their railroad equipment to Seatrain Lines, Inc."

I am now authorized and instructed by the Erie Railroad Company to serve upon you similar notice as to railroad equipment owned or leased by it, and such notice is hereby served.

Yours truly,

(S) D. T. LAWRENCE, *Chairman.*

[Copy]

TRUNK LINE ASSOCIATION

TRAFFIC EXECUTIVE COMMITTEE

143 Liberty Street

File 51450

NEW YORK, *March 11, 1933.*

SEATRAIN LINES, INC.,
39 Broadway, New York City.

GENTLEMEN: Under date of October 3, 1932, I addressed to you a letter as follows:

"The undersigned being an agent for—
The Baltimore & Ohio Railroad Company
The Central Railroad Company of New Jersey
The Delaware, Lackawanna & Western Railroad Company
Lehigh Valley Railroad Company
The Long Island Railroad Company
The New York Central Railroad Company
The New York, New Haven and Hartford Railroad Company
New York, Ontario and Western Railway Company
The Pennsylvania Railroad Company
Reading Company
West Shore Railroad
has been authorized and instructed by each of those companies to sign and transmit to you the following as its individual statement:

'The attention of this company has been called to a plan of your company to operate in the near future a transportation service between New York and Havana, and between New York and New Orleans via Havana, and, in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight cars, owned or leased by common carriers by railroad.

'This is to notify and advise you that this company does not consent to such use by your company of railroad equipment owned or leased by this company, and that your company must therefore refrain from taking the same for the purpose in question.'

"It will be appreciated if you will acknowledge the receipt of this letter and give me the assurance that in view of the unwillingness of these companies to permit your company to make such use of their said property, your company will refrain from placing and transporting the same on its vessels."

I am now authorized and instructed by the Erie Railroad Company to serve upon you similar notice as to railroad equipment owned or leased by it, and such notice is hereby served.

Yours truly,

(Signed) D. T. LAWRENCE.
Chairman.

1051 [Copy]

HOBOKEN MANUFACTURERS RAILROAD COMPANY

Foot of Fifth Street

HOBOKEN, NEW JERSEY

39 BROADWAY, NEW YORK.
October 6, 1932.

Mr. D. T. LAWRENCE,
Chairman, Trunk Line Association,
143 Liberty Street, New York, New York.

DEAR MR. LAWRENCE: On behalf of Hoboken Manufacturers Railroad Company receipt is acknowledged of your letter of October 3rd (File No. 51450) written by you on behalf of the various trunk line railroads named.

This is to advise you that Hoboken Manufacturers Railroad Company is a party to the per diem rules agreement and is prepared to and will account to the owning roads for any and all railroad equipment received by it in accordance with the provisions of that agreement and of the per diem rules prescribed by the Interstate Commerce Commission. Hoboken Manufacturers Railroad does not conceive that it is the intention of the trunk line railroads by your said letter of October 3rd to abrogate the provisions of the per diem rules and the per diem rules agreement, or that, if such is their intention, they have the legal right to do so. Hoboken Manufacturers Railroad does not understand that there is any provision in the per diem rules agreement or the per diem rules limiting the industries served by the subscribing road to which cars may be delivered and that under the provisions thereof the only obligation of the subscribing road is to be responsible for the cars and to pay for the use thereof in accordance with the per diem rules as prescribed by the Commission until the cars are returned to a member road.

Hoboken Manufacturers Railroad in delivering cars to Seatrain Lines, Inc., will do so not in assertion of any title or interest in the cars adverse to that of the owning roads, but pursuant to the terms and provisions of the per diem rules agreement, and

will continue to be responsible for the payment of per diem and for the handling of the cars strictly in accordance with the per diem rules until their return to another member road, as provided in the rules.

Very truly yours,

(Sgd.) JOSEPH HODGSON,
Vice President.

1052 [Copy]

TRUNK LINE ASSOCIATION

143 Liberty Street

File 51450

NEW YORK, *October 3, 1932.*

SEATRAIN LINES, INC.,
39 Broadway, New York.

GENTLEMEN: The undersigned being an agent for—

The Baltimore & Ohio Railroad Company
The Central Railroad Company of New Jersey
The Delaware, Lackawanna & Western Railroad Company
Lehigh Valley Railroad Company
The Long Island Railroad Company
The New York Central Railroad Company
The New York, New Haven and Hartford Railroad Company
New York, Ontario and Western Railway Company
The Pennsylvania Railroad Company
Reading Company
West Shore Railroad

has been authorized and instructed by each of those companies to sign and transmit to you the following as its individual statement:

"The attention of this company has been called to a plan of your company to operate in the near future a transportation service between New York and Havana, and between New York and New Orleans, via Havana, and, in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight cars, owned or leased by common carriers by railroad.

"This is to notify and advise you that this company does not consent to such use by your company of railroad equipment owned or leased by this company, and that your company must therefore refrain from taking the same for the purpose in question."

It will be appreciated if you will acknowledge the receipt of this letter and give me the assurance that in view of the un-

willingness of these companies to permit your company to make such use of their said property, your company will refrain from placing and transporting the same on its vessels.

Yours truly,

(Signed) D. T. LAWRENCE,
Chairman.

1053 [Copy]

TRUNK LINE ASSOCIATION

143 Liberty Street

File 51450

NEW YORK, *October 3, 1912.*

HOBOKEN MANUFACTURERS RAILROAD COMPANY,
Hoboken, N. J.

GENTLEMEN: The undersigned being an agent for—

The Baltimore & Ohio Railroad Company
The Central Railroad Company of New Jersey
The Delaware, Lackawanna & Western Railroad Company
Lehigh Valley Railroad Company
The Long Island Railroad Company
The New York Central Railroad Company
The New York, New Haven and Hartford Railroad Company
New York, Ontario and Western Railway Company
The Pennsylvania Railroad Company
Reading Company
West Shore Railroad

has been authorized and instructed by each of those companies to sign and transmit to you the following as its individual statement:

"The attention of this Company has been called to a plan of Seatrain Lines, Inc., to operate in the near future a transportation service between New York and Havana, and between New York and New Orleans via Havana, and, in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight cars, owned or leased by common carriers by railroad. It also is understood that Seatrain Lines, Inc., has acquired the properties of your company, and that your company and Seatrain Lines, Inc., intend to cooperate with each other in the transfer of railroad equipment from rail to vessel and from vessel to rail.

"This company has notified and advised Seatrain Lines, Inc., that this company does not consent to such use by that company

of railroad equipment owned or leased by this company, and that Seatrain Lines, Inc., must therefor refrain from taking the said property of this company for the purpose in question.

"This is to notify and advise you that your company must not deliver to Seatrain Lines, Inc., railroad equipment owned or leased by this company which may be interchanged with your company."

It will be appreciated if you will acknowledge the receipt of this letter and give me the assurance that in view of the unwillingness of those companies to permit Seatrain Lines, Inc., to make such use of their property, your company will refrain from making delivery of their railroad equipment to Seatrain Lines, Inc.

Yours truly,

(Signed) D. T. LAWRENCE.
Chairman.

1053-A *Exhibit 20*

OUT TO SEA ON RAILS

Copyright, 1932, Seatrain Lines, Inc.

1054 On the twelfth day of January 1929, the S. S. "Seatrain" sailed from New Orleans for Havana, across the Gulf of Mexico—the first ship to carry a mile-long train of loaded freight cars. A new form of transport came into being, differing greatly in its economic and physical characteristics from previous rail or water methods. Uninterrupted service during the following years has proven that

1. "Seatrain" transportation is not only cheaper than existing forms, but is better, safer, and faster.

2. "Seatrain" has opened and is opening new arteries of trade to American industries, thus creating new markets which the ordinary rail or water carrier cannot reach nor economically serve.

1055 SEATRAINS? CERTAINLY!

A sea-going railroad running hundreds or even thousands of miles across the ocean to some far distant port with a train of freight cars a mile long—the latest development in the art of transportation.

The Seatrain vessels are ocean-going steamers, ranging from 420 to 478 feet in length with four decks, on each of which standard gauge railway tracks are laid. Each vessel is capable of carrying 100 freight cars. The ships are loaded and discharged by means of elevators located at each terminal.

Although it is an ocean carrier, a Seatrain ship is actually a floating bridge—a connecting link for all railroads. In the case of Cuba, Seatrain has literally added to North American railroads 2,626 miles of standard gauge Cuban trackage.

After several years of study, the Seatrain idea was developed by Graham M. Brush, President, and Joseph Hodgson, Vice President of Seatrain Lines, Inc. Analysis of the costs of American steamship lines operating in the North American trades showed that all the lines were spending in terminal ex-
1056 penses fifty cents or more out of every dollar received. The balance of the dollar was used to pay for vessel operation, management, traffic expenses, insurance, taxes, bond interest, and profits, if any. Further analysis showed that vessels were engaged more than half their time loading and discharging; and the cost of vessels lying at docks paying wharfage was virtually as great as when at sea burning fuel.

A cargo carrier's first job, obviously, is to carry cargo. Apparently, too much money and too much time were being spent in the terminals. Half of each dollar and half of each day were unproductive from the standpoint of moving freight. These unproductive costs were, necessarily, being passed on to shippers and consignees. Would it be possible to reduce these terminal costs and delays?

To keep ships at sea, earning by carrying, meant reducing the idle or dock time, and that in turn seemed to call for some sort of container which would permit faster handling of goods in loading and unloading. Millions of suitable containers were already available—the freight cars on every railroad and sid-
ing in North America, Central America, and Cuba. Most
1057 of the cargoes which vessels carry move to and from the seaboard in freight cars anyway. Furthermore the freight car is an excellent package, for the railroads have spent a century in developing it to transport all sorts of products including liquids, perishables, bulk goods, and every other form of commodity. No other package can compare with the low cost and efficiency of the American freight car.

BUILDING FOR EFFICIENCY

If a ship could be built to carry these containers safely and economically, no warehouses or covered piers would be necessary. Valuable time would be saved in interchange between rail and water lines as well as in the actual loading and discharging of the vessels. A minimum of expense would be incurred in terminal operations due to the elimination of all man-handling of the goods by the substitution of simple machinery to move a

few large packages—the freight cars. The speed of operations would be many times increased.

The result of this work and reasoning was the first Sea-
1058 train—built to fill a definite need. Little was it realized then that the accomplishment of these simple purposes would open new and even greater fields for economy, simplification, and coordination of our national transportation system.

After three years of extraordinarily successful operation in one of the most competitive trades in the world, and during a period of international depression, Seatrain was found to have prospered. The idea was basically sound; there was a real need for it, and, therefore, it made good. With one vessel, Seatrain Lines, Inc., had become the largest common carrier from the United States to Cuba. Answering an irresistible demand, Seatrain had to grow.

In the spring of 1932, the keels of two new and faster vessels, of the same type, were laid in the yards of the Sun Shipbuilding & Dry Dock Company at Chester, Pa. These two Seatrains are the first freighters to be built in the United States since the war—a fact in itself significant of Seatrain's vitality in the shipping world. They are the speediest freighters in the world, capable of maintaining 16½ knots at sea.

These new vessels were built to supplement the "Seatrain New
Orleans," operating between New Orleans and Havana, and
1059 to extend the service from Havana to New York. With ships running between New York and Havana and New Orleans and Havana, Seatrain service is available between practically every point in the United States and Cuba. In addition, by continuing the vessels beyond Havana, a weekly New York-New Orleans service is established.

In order to obtain a terminal at New York which could be served by all railroads entering the port, Seatrain Lines, Inc., purchased, in the spring of 1932, the Hoboken Shore Railroad and Hoboken Terminal properties. Thus, Seatrain gained possession of a connecting rail link between the trunk lines of the continent and the piers in the heart of America's largest port.

The new vessels commenced operation on October 6, 1932, and, like their predecessor, have established themselves in the new routes with even a greater record of achievement.

POINTS FOR THE SHIPPER

Seatrain saves money for shippers in three or more ways:
(1) by decreasing or eliminating packing costs;
(2) by procuring reduced cargo insurance rates;
1060 (3) by delivering shipments in faultless condition.

In many instances, Seatrain passes back to the shipper by means of lower rates the savings in transportation costs which this new method makes possible. A vital distinction between Seatrain and the older type of marine transportation is that Seatrain solicits freight in terms of carload space, whereas in most trades the ordinary vessel is concerned with rates per ton. It is a fact that the major part of the tonnage handled by transportation companies consists of low-grade commodities; car loadings of these are higher than of the high-grade commodities. Therefore, the revenue per car for the low-grade shipment is often greater than for the high-grade shipment. As ocean rates on low-grade commodities are based largely on cost of handling goods, Seatrain, which dispenses with handling goods, operates profitably in many instances on rates actually below the stevedoring costs to the ordinary steamer.

When the shipper finds that money is saved for him by these factors, he finds his way easier toward gaining new markets, and increasing his own business.

1061 Seatrain handles any and all types of freight cars. Box, gondola, tank, flat, cattle, or refrigerator cars—Seatrain makes no distinction among them. No one knows how to pack his goods better than the shipper himself, and Seatrain enables him to do so. He selects whatever type of freight car best serves his product and loads into that. Seatrain supplies him the package, the freight car, at no cost. What does this mean to the shipper?

(a) The Gondola Car

Until Seatrain arrived with the gondola car, Cuba had bought coke for her gas plants from England and Germany. This car takes coke from the Alabama ovens and places it at the furnaces in Cuba without pulverization and without the cost and necessity of storage yards or bulk-handling terminals. It is no longer necessary to purchase full cargoes of coke or coal in Cuba to obtain reasonable transportation rates. On the return trip, the gondola cars bring back manganese ore, rock asphalt, scrap iron, and the like. This has opened new and cheaper sources of supply to our Southern manufacturing industries. This group of commodities

1062 never moved in the New Orleans-Havana route before Seatrain came into existence. This group of commodities would stop moving today if Seatrain were not available.

(b) The Tank Car

The tank car enables shippers to transport liquids without the cost of supplying drums, barrels, or flasks. It reduces transpor-

tation costs because there is no freight charge to pay on the weight of the drums or other containers, a very sizeable item. The greatest single development of trade which Seatrain has created is due to the tank car. Lard, cottonseed oil, vegetable greases for soap making, acids, gasoline, kerosene, lubricating oils, and greases move in large volume every week. The tank cars are cleaned and are loaded back with molasses for the cattle feed manufacturers of the Middle West. Seatrain has opened new markets for the small producers of molasses in Cuba and has made it possible for them to sell direct to our cattle feed trade at lower prices than formerly existed. This has reduced the cost of producing cattle feed for the farmer and breeder.

The largest oil companies ship to Cuba all their kerosene, lubricating oils, greases, and special gasolines in tank cars by
1063 Seatrain. Storage tanks are no longer necessary at each terminal for these and other liquids which do not move in full tanker corgoes.

(c) The Refrigerator Car

The refrigerator car has opened up new markets for the growers of perishable goods. Apples, pears, melons, lettuce, and similar products move from the Pacific Coast States to Cuba without change in temperature, without the disastrous handling at seaboard terminals which ruins so much perishable stuff, and without delay. Northbound, Seatrain brings tropical fruits of the West Indies, sometimes in full train loads. Pineapples, loaded in bulk in refrigerator cars in the fields of Cuba without packing, move through to the canning factories of Canada in seven days.

One of the outstanding developments in connection with Seatrain transportation is the new mechanical refrigeration units which are installed in the bunkers of refrigerator cars and provide controlled temperatures and circulation throughout the voyages of the vessels. When desired by shippers Seatrain also provides for icing of the cars each day in accordance with Shippers' instructions.

1064 (d) The Box Car

The box car offers an equal number of advantages for Seatrain shipments. Grain need not be bagged; machinery need not be packed. Low-grade commodities, such as salt in bulk, are now shipped in large quantities. Seatrain has enabled Louisiana salt producers to capture the entire Cuban business from other nations.

(e) The Flat Car

The flat car, for lumber, poles, timber, and the like, enables Seatrain to give a service without breakage, damage, or handling. In one year, Southern lumber companies using Seatrain tripled their sales in a rapidly falling Cuban market. Seatrain has stopped the importations of Russian and Central American lumber into Cuba, and has turned this market over to the United States.

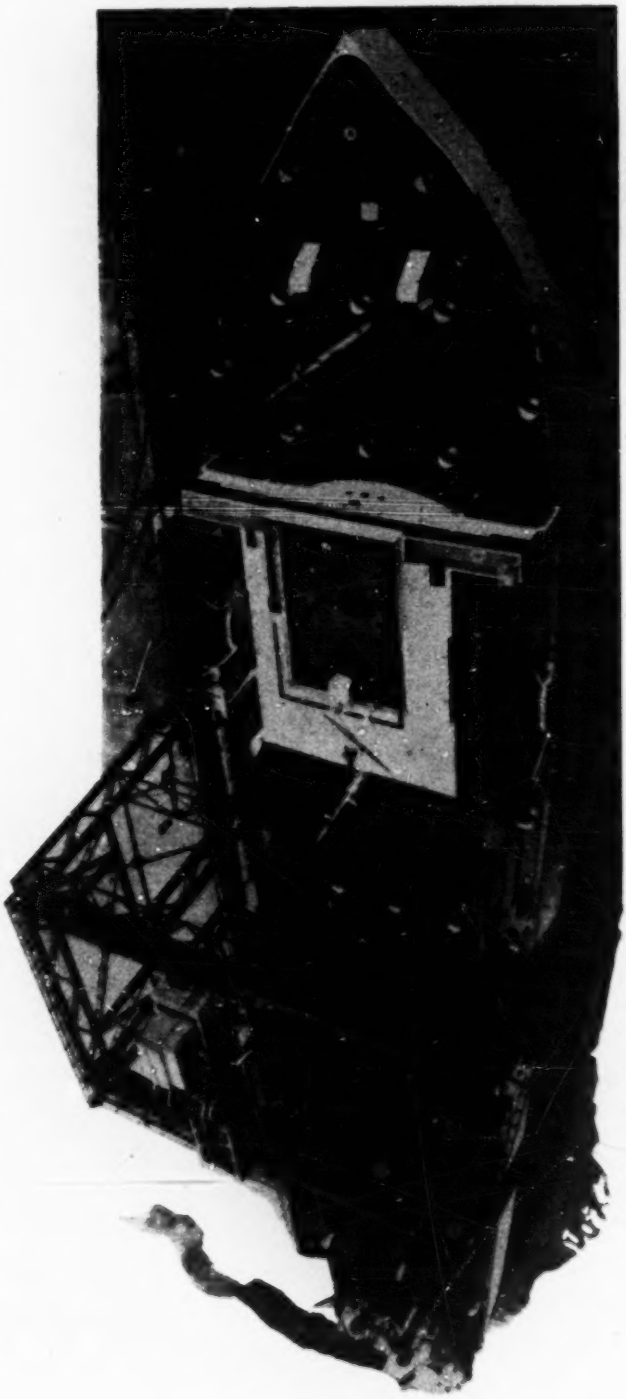
(f) Ports of Call

Because of fast and relatively inexpensive terminal operations the Seatrain type vessel can stop at ports of call between the termini of a line, discharge and load a considerable volume of freight, and arrive at final destination without material
1065 delay. Low-cost terminal operations make it possible to tran'ship cars from one vessel to another, and this creates new indirect routes which could not support regular direct sailings. These unique features not only open vast new territory which could not be served by the ordinary type vessel, because of excessive port time and costs, but they permit more frequent sailings between the ports served. The case is similar to that of two railroads—one with a main line only—the other with a main line with many branches. Obviously the branch lines make possible the operation of more trains on the main line per day, and tap territory which the main line could not serve.

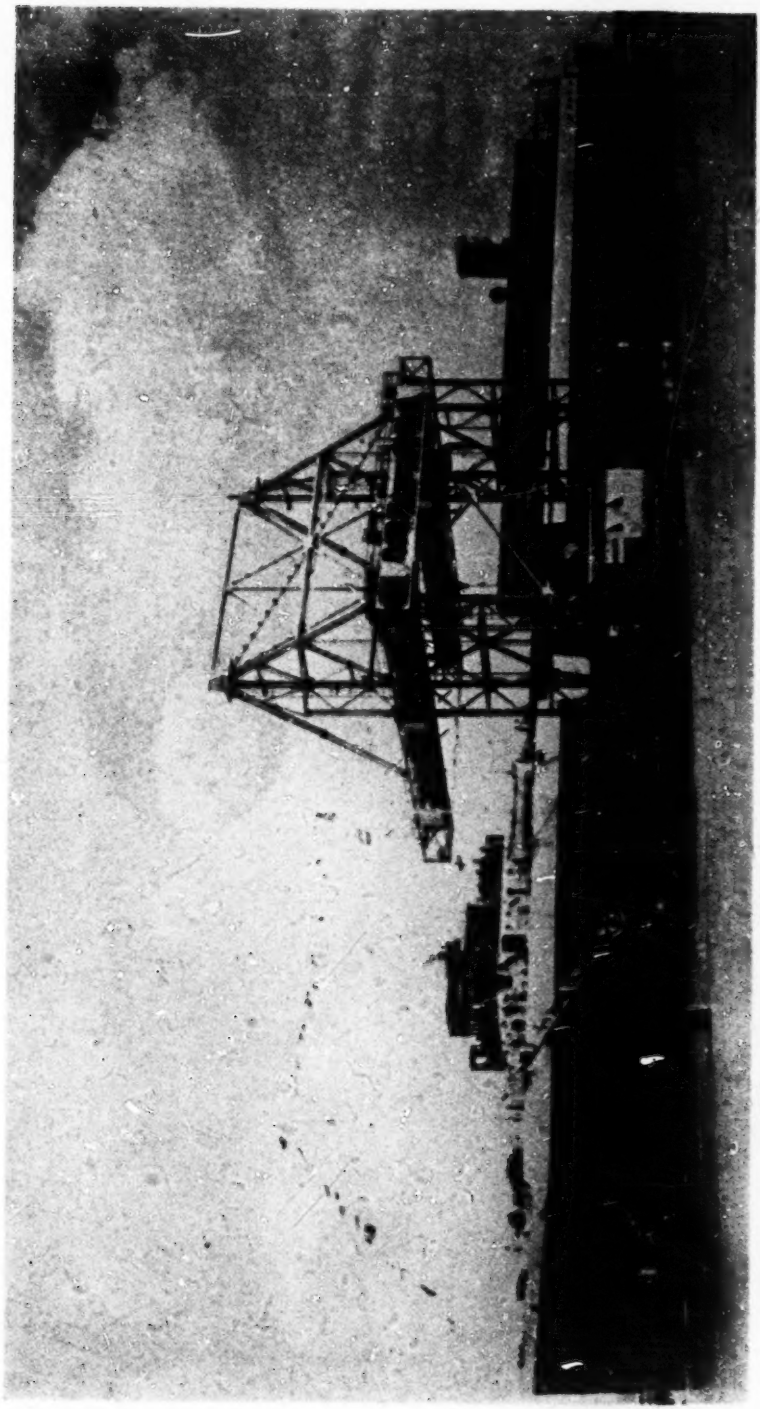
POINTS FOR THE RAILROADS

(a) New Traffic Developed

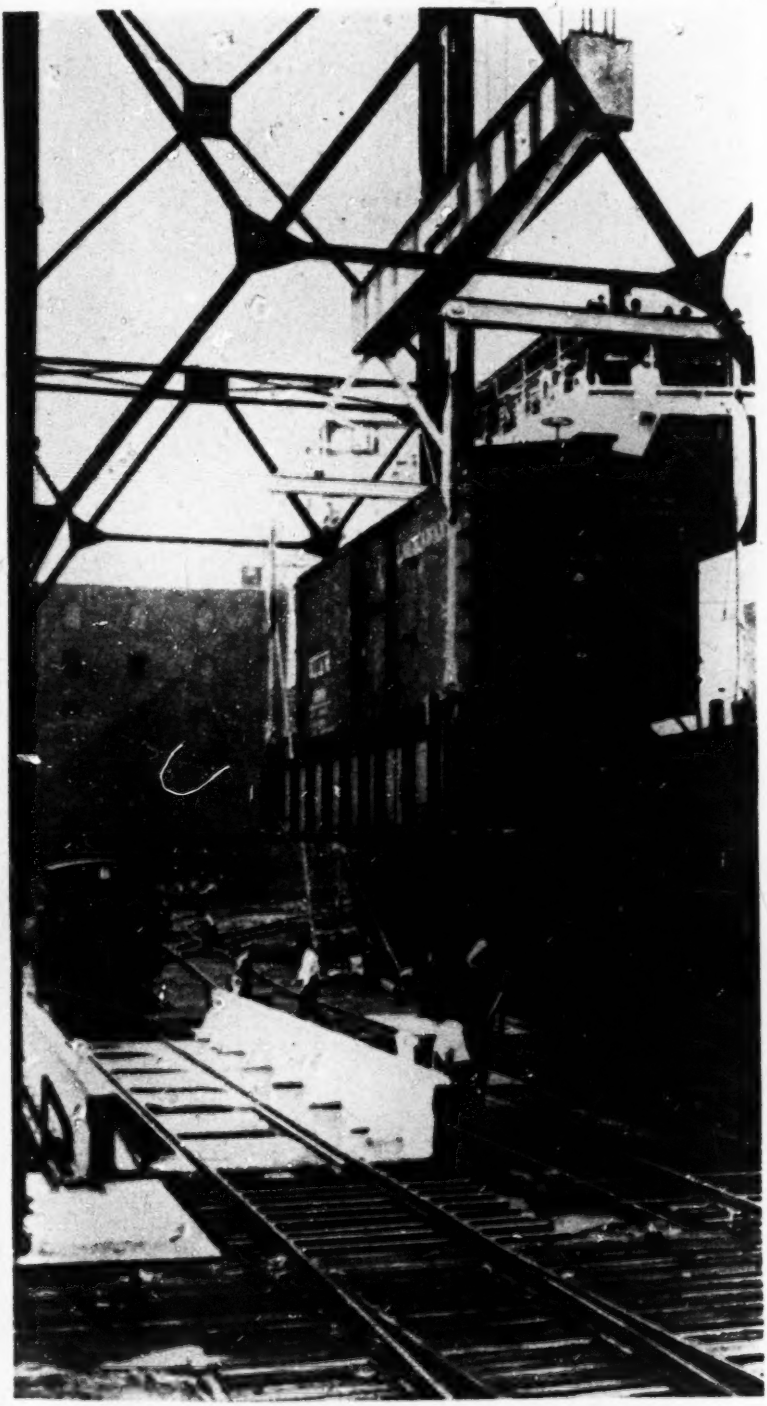
When any development creates new business, it is naturally welcome to those who benefit from it. As stated above, Seatrain has created for the railroads a considerable volume of straight freight hauling which they never had before. This is new business; the railroads would not have it but for Seatrain, and they would lose it at once if Seatrain were not available. Other
1074 ships can not handle it. But this is only one angle of interest to the railroads.



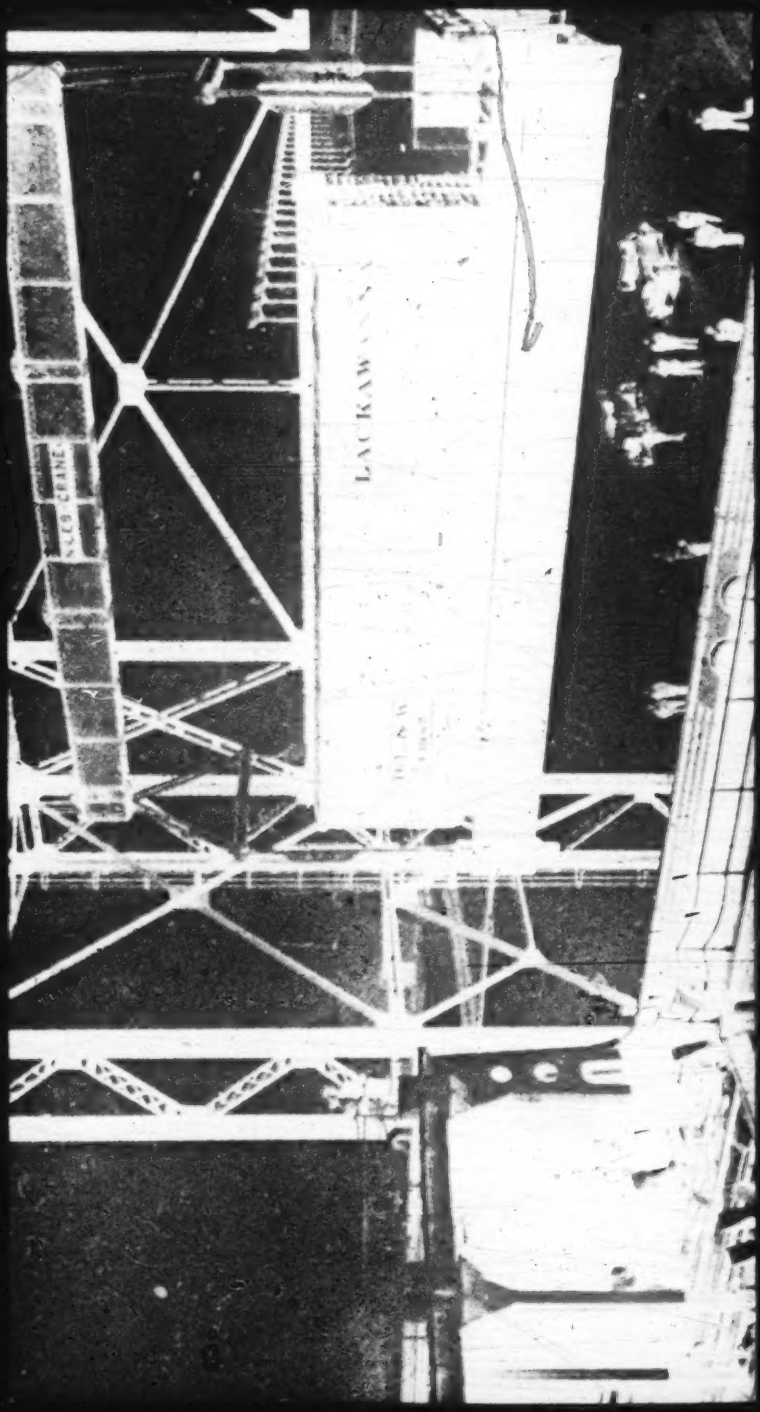
1911 "Seatrain New York" under the crane at New York. A freight car is just being lowered into the hold.



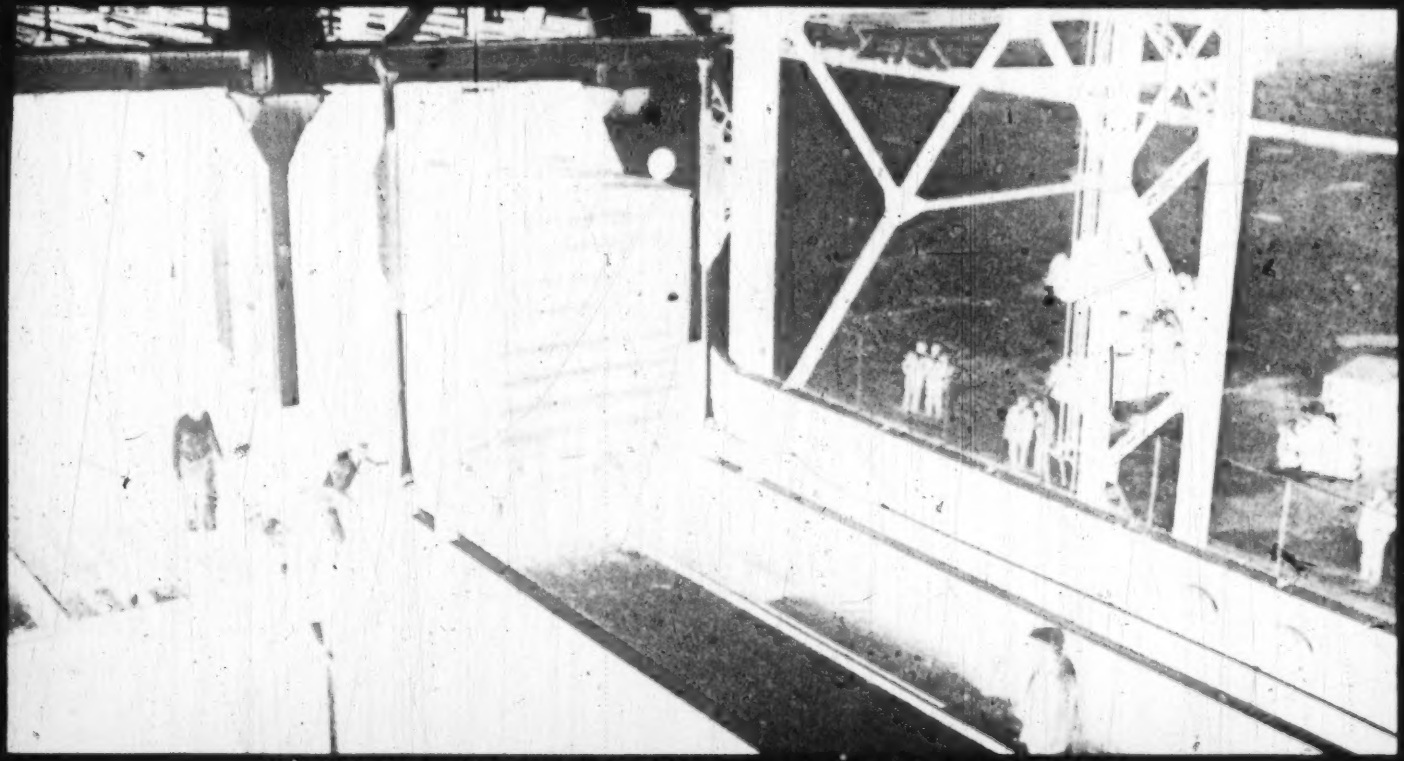
1957 "Scatrain New Orleans" loading at terminal.



1068 A freight car, clamped on the cradle, being lifted into the ship. The yard engine on the left track is returning for the next car.



1889. The car being lifted over the side.

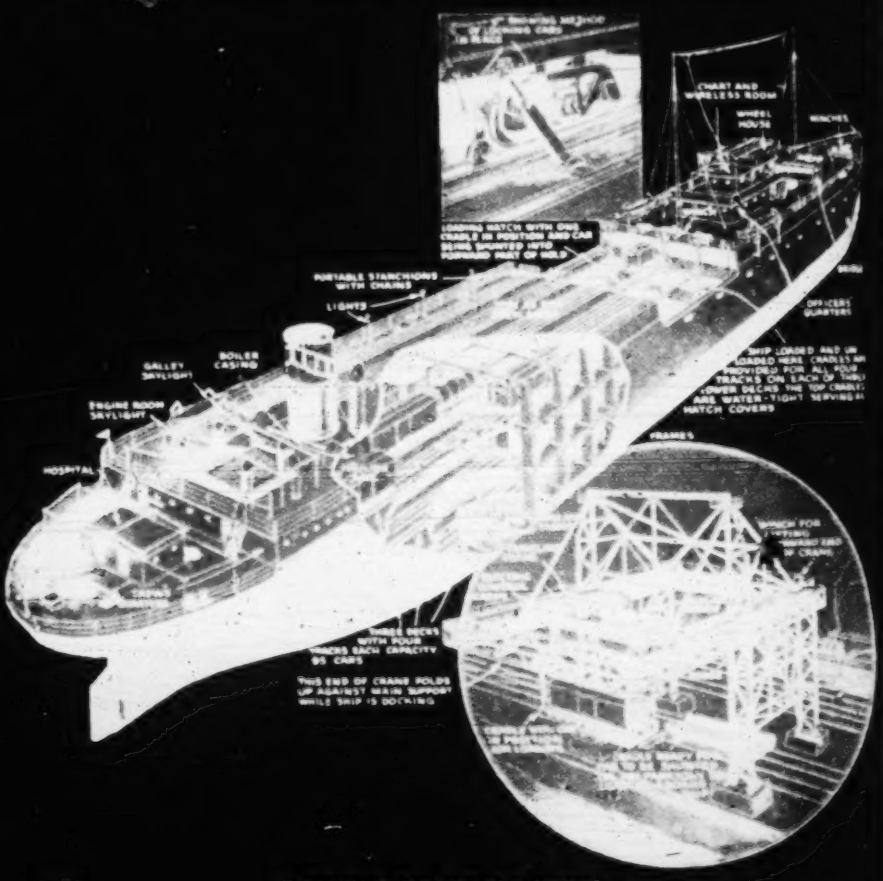


1070 With the cradle in place in the hatch, the car is drawn off on any desired deck.

1071. Making cars fast for the voyage with powerful jacks, chains, and clamps. A tank car is just being pulled off cradle in barge.



1072 Each of the three decks, as well as the superstructure carries four rows of tracks. This view is down through the hatch.



1073 Descriptive drawing of a Seatrain.

(b) Short Haul Traffic Restored

Profitable short haul traffic is restored to the railroads by Seatrain. In the past (and largely in the present as well), shippers within a short distance of the seaboard customarily transported their goods to the port in motor trucks. But now, when the goods are to move in a route served by Seatrain, shippers use the rails from origin, via Seatrain, to destination. Here is a former source of revenue restored to the railroads. In many instances, too, it is more profitable to the railroads to receive the local rates to a port than to receive the proportionate share of a long-haul through rate.

(c) Saving and Transshipment

A very significant advantage to the rail lines is the saving of expenses incurred in delivering to or receiving from water car-

riers. Railroads, according to American practice, must deliver goods at the ship's sling and, vice versa, receive the freight to be moved to the interior from ship's side. That means tugs, lighters, barges, trucks, handling, and time. The cost of interchange
1075 represents to the railroads a sufficiently well-known problem; every rail executive is aware of it. In not a few instances, indeed, the cost is prohibitive. And yet it is a problem which Seatrain easily solves.

Seatrain takes the shipments in the railroad freight cars, right off the railroad tracks. There is no lighterage, no trucking, no handling, no transshipment. The whole complicated and costly system of moving goods hither and yon across harbors from railroad terminal to steamship terminal or even across the steamship's docks is completely abolished. In the reduced cost of interchange between rail and water carriers, Seatrain creates a very considerable saving, amounting to between $10 and $50 per car—running into the hundreds of thousands of dollars per annum for the railroads.

(d) Use of Railroad Cars by Seatrain

One might suppose that the use of freight cars by Seatrain would deprive the railroads of needed equipment. A study of the many factors involved shows the opposite to be the case. Seatrain service helps the railroads in their car supply as well
1076 as other problems. As one example, it is common knowledge that the Eastern roads have many empty Southern and Southwestern cars in and around the Eastern ports without loads for their return. Without Seatrain, the railroads are obliged to haul these cars empty at considerable expense many hundreds of miles, paying $1.00 per day during the journey and wearing out the cars during the empty haul. With Seatrain service available, these cars may be used to handle the cargoes to be moved by Seatrain, thus saving the cost of empty haulage, the wear and tear on the cars and the $1.00 per day rental charge.

TERMINALS

The New Orleans terminal is at Belle Chasse, on the west bank of the Mississippi River within the customs and switching limits of the port of New Orleans. It is on the line of the New Orleans and Lower Coast Railway, which performs all switching to and from the city and the many important rail lines serving the second largest port in America.

At New York, the terminal is just above 14th Street, Hoboken, opposite 23rd Street, Manhattan, on the Hoboken

1077 Shore Railroad, which is owned by Seatrain Lines, Inc. This railroad extends the entire length of the Hoboken water front, serves all piers there, including the Shipping Board piers, and connects with all trunk line railroads.

At Havana the terminal is in the heart of the harbor at Hacondados. Cars destined for the city of Havana are switched by the United Railways of Havana either to private switches of the consignees, to team tracks, or to the bonded warehouses. Cars for the interior of Cuba are cleared through the Havana Customs or dispatched in bond to destination.

INTERCHANGE PRACTICE

Seatrain Lines, Inc., operates under the rules and regulations of the American Railway Association in the matter of per diem on railway-owned equipment, and of mileage allowance on privately owned equipment. Repairs to cars are also handled in accordance with the M. C. B. Rules of the Association, and freight claims are handled in accordance with the rules of the Freight Claim Division. Thus, it may be said that the function
1078 of Seatrain is essentially that of an intermediate rail carrier; it extends the rails out across the sea.

All cars handled by Seatrain Lines, Inc., are covered with marine insurance to the full value of the cars, as determined by the rules of valuation of the American Railway Association. The cost of this insurance is absorbed by Seatrain Lines, Inc.

INSURANCE

Cargo moved by Seatrain is not immune to the perils of the sea, but, as a matter of record, no cargo underwriter has ever received a claim from a shipper because of loss or damage to cargo carried by Seatrain. A record of over 6,000,000,000 ton-miles of transportation without any such claim is unique.

This performance has brought about a substantial reduction in cargo insurance rates. Policies can be issued on behalf of the shipper at rates far less than those prevailing for cargoes moving by ordinary vessels of the highest classification.

Although few shippers would forward goods without insurance, they realize that this affords only monetary protection. In-
1079 surance does not protect good will; it does not make good to the consignee in the event of damage, shortage, or nondelivery. It can't start the wheels of the factory again if the awaited part arrives broken or damaged. By Seatrain, however, this practical freedom from loss, damage, or spoilage which brought about a reduction in insurance rates, serves to protect the shippers' good will, the most valuable asset in any business.

When shipped by the ordinary type of vessel, each package is handled many times, and damage to the goods is a frequent occurrence. It may result from rain, careless stowing, rough handling, dropping, use of hooks, shifting of cargo at sea, fire, odors, or dampness, leaky pipes, sweating, and many other causes.

By Seatrain each commodity is carried in a sealed and separate car, and each car is accessible from both sides, top, and bottom. There is no handling; pilferage is almost impossible; and conditions are ideal to prevent fire. Four fire hydrants and four chemical extinguishers are located on each deck, and gas masks are readily available in case of need. Water pressure is always on the fire lines at sea. Day and night, watchmen patrol the open spaces between the cars, with time clocks to be punched at various stations throughout the vessel.

Cargo on Seatrain is never damaged by sweating or leaky pipes. The isolation in separate containers has the great advantage of preventing any contamination of one commodity by another through odor, absorption of moisture, etc.

Hundreds of unsolicited letters from enthusiastic shippers have been received by Seatrain. The following excerpts are typical examples:

Letter from a chemical company to Seatrain Lines:

"I have talked to you before about the bad order experience we have had on carload package freight which have been moved by the steamship lines to New York. The attached report indicates that your service, which avoids breaking bulk, is going to accomplish the results desired.

"In the past we have had much trouble because no matter how well we load the car at our plant the reloading at the Gulf ports has never been accomplished in a manner that would avoid damage to the shipment on the haul beyond the port. This is one good reason why your service is advantageous as compared with the break bulk lines, and we will continue to use it whenever possible."

Letter from a customer to a manufacturer:

"The car written of in your letter arrived in better condition than any so far received. Material was well packed in the car and properly braced. It certainly would be to mutual advantage to receive carload material as arrived in this car instead of the usual high rate of damaged packages."

It is natural that insurance on Seatrain cargoes should be materially lower than on cargoes in other carriers. Lower rates via Seatrain than via other lines can be obtained by all shippers from their own brokers or through any office of Seatrain Lines, Inc., which carries an open policy for the convenience of shippers with Lloyd's Underwriters, London.

METHOD OF LOADING

A car elevator at the terminal loads and discharges the ship. This elevator, or crane, has a lifting capacity of 125 tons. Under it there runs a double track from the classification yard. Directly beneath the crane the tracks are broken, and big platforms are fitted in these breaks. The platforms, or cradles, are movable bridges of the through girder type, and are fitted with rails so arranged that when in place they register exactly with the rails on the dock or in the vessel.

1082 When a car is to be loaded into the vessel, it is spotted on the platform or cradle by a switch engine, locked securely in place by means of strong rail clamps, and then the entire cradle, bearing the car, is lifted from its four corners and moved over the hatch of the ship. The crane then lowers away, and the cradle descends into one of four sets of guides forming shaftways, which hold it in position exactly in the manner of a platform in an elevator shaft. When the desired deck is reached, the cradle comes to rest upon mechanically operated supports, the wheel clamps are removed and the car is free to be moved either forward or aft on the rails laid on the decks of the vessel—all this in less time than it takes to tell about it.

The moving of the cars along the rails within the vessel itself is accomplished by a steam-driven car-hauling gear. The cradle is now empty, and, if desired, a car can be discharged from the same deck by reversing the operation of loading, a car intended for discharge being pulled on to the opposite end of the cradle.

When each deck has been loaded to capacity, the hatch-
1083 way itself is utilized. The four cradles in the hatchway at the Main Deck are provided with special water-tight flanges, thus making the hold of the vessel absolutely water tight. When a ship is loaded to its capacity of 100 cars, the distribution is as follows: 26 in the Hold, 26 on the 'Tween Deck, 30 on the Main Deck, and 18 on the Superstructure.

As soon as a car has been placed in its assigned position on the vessel, the wheels are locked by means of four rail-clamps to prevent rolling along the tracks. Powerful jacks, operating at an angle of about 45 degrees with the perpendicular, relieve the car springs from the tension normally imposed upon them by the weight of the car. Four stout chains and turn-buckles from the frame of the car then draw the car firmly down upon the jacks. Thus the car cannot move in any direction, and there can be no danger due to harmonic vibrations which might be set up in the springs, as the jacks and chains prevent any movement in the springs.

Why Seatrain shipment is faster, cheaper, and safer than the old kind of shipment is obvious. Seatrain eliminates pack-
1084 ing, stowing, slings, hooks, ropes, covered piers, lighters, barges, trucks, and all the costly, inefficient, time-consuming operations of the old method. Seatrain handles cars at the rate of 20 an hour, or 100 cars out and 100 cars loaded back in a period of ten hours. Ordinary vessels require six days to handle an equal amount of freight. In addition, Seatrain vessels are the fastest freighters afloat.

Dimensions of "Seatrain New York" and "Seatrain Havana"

Length	478 feet
Beam	63½ feet
Loaded Draft	22 feet
Capacity	100 cars
Power	8800 S. H. P.
Speed	16½ knots
Hull	Isherwood, complete double skin
Machinery	Water tube boilers, geared turbines, electric auxiliaries
Steam pressure	400 lbs., 700 degrees F.

1085 OFFICES AND AGENTS OF SEATRAIN LINES, INC.

Requests for further information concerning this Service, or inquiries regarding rates and bookings, should be directed to the nearest representative of Seatrain Lines, Inc., as listed below:

New York, Seatrain Lines, Inc., 39 Broadway, New York, N. Y.

New Orleans, Seatrain Lines, Inc., Hibernia Bank Building, New Orleans, La.

Havana, Seatrain Lines, Inc., 75 Obispo, Havana, Cuba.

St. Louis, Seatrain Lines, Inc., Railway Exchange Building, St. Louis, Mo.

Dallas, Seatrain Lines, Inc., Republic Bank Building, Dallas, Texas; Cyrus A. Anderson, Pacific Coast Agent, 149 California Street, San Francisco, Calif.; Robert G. Budrow, Commercial Agent, 820 Central Building, Los Angeles, Calif.;
1086 Donald R. Maxwell, Commercial Agent, White Building, Seattle, Wash.

Dichmann Wright & Pugh, Inc., Eastern Interior Agents, Oliver Building, Pittsburgh, Pa.; Bourse Building, Philadelphia, Pa.; Keyser Building, Baltimore, Md.; Citizens Bank Building, Norfolk, Va.

Stone's Express, Inc., New England Agents, 412 Broad Street, Lynn, Mass.

R. W. Miller, Traffic Representative, 1329 Huntington Turnpike, Bridgeport, Conn.

Dawnie Steamship Corporation, Agents, 12 Plaza, Albany, N. Y.

M. D. Warren, District Freight Agent, 335 Broad Street Bank Bldg., Trenton, N. J.

E. H. Mundy & Co., Ltd., General European Agents, 708 Royal Liver Building, Liverpool, England.

Messrs. J. & M. Gordon, Agents, 11 Creechurch Lane, London, E. C. 3, England.

John Weatherill & Sons, Agents, D'Olier Chambers, Dublin, Ireland.

Prentice Service & Henderson, Agents, 175 West George Street, Glasgow, Scotland.

Stephens & Walkington, Agents, 8 Victoria Street, Belfast, Ireland.

1087 Messrs. Charles E. Turnbull & Jacobs, General Agents, Alsterthor 21, Hamburg, Germany.

Kennedy Hunter & Company, General Agents, 2 Quai Orfebvre, Antwerp, Belgium.

Phs. Van Ommeren, Scheepvaartbedrijf, General Agents, Westerdaan 10, Posthus 845, Rotterdam, Holland.

Herm. Person & Stockwell, Ltd., General Agents, 12 Rue de Nancy, Paris, France.

Arnold de Champs, Agent, 7 Kungsgatan, Stockholm, Sweden.

1088 *Exhibit 21*

AUGUST 15, 1925.

AMERICAN RAILWAY ASSOCIATION,
30 Vesey Street,
New York City.

GENTLEMEN: Our Company will start a service between Belle Chasse, La., and Havana, Cuba, in December of this year. Belle Chasse is a point on the New Orleans and Lower Coast Railroad, a few miles South of New Orleans. Our service will be similar to that of the Florida East Coast Car Ferry service from Key West to Havana.

We will serve an intermediate car carrier between the New Orleans and Lower Coast Railroad, on the one hand, and the United Railways of Havana on the other hand.

Our service is, of course, a steamship service, and we will operate under the United States Shipping Board jurisdiction.

As in the case of the Florida East Coast Car Ferry Co., however, we will take American cars to Cuba, and we wish to subscribe to the code of Per Diem rules and interpretations governing same for the use of freight cars.

Please advise us what action is to be taken by us in this matter.

Yours very truly,

————————, *Vice President.*

JH-AM.

1089 *Exhibit 22*

(Letterhead of)

AMERICAN RAILWAY ASSOCIATION

NEW YORK, *August 17, 1928.*

MR. JOSEPH HODGSON,
Vice President, Over-Seas Railways, Inc.,
11 Broadway, New York, N. Y.

DEAR SIR: Your letter of August 15th, making application to become a subscriber to the Car Service and Per Diem Agreement, has been received.

The application will be placed in the proper channels, and I will communicate with you further relative thereto a little later.

Yours very truly,

(Signed) H. J. FORSTER,
Secretary.

EB.

1090 *Exhibit 23*

(Letterhead of)

AMERICAN RAILWAY ASSOCIATION
CAR SERVICE DIVISION

Washington, D. C.

R. W. Edwards, District Manager, Birmingham, Age-Herald Building

BIRMINGHAM, ALA., *March 22nd, 1929.*

MR. CLAUD DEVEZE,
Secretary, Over-seas Railways, Inc.,
1425 Hibernia Bank Building,
New Orleans, La.

DEAR MR. DEVEZE: Yours 20th:

My report to Washington was made on February 19th and covered a lot of matters connected with the Florida East Coast and P. & O. lines in addition to the Overseas operations. Excerpts therefrom of interest to your Company are enclosed and I hope will afford you the information desired. The report, of course, is confidential and not to be quoted publicly.

Mr. Rodriguez and his staff in Havana were very pleasant and afforded me every assistance in my investigations of your operation.

If I can be of further service, please let me know.

Yours very truly,

(Signed) R. W. EDWARDS.

1091 EXCERPTS FROM REPORT OF R. W. EDWARDS, DISTRICT MANAGER, TO MR. M. J. GORMLEY, CHAIRMAN, CAR SERVICE DIVISION, AMERICAN RAILWAY ASSOCIATION, WASHINGTON, FEBRUARY 19, 1929

* * * * * * *

In Havana I examined the P. & O. and Overseas terminals, talked with ranking representatives of both concerns, and also interviewed Mr. T. J. Humbert, who, with the title of Traffic Manager, is actually General Superintendent of the United Railways with the following result:

The Seatrain arrived at Havana from New Orleans Monday night, February 11th, on its fifth trip and left at midnight Tuesday returning. On these five trips perhaps 15 to 20% of the traffic has been business formerly handled by the F. E. C. and the remainder by the regular steamship lines.

Business of the Seatrain is increasing on each trip and they have had to move empties (boxcars) from New Orleans to Havana for return loading. The traffic from Cuba via both routes consists largely of refined and raw sugar, bones, tankage, and similar fertilizer—the refined sugar comes entirely from the Hershey plant above mentioned, the raw sugars come from various mills in the interior and are moved to refineries located at New Orleans and points in Louisiana, most of which has heretofore moved by ordinary steamship. Any kind of box will do for raw sugar and the Overseas people are getting a pretty good tonnage of it at present. This sugar is handled by rail from the docks at Belle Chasse to destinations in Louisiana, including New Orleans.

The United Railways of Havana own the ground and all the facilities used by the P. & O. and Overseas lines except the actual docks at which the boats land and do all the switching and freight handling for both companies. They have a belt line around Havana and reach all industries in that city.

Mr. Humbert of the United Railways is somewhat disturbed at the cross haul of empty box made necessary by respecting the home route as between the Overseas and the P. & O. and is also discussing with the Overseas people the question of per diem while empties are in his possession awaiting prospective loading and also while loads are at Havana awaiting arrival of the ship. His Company is quite willing to do business with the Overseas people on the same basis as the P. & O.; in other words, they are open for all the traffic they can get.

I found the switching service of the United Railways to be prompt and satisfactory to both the P. & O. and Overseas.

I went on board the Seatrain Tuesday, February 12th, and watched them unloading—also talked with the Captain of the boat and with the United Railways Car Inspector located at the
1092 dock. Captain Jenkins was enthusiastic about the opera-

tion of his ship, the handling of the cars in and out of the boat and the prospects for future business. They made some slight alterations in the interior structure of the boat to afford better clearances for the cars. The Car Inspector says the equipment is arriving in first-class shape and without any signs of damage except for an occasional door hasp or something of that kind on account of the type of clearance but this has been overcome and he can see no objection so far as the condition of the cars is concerned to their being handled by this ferry. The General Agent of the Overseas, Mr. Rodriguez, also is naturally enthusiastic over the enterprise and quoted some fast time made between Chicago and Havana recently. This man was trained by the F. E. C. and P. & O. Companies and left them to go with the Overseas Company so he is thoroughly familiar with the Havana-Key West-F. E. C. operation and service.

* * * * * * *

The process of handling cars in and out of the Seatrain and of storing them is extremely simple and at Havana they were unloading cars at the rate of one every five minutes while I was there and the Captain claims he is doing equally as well at Belle Chasse now. They are preparing to handle refrigerator cars under ice and also have a thorough system of ventilation in the body of the ship. (See note.)

Summing up, the Overseas ferry service is a going concern, thoroughly organized and efficient with every prospect of continuing and perhaps expanding their facilities; it looks as though they have developed a new means of transportation which appeals to the shippers and is likely to expand considerably—they have ample capital behind them. If this takes place, there will be a number of new factors with regard to per diem, car mileage, etc., that will have to be worked out, one point will be whether private lines' cars will draw the same rate per mile while riding on the car ferry as they would when moving over the railroad; another would be in the event the New York-California line is established, the eastern roads could get rid of a lot of Pacific Coast ownership box by loading them up in the east via the ferry. Another point would be the per diem while cars were awaiting the boat in port which I presume would be the same as the present practice with relation to the steamship lines.

* * * * * * *

Enclosed are two copies of a pamphlet describing the ship and its operation.

Note: A detailed description of the operation involved in handling cars between the Seatrain and the dock at Bell Chasse and the Switching service connected therewith was sent Chairman Gormley by Mr. Edwards January 15th, 1929.)

1093 *Exhibit 24*

(Letterhead of)

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building, 17th and H Streets NW.

File 394-2

WASHINGTON, D. C., *September 20, 1932.*

DEAR MR. BRUSH: You will recall at our conversation it was suggested that it would be necessary as soon as your operations begin, and in connection with the possibility of cars moving southbound through New York subsequently clearing through New Orleans, for the car accounting forces of the Hoboken Manufacturers and the New Orleans & Lower Coast to exchange interchange information in order that the records of both railroads and private lines, whose cars were involved, may be fully informed as to the movement.

It is assumed that you will protect this in due time, if you have not already done so.

Yours very truly,

(Signed) W. C. KENDALL,
Manager.

MR. GRAHAM M. BRUSH,
President, Hoboken Manufacturers Railroad Co.,
39 Broadway, New York, N. Y.

1094 *Exhibit 25*

Agreement made this 15th day of November 1932 between Seatrain Lines, Inc., a corporation organized and existing under and pursuant to the laws of the State of Delaware (hereinafter referred to as Seatrain), and Hoboken Manufacturers Railroad Company, a corporation organized and existing under and pursuant to the laws of the State of New Jersey (hereinafter referred to as Railroad).

Witnesseth:

Whereas Seatrain is the owner of cargo vessels which will dock at the berth at Hoboken leased by it from Railroad; and

Whereas Seatrain will deliver to Railroad freight loaded in railroad cars and also empty railroad cars and may desire to receive from Railroad freight loaded in railroad cars; and

Whereas Railroad is ready and willing to deliver railroad cars containing freight to Seatrain, provided Seatrain will assume responsibility therefor and will agree to handle such cars only in accordance with the rules of the American Railway Association and to save Railroad harmless in all respects with reference to said cars, and provided also Seatrain is willing to re-
1695 ceive empty cars from Railroad which Railroad may be obligated under the rules of the American Railway Association to deliver to it; and

Whereas the parties hereto on October 1, 1932, entered into an oral agreement with respect to the handling and settlement for said railroad cars and desire to embody the terms of said oral agreement in a written contract more fully setting forth the terms thereof and superseding said oral contract:

Now, therefore, in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. Railroad agrees to receive from Seatrain all railroad cars of whatever ownership which Seatrain may have for delivery to it and as between it and Seatrain to be responsible for said cars, to pay to the owner thereof all per diem charges accruing on said cars in accordance with the rules and regulations of the American Railway Association or all mileage charges accruing under any arrangement with the owners of said cars for the use thereof, and generally to be responsible for the cars from the time the cars are removed from the cradle of the car elevator alongside Seatrain's vessels so long as said cars are upon the rails of Railroad.

1696 2. Seatrain agrees to be responsible to Railroad for all cars delivered to it by Railroad from the time such cars are placed upon the cradle of the car elevator alongside its ships until the return of such cars to Railroad or their delivery to the New Orleans & Lower Coast Railroad Company and to save Railroad harmless from any and all claims for loss, damage, or injury to said cars or to freight contained therein, agreeing during said period to keep the cars and their contents while in its possession fully insured to the satisfaction and for the account of Railroad against all marine risks, to handle such cars only in accordance with the M. C. B. Rules with respect to their physical handling, to reimburse Railroad for all per diem charges accruing on said cars during said period in accordance with the rules and regulations of the American Railway Association or all rental or mileage charges accruing on said cars under any arrangement between Railroad and the owners of said cars for the use thereof and with respect to the routing and use of cars, their maintenance, and settlement of claims with respect thereto to be governed by and con-

form in all respects to the rules and regulations of the American Railway Association relating thereto.

3. Seatrain agrees to receive from Railroad empty cars
1097 which Railroad may be obligated to return to it under the rules and regulations of the American Railway Association or under the terms of any contract or agreement with the owners of said cars and to be responsible for them in accordance with the provisions of Paragraph 2 hereof.

4. This contract shall be effective at once but shall be retroactive to October 1, 1932, with respect to the settlement between the parties hereto of per diem charges and of mileage charges with respect to cars heretofore interchanged between them.

5. This contract shall inure to and be binding upon the successors and assigns of the parties hereto and shall continue in effect for a period of one year from the first day of October 1932 and thereafter until cancelled by thirty days' notice in writing given by either party to the other.

In Witness Whereof the parties have caused this agreement to be executed by their duly authorized officers the day and year first above named.

SEATRAIN LINES, INC.,
By JOSEPH HOGDSON.
HOBOKEN MANUFACTURERS RAILROAD COMPANY.
By W. J. MATHEY.

1098 *Exhibit 26*

(Letterhead of)

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building, 17th and H Streets NW.

File 594-2

WASHINGTON, D. C. *October 27, 1931.*

DEAR MR. BRUSH: Acknowledging yours of the 26th:

I am sorry that I did not know what you had in mind yesterday for I was in New York all day until 3:30 and might very well have spent some time with you.

In order to explain the position of the Car Service Division in connection with the new rules to which you have reference, may I say that we have nothing to do with the making of rules for the handling of cars as between railroads. Such rules are formulated through committees of the Transportation Division and submitted, after approval by the General Committee of the Transportation Division, to member roads for letter ballot, which is in

accordance with the regulations and by-laws of the American Railway Association.

Rules concerning per diem generally originate with the Car Records Committee and rules concerning car handling originate with the Car Service Committee.

Upon request of member roads the Car Service Committee was convened in New York on October 17 to consider certain phases of car handling which had developed by reason of the operation of the Seatrain in handling cars between New York and New Orleans. As a result of that meeting a new rule, to be known as Car Service Rule 4, was formulated and approved by the Committee for submission to the General Committee for the latter's consideration. This proposed new rule reads as follows:

"Cars of railroad ownerships must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owners filed with the Car Service Division."

At the present moment this subject is in the hands of the General Committee of the Transportation Division for their action.

There is no other rule under consideration so far as I know. Presumably what you have in mind refers to a proposed order which was before the Committee to be issued by the Car Service Division under the provisions of Per Diem Rule 19 (b), 1939 which gives to the Car Service Division authority to permit departures from Car Service Rules 1 to 5, inclusive. The order which was before the Committee for consideration was one designed to protect roads entering New York and New Orleans from certain inequities in empty mileage and per diem which might be brought about by handling of cars between New Orleans and New York by Seatrain. For example, assume that some of the New Haven cars which went south with the machinery in your first sailing would be loaded by any of the New Orleans roads to a point on the Erie, Pennsylvania, or New York Central just east of, or outside of switching districts on these various lines at St. Louis or Chicago. Under the rules the road would be obliged to haul such car to their connection with the New Haven. Such a move might be unfair individually to the roads referred to.

Similarly if a Missouri Pacific car is loaded to Newark, for example, via Seatrain, the Pennsylvania would be obliged to haul that car empty from Newark to St. Louis. The order as proposed by the Car Service Division was to make it optional with the roads at New York and New Orleans, permitting them to return car via service route (Seatrain Lines) if such a move was the economical thing for them to do under the circumstances. It is not practical to go into all phases of these orders within the scope of this letter, but I think I can convince you of the fairness of the action taken in case you wish to discuss it further.

Upon further consideration it has been decided by the Car Service Division that we should separate the proposed order into two parts, one applicable at New York and one at New Orleans. The New York order is being issued as of today and I am attaching a copy of it for your information.

So far as meeting you in New York is concerned, I would be very glad indeed to go to New York at any time for this purpose. I have no appointments there in the near future, but if you will fix a date when you would like to have me meet you in your office I can probably meet your convenience.

As to A. R. A. representatives obtaining certain information regarding Seatrain affairs, this is to an extent true and I am glad of an opportunity to be frank about it. We wanted to know the initials of the cars (and their identification by number is also necessary) which were handled by Seatrain in both directions and whether same are loaded or empty, and for the purpose of governing us in any orders such as are referred to above which it might be necessary for the Car Service Division to issue. We are not interested, and have no purpose in being interested, in the contents of the cars or the nature of the traffic which you are handling. I think you will agree, therefore, that the information which we desired, and which I have described above, is not of any use to your connections for traffic purposes. With this understanding I assume that there are no objections to our having such records on such occasions as we may find it necessary to ask your people for them. When you mention "headquarters" I am not sure whether you mean 39 Broadway or some of your offices at the piers. If you will make this clear we will be governed accordingly.

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I am sure Mr. Gormley will be very glad indeed to sit down with you in New York for such time as you wish to discuss membership in the American Railway Association. I might suggest, however, that you may in the meantime find it advisable to talk with Mr. H. J. Forster, Secretary-Treasurer of the American Railway Association, whose office is at 30 Vesey Street, New York. All details of membership in the Association are handled through Mr. Forster. It is my understanding of the By-laws of the Association that Seatrain Lines would not be eligible to membership.

I will bring your suggestion to the attention of Mr. Gormley and you may depend upon his meeting you in New York some time in the near future.

Yours very truly,

(Signed) W. C. KENDALL,
Manager.

MR. GRAHAM M. BRUSH.
President, Seatrain Lines, Inc.,
39 Broadway, New York, N. Y.

1101 *Exhibit 28*

(Copy)

UNITED STATES SHIPPING BOARD

OFFICE OF THE CHAIRMAN

WASHINGTON, *October 4, 1932.*

D. T. LAWRENCE, Esquire,
Chairman, Trunk Line Association,
143 Liberty Street, New York, N. Y.

DEAR SIR: This is to acknowledge your letter of September 29, 1932, with reference to the application of the Seatrain Lines, Inc., before this Board and the hearing which is scheduled to be had before the Board on Wednesday, October 5, 1932.

Section 38 of the Loan Agreements between the Seatrain Lines, Inc., and the Shipping Board reads as follows:

"SEC. 38. The vessel will be operated in maintaining service on lines between New Orleans, Louisiana, and Havana, Cuba, and in other exclusive foreign service between Atlantic and or Gulf ports and Cuba, or in such other service or services as the Board may by resolution hereafter authorize, and not otherwise."

This provision of the Loan Agreements has been interpreted by the Shipping Board as meaning that the Seatrain Lines, Inc., are deprived of the privilege of engaging in coastwise trade unless the Shipping Board should by resolution so authorize. In the Board's view, should such authority not be granted by the Board, and none the less, the Seatrain Lines, Inc., should carry on coastwise trade, the terms of the said Loan Agreements and of the preferred mortgages which are put upon the vessels would be violated and a default would occur which would make it necessary for the Board to exercise its rights under the preferred mortgages by foreclosure or otherwise. It was in view of this situation that the Seatrain Lines, Inc., are making their petition to the Board, and the Shipping Board intends to hear and consider this question only.

We note in your letter of September 29, 1932, that it is your view that no hearing should be held upon the said application of the Seatrain Lines, Inc., until the Interstate Commerce Commission has determined the questions arising under the petition dated September 24, 1932, and that a hearing upon the said application of the Seatrain Lines, Inc., prior to such determination by the Interstate Commerce Commission would prove a vain and useless proceeding.

On the contrary, the Board's present view is that the carrying on of coastwise trade by the Seatrain Lines, Inc., would not necessarily bring the Seatrain Lines, Inc., within the jurisdiction of the

Interstate Commerce Commission, and even though the Interstate Commerce Commission might determine that it had exclusive jurisdiction to hear and determine the matters referred to in your letter that would not deprive the Shipping Board of its authority to vary the terms of the Loan Agreements and of the preferred mortgages on the vessels with reference to their operation in coastwise trade within the purview of Section 38 of the Loan Agreements and the preferred mortgages on the vessels.

Very truly yours,

(Signed) S. S. SANBERG,
Vice Chairman.

By Direction of the Board.

1102 *Exhibit 29*

I. C. C. Docket 25878—Witness, R. J. McDermott

Statement of cars delivered to and received from N. O. & T. C. by Southern Lines, Inc., January, April, July, October, 1932, and January, April, July, September, 1933

RECAPITULATION

	Received loaded		Received empty		Total received	
	R. R. owned	Others	R. R. owned	Others	Loaded	Empty
January 1932	54	21	121	32	75	153
April 1932	258	18	38	58	276	96
July 1932	110	30	14	48	140	62
October	112	17	46	28	129	74
Total	534	86	219	191	620	410
January 1933	100	14	91	45	114	136
April 1933	246	8	52	33	254	85
July 1933	87	43	25	24	130	49
September 1933	172	33	14	13	205	27
Total	1,083	98	184	115	1,183	299

	Delivered loaded		Delivered empty		Total delivered	
	R. R. owned	Others	R. R. owned	Others	Loaded	Empty
January 1932	159	44	36	7	203	43
April 1932	176	42	84	25	218	109
July 1932	84	30	83	19	114	102
October 1932	118	32	90	12	150	102
Total	537	148	293	63	685	356
January 1933	254	48	59	26	302	85
April 1933	89	33	31	13	122	44
July 1933	258	33	183	18	291	201
September 1933	294	81	114	7	375	121
Total	1,030	195	387	64	1,225	451

Statement of cars delivered to and received from N. O. & L. C. by Seatrain Lines, Inc., January, April, July, October, 1932, and January, April, July September, 1933—Continued

1932

	Received loaded		Received empty		Total received	
	R. R. owned	Others	R. R. owned	Others	Loaded	Empty
Jan. 4, 1932	21	2	42	9	23	51
Jan. 11, 1932	14	14	13	7	28	20
Jan. 18, 1932	9	4	34	7	13	41
Jan. 25, 1932	10	1	27	9	11	36
Total	54	21	121	32	75	153
Apr. 5, 1932	58	2	13	20	60	33
Apr. 11, 1932	41	2	8	15	43	23
Apr. 18, 1932	80	2	1	11	82	12
Apr. 25, 1932	59	12	16	7	71	23
Total	238	18	38	53	255	91
July 4, 1932	13	5	6	14	18	20
July 11, 1932	24	4	20		28	20
July 18, 1932	22	5	7	10	27	17
July 25, 1932	56	6	1	4	62	5
Total	115	20	14	48	135	62
Oct. 4, 1932	10	9	9	8	19	17
Oct. 11, 1932	51	5	13	25	56	38
Oct. 18, 1932	42	2	1	3	44	4
Oct. 25, 1932	14	1	23	22	15	45
Total	117	17	46	58	134	104

1933

Jan. 4, 1933	53	2	18	8	55	26
Jan. 11, 1933	23	4	14	11	27	25
Jan. 18, 1933	35	6	19	11	41	30
Jan. 25, 1933	9	2	40	15	11	55
Total	100	14	91	45	114	136
Apr. 4, 1933	58	1	9	8	59	17
Apr. 11, 1933	48	1	7	9	49	16
Apr. 18, 1933	83	3	7	7	86	14
Apr. 25, 1933	57	3	29	11	60	40
Total	246	8	52	35	254	87
July 4, 1933	91	6		3	97	3
July 11, 1933	74	12	10	9	86	19
July 18, 1933	84	13		3	97	3
July 25, 1933	88	10		1	98	1
July 29, 1933	30	2	17	57	32	74
Total	367	43	27	73	410	100
Sept. 7, 1933	66	11		2	81	2
Sept. 12, 1933	86	8		4	94	4
Sept. 21, 1933	45	3	11	29	48	40
Sept. 20, 1933	83	5	3	3	88	6
Sept. 27, 1933	89	6		5	95	5
Total	372	33	14	43	405	57

Statement of cars delivered to and received from N. O. & L. C. by Southern Lines, Inc., January, April, July, October, 1932, and January, April, July, September, 1933—Continued

1104

1932

	Delivered loaded		Delivered empty		Total delivered	
	L. R. owned	Others	L. R. owned	Others	Loaded	Empty
Jan. 5, 1932	41	3		7	44	7
Jan. 12, 1932	26	7			33	
Jan. 19, 1932	45	17	26		62	26
Jan. 26, 1932	47	17			64	
Total	159	44	26	7	203	33
Apr. 5, 1932	52	8	22		60	22
Apr. 12, 1932	47	16	15	20	53	35
Apr. 19, 1932	66	11	44		47	44
Apr. 26, 1932	51	7	13	5	58	18
Total	176	42	94	25	218	119
July 5, 1932	16	4		3	20	3
July 12, 1932	14	5	15	4	20	19
July 19, 1932	24	7	38	5	31	43
July 26, 1932	30	14	30	7	44	37
Total	84	30	83	19	114	102
Oct. 14, 1932	65	20	20	13	85	33
Oct. 20, 1932	26	14	36	1	40	37
Oct. 27, 1932	27	18	43	2	45	45
Total	118	52	99	16	170	115

1933

Jan. 5, 1933	56	21	4		77	4
Jan. 12, 1933	63	23		10	86	10
Jan. 19, 1933	70	8	11	15	78	26
Jan. 26, 1933	65	6	24		71	24
Total	254	58	39	25	312	64
Apr. 5, 1933	79	12	3		91	3
Apr. 12, 1933	82	7	10		89	10
Apr. 19, 1933	66	20	17	1	86	18
Apr. 26, 1933	73	12	3	12	85	15
Total	300	51	33	13	351	46
July 5, 1933	62	14	19	1	76	20
July 12, 1933	54	15	21		69	21
July 19, 1933	63	12	22		75	22
July 25, 1933	7	5	16	15	12	31
July 29, 1933	50	6	18	2	56	20
Total	236	52	103	18	288	123
Sept. 7, 1933	16	13	8		74	8
Sept. 12, 1933	8	10	16		18	16
Sept. 16, 1933	62	2	22	4	64	26
Sept. 21, 1933	53	8	11	1	61	12
Sept. 27, 1933	54	18	10	2	72	12
Total	238	51	114	7	289	121

1105 *Exhibit 30*

I. C. C. Docket 25878—Witness, R. J. McDermott

Amounts collected from Seatrain Lines by New Orleans Lower Coast for Per Diem paid on Railroad Owned Cars All Ownerships

	Amount		Amount
January 1932	$2,931.00	April 1933	$3,810.00
April 1932	4,096.00	July 1933	4,267.00
July 1932	1,511.00	August 1933	3,718.00
October 1932	2,781.00		
January 1933	2,748.00	Total	25,592.00

1106 *Exhibit 31*

CONTRACT BETWEEN SEATRAIN AND NEW ORLEANS & LOWER COAST RAILROAD COMPANY AS TO USE OF EQUIPMENT

The following are excerpts from the contract between the parties, other portions of which deal with other matters:

"This agreement, made and entered into in duplicate January 11th, 1929, by and between the New Orleans Lower Coast Railroad Company, a corporation incorporated under the laws of the State of Louisiana, hereinafter called the party of the first part, and Over-Seas Railways Inc., a corporation organized under the laws of the State of Delaware, hereinafter called the party of the second part.

"Witnesseth: That, for and in consideration of the sum of One Dollar ($1.00) herein paid by each of the parties hereto to the other, and the mutual considerations set forth in this agreement, the parties hereto agree as follows:

* * * * *

"10. The party of the first part agrees to cooperate with the party of the second part by receiving and delivering freight cars from and to the loading gear of said vessel or vessels at such times as the party of the second part may be loading and discharging said vessel or vessels and in such manner that the loading and discharging of said vessel or vessels will not be unreasonably delayed by the operations of the party of the first part in receiving and delivering cars from and to said loading gear. It is understood and agreed by the parties hereto that the point of interchange shall be at the loading gear of the vessel located at said berth, but when mutually agreed the point of interchange may be located at some other point. The party of the second part agrees to be responsible for all equipment delivered to it by the party of the first part until returned to said party, the M. C. B. rules governing the physical interchange, and the party of the second part shall pay Per Diem as determined in accordance

with American Railway Association Code of Per Diem Rules in all respects except that on cars delivered by the Party of the first part the party of the second part shall be responsible for Per Diem from 12:01 a. m. of the day on which the vessel is
1107 scheduled for loading said cars, and the party of the first part shall assume the per diem from 12:01 a. m. on the date of return of said cars to the party of the first part.

* * * * *

"14. The party of the second part agrees to cover all cars in its possession with full insurance for all marine risks to the satisfaction of and for account of the party of the first part.

"15. The party of the second part agrees to pay whatever mileage it may arrange with car owners for all cars from the time cars are received until said cars are returned to the party of the first part.

* * * * *

"17. The party of the first part agrees to supply, as far as may reasonably be possible, suitable railroad owned cars for southbound and/or northbound movements at such times as the party of the second part has freight offering but no equipment available for said movement."

1108 *Exhibit 32*

I. C. C. Docket 25878—Witness, R. J. McDermott

NEW ORLEANS & LOWER COAST RAILROAD

Statement of defective cars received from Seatrain Lines, Inc., period January 1, 1929, to October 27, 1933, inclusive

(Inauguration of service to date)

SUMMARY

Sheet No.	Number defective cars	Seatrain Lines defect	United Railways Havana defect	Sheet No..	Number defective cars	Seatrain Lines defect	United Railways Havana defect
1	29	29		9	3		3
2	21	21		10	24	24	
3	9	9		11	1		1
4	7		7	12	22	22	
5	25	25		13	7	7	
6	5	5					
7	5		5	Total	177	161	16
8	19	19					

Total cars received	11,344—loads
From Seatrain Lines	6,399—empties
During above period	17,743—cars
Per Cent damaged	.998

Exhibit 33

SOUTHWEST DISTRICT

	Auto-Box			Flat			Coal			Stock			Refrigerators		
	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933
B. R. I.	60	26	183	64	60	.....	50	52	.....	30	.....	.....	.....	.....	.....
Ft. S. & W.	.....	.....	.....	.....	.....	.....	50	.....	.....	.....	.....	.....	.....	.....	.....
G. C. Lines	200	300	100	.....	70	20	.....	100	.....	50	20	.....	.....	.....	.....
I.-G. N.	200	500	125	.....	40	20	140	70	.....	.....	20	.....	.....	.....	.....
K. C. S.	200	150	.....	125	50	25	100	.....	.....	125	150	.....	.....	.....	.....
K. O. & G.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
La. & Ark.	29	58	.....	13	.....	.....	18	.....	.....	.....	.....	.....	.....	.....	.....
M. V.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
M. & N. A.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
M-K-T Lines	1,486	416	.....	.....	.....	103	.....	.....	.....	.....	.....	.....	.....	.....	.....
Mo. Pac.	2,451	2,850	300	397	225	.....	1,104	1,200	50	655	.....	100	.....	.....	.....
S. P. in T. & La.	2,839	3,503	1,174	1,018	874	645	.....	348	629	1,095	900	594	.....	.....	.....
St. L. & S. F.	7,579	6,812	6,557	970	789	824	2,214	1,897	1,717	1,231	964	978	210	132	123
St. L. S. W.	1,063	850	531	.....	50	21	.....	.....	.....	75	36	20	.....	.....	.....
Texas & Pacific	185	.....	.....	41	.....	.....	85	237	468	257	325	171	.....	.....	.....
Eastern Dist.	87,550	87,897	59,490	4,198	4,382	2,849	53,375	49,709	26,184	2,171	1,437	701	421	324	330
Allegheny Dist.	43,138	54,273	28,818	1,553	1,469	951	92,836	89,460	39,201	1,506	1,433	655	1	43	86
Pocahontas Dist.	309	3,578	2,122	.....	212	113	14,317	17,770	11,515	534	659	350	.....	.....	.....
Southern Dist.	37,704	38,306	15,584	3,957	3,958	2,343	22,248	16,624	7,014	1,578	1,406	998	1,786	1,746	874
Northwestern Dist.	44,451	52,689	48,845	3,928	6,323	6,035	4,502	11,670	9,524	3,385	5,751	4,400	658	1,206	82
Central Western	63,921	71,956	50,172	5,714	5,362	4,253	20,044	21,898	10,599	11,889	12,238	11,696	8,354	8,383	8,273
Southwestern	16,291	15,465	8,970	2,628	2,158	1,658	3,751	3,904	2,883	3,498	2,415	1,863	210	132	123
Total Western	124,663	140,110	116,987	12,270	13,843	11,946	28,277	37,472	23,006	18,762	20,404	17,959	9,222	9,721	8,478
Grand total	293,424	324,254	223,001	21,978	23,864	18,202	211,053	211,035	106,920	24,551	25,339	20,633	11,430	11,834	9,768

These figures compiled from C8-44-A report made by American Railway Association Car Service Division semimonthly.

Exhibit 33—Continued

EASTERN DISTRICT

	Auto-Box			Flat			Coal			Stock			Refrigerators		
	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933
Group A															
B. & Albany		170	140		30	10		185	155						
B. & Maine	1,092	1,262	809	38	39	28	716	804	77	7	5	10	76	100	75
Maine Cent	529	721	133	193	222	122	413	381	49	24	16	11			
N. Y. N. H. & H	3,960	4,319	2,865	414	235	85	379	682	281						
Group B															
B. R. & P.[1]	300						2,690								
D. & H	967	1,037	846	10	5	18	3,078	4,445	2,760	19	49	56			
D. L. & W	2,869	3,519	2,452				1,843	2,406	1,254	8	33	26	343	222	254
Erie	7,187	8,297	3,595	245	377	186	2,029	2,246	917			33			
Lehigh Valley	240	115						257							
N. Y. C	23,902	20,817	8,445	2,070	2,275	1,487	11,149	11,471	1,409	644	221	72			
Group C															
C. C. C. & St. L	5,499	5,506	5,003	283	190	137	10,540	7,862	2,629	971	661	104			
Michigan Cent	12,905	14,151	15,091	18	275	234	5,020	2,164	1,100						
N. Y. C. & St. L	6,357	5,880	1,985	131	99	9	847	1,134	435	389	340	265			
P. M	4,986	5,394	4,438		12	20		19							
P. L. E	5,317	4,836	3,659	90	74	79	7,979	7,665	9,072						
Wabash	7,175	6,894	5,105	103			380	490	112	48	51				

[1] Figures for 1932 and 1933 included in B. & O.

ALLEGHENY DISTRICT

B. & O	14,835	17,415	8,456	904	802	419	10,173	16,511	1,364	739	643	273			
B. & L. E	589	370					2,127	4,145							
C. R. R. of N. J		1,230	219	41	76	39	1,526	268						8	
Penna. System	21,177	31,743	19,219	495	494	407	69,070	60,736	34,040	733	749	305			
Reading Co	3,213	3,168	514	88	97	86	7,789	8,469	3,134	34	41	18	1	35	86
Western Md	291	289	308				636	889							

POCAHONTAS DISTRICT

C. & O.	115	2,074	580				3,488	5,155	4,999						
N. & W.	250	1,509	1,537		212	113	10,307	12,220	6,160	533	659	350			
Virginian	4	4	5				522	595	446	1					

SOUTHERN DISTRICT

Group A															
A. C. L.	10,637	12,540	7,469	1,813	1,800	1,020	780	900	650	127	144	117	26	108	65
Clinchfield	35	100	60			15	3,054	4,000	500	25	50	50			
C. & W. C.	60	160	167	70	50	28	30	10	14		3	3			
Norfolk Sou.	150	625	715	25	50	15	15	45	20						
R. F. & P.	515	841	128												
S. A. L.	2,162	1,727	1,464	479	632	351	1,020	1,513	878	9	2				
Southern System	9,700	10,000					300	800							
Group B															
A. B. & C.	29	19	10	129	179	154	373	456	315	17	13	15			
A. & W. P.-W. of A.		48	41	38	58	70	35	95	122	4	73	5			
Cent. of Ga.	700	300	300	75	150	45	50	200	295						
Col. & Green		2													
F. E. C.	190	30	18	15	10	8			7				5		
Ga. & Fla.															
Georgia	93	83	108	20	80	95		51	21	6	10	27			
G. M. & N.			29	89	18	20		18	10	8	6	5			
Ill. Cent. Sys.	4,739	5,454	928	720	584	266	8,382	2,388	502	643	696	309	1,755	1,638	805
L. & N.	5,117	5,615	2,040	290	295	180	7,190	4,935	3,170	350	255	310			
Miss. Cent.				48	19	2	6	6	6						
M. & O.	1,690	1,491	679				266	495	132	108	46	31			
N. C. & St. L.	1,867	1,620	1,421	138	98	66	660	301	241	254	146	120			
N. O. G. N.[1]	11	32		1	5		35	2		3	2				
Tenn. Cent.	9	9	7	7	20	8	54	349	131	24	20	6			

[1] Figures for 1932 and 1933 included in G. M. & N.

Exhibit 33—Continued

CENTRAL WEST DISTRICT

	Auto-Box			Flat			Coal			Stock			Refrigerators		
	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933	Oct. 1 1931	Oct. 1 1932	Oct. 1 1933
A. T. & S. F. Sys.	19,413	23,192	21,643	1,344	1,171	1,194	4,390	4,326	3,396	6,126	6,091	5,521	8,076	8,147	8,119
Alton (C. & A.)	152	589	632				1,030	44	6	222	94				
C. & E. I.	1,142	2,609	498	6	7	14	730	1,783	486	25	54	33	18	20	6
C. B. & Q.	7,386	7,386	4,523	308	444	275	4,414	4,866		119	191	980			
Colo. & Sou.	230	240	100		40	20	120	305	155	100	70	95	12	15	2
Colo. & Wyo.															
C. R. I. & P.	14,012	15,394	13,671	900	600	335	200	1,300	720						
D. & R. G. W.	2,050	2,300	2,150	163	184	71	2,417	2,577	939	721	803	500	122	144	107
D. & S. L.							86	7	10						
F. W. & D. C.	1,316	1,250	400												
N. W. Pac.	19	40	41	70	62	59	48	77	61			56			
St. J. & G. I.	971	1,213	217	31	83	74	296	27	8	78	77	116			
S. P. (Pacific)	4,273	5,572	5,153	1,044	967	660	2,314	2,690	1,849	1,613	2,267	1,592	129	42	40
T. P. W.															
U. P. System	11,967	11,496	9,514	1,833	1,679	1,371	3,104	2,681	2,099	2,765	2,421	1,931			
Utah							200	1,050	750						
Western Pac.	990	675	630	15	125	180	265	165	450	120	170	125		15	1

Exhibit 35

FLORIDA EAST COAST RAILWAY

W. R. Kenan, Jr., and S. M. Loftin, Receivers

COMPLETION REPORT OF CHANGES MADE IN EQUIPMENT DURING SIX MONTHS ENDED

General Account II—53 Freight Train Cars

Authority		Equipment unit numbers, names, or series affected by change	Owner	Lessee	Description of equipment to which the change is applicable	Total number of units affected	Description of the change affected and of the other items contributing to the costs incurred	Date of change	Costs incurred	
A. F. E. No.	Approved								Charge account No.	Amount
None	None	17001 to 17500	F. E. C. Car Ferry Company.	F. E. C. Ry.	Vent. box cars, Standard Steel Car Co. 1920 ventilated and insulated 40' 9" long cast steel trucks 33" dia. 700# C. I. wheels. Westinghouse K. C. 1012 air brakes steel underframe composite body sessions friction type draft gear, A. R. A. type D couplers, light weight 50200#.	500	Purchased new	6-30-20	53	$1,789,292.29 [1] 3,578.58
None	None	11001 to 11175	F. E. C. Car Ferry Company.	F. E. C. Ry. Co. Subleased to Fruit Growers Express.	Refrigerator cars, Mt. Vernon Car Mfg. Co., 1923 steel under-frame wood body 41' 1¾" long cast steel trucks 33" dia., 700# C. I. wheels, Westinghouse K. C. 1012 air brakes, miner friction A-18-5 draft gear. A. R. A. type D couplers. U. S. R. A. std. refrigerator system, 2 ice boxes, light weight 58000#.	175	Purchased new	3-26-23	53	488,363.75 [1] 2,790.65

NOTE.—476 of these cars in service as of Dec. 31, 1932.

[1] Cost each.

Source: Completion Report filed with Interstate Commerce Commission; Division of Valuation.

1113 *Exhibit 36*

LOUISVILLE & NASHVILLE RAILROAD COMPANY

LOUISVILLE, KY., *December 2, 1932.*

MR. GRAHAM M. BRUSH,
President, Hoboken Manufacturers R. R. Co.,
No. 39 Broadway, New York, N. Y.

DEAR SIR: The Louisville & Nashville Railroad Coompany hereby serves upon you the following notice:

The attention of this Company has been called to a plan of the Seatrain Lines, Incorporated, to operate in the near future a transportation service between New Orleans and New York, and in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight cars, owned or leased by common carriers by railroad.

It is also understood that your Company and Seatrain Lines, Inc., intend to cooperate with each other in the transfer of railroad equipment from rail to vessel and from vessel to rail.

This Company has notified and advised the Seatrain Lines, Inc., that it does not consent to such use by that Company of railroad equipment owned or leased by this Company for movement under load in either direction between New York and New Orleans, and between New York and Havana, whether billed directly or reconsigned or diverted, and that Seatrain Lines, Inc., must therefore refrain from taking the said property of this Company for the purpose in question.

This is to notify and advise you that your Company must not deliver to Seatrain Lines, Inc., railroad equipment owned or leased by the Louisville & Nashville Railroad Company which may be interchanged with your Company when destined to New Orleans, Havana, or intermediate coastwise points, whether billed directly or reconsigned or diverted.

I will appreciate it if you will acknowledge receipt of this letter and give me the assurance that in view of the unwillingness of this Company to permit Seatrain Lines, Inc., to make such use of its property, in the manner shown, your Company will refrain from making delivery of its equipment to the Seatrain Lines, Inc., at New York.

Yours truly,

(Signed) T. E. BROOKS,
Vice President.

1114 *Exhibit 37*

CARS RECEIVED BY PENNSYLVANIA RAILROAD FROM HOBOKEN RAILROAD, SEPTEMBER 1933

Total—23 cars

Car number:	Destination
P. R. R. 83111	37th St., New York
P. R. R. 573043	Cannonsburg, Pa.
T. & P. 61560	Harrison, N. J.
S. C. O. X. 745	Bush Terminal, N. Y.
R. S. E. 441	Harrison, N. J.
St. L. & S. F. 127401	Bayonne, N. J.
P. R. R. 55403	Rahway, N. J.
S. C. O. X. 714	Brooklyn E. D. Terminal
B. I. 141435	Trenton, N. J.
B. & M. 72590	Jersey City, N. J.
P. R. R. 60572	Harrison, N. J.
T. & N. O. 51967	Bayonne, N. J.
N. P. 80024	Jersey City, N. J.
D. & H. 17509	Jersey City, N. J.
N. P. 47252	Jersey City, N. J.
T. & P. 50773	Flemington, N. J.
I. G. N. 6284	Trenton, N. J.
A. T. & S. F. 121112	Bayonne, N. J.
P. R. R. 50340	Jersey City, N. J.
T. & P. 60731	Rahway, N. J.
S. C. O. X. 755	Brooklyn E. D. Terminal
I. G. N. 16093	Clarendon, Pa.
S. C. O. X. 757	Brooklyn E. D. Terminal

1115 *Exhibit 38*

CARS DELIVERED BY PENNSYLVANIA RAILROAD TO HOBOKEN SHORE RAILROAD, SEPTEMBER 1933

Total—39 cars

Car number:	Origin
P. R. R. 511030	Newell, W. Va.
P. R. R. 52024	Weirton, W. Va.
P. R. R. 124789	Carnegie, Pa.
P. R. R. 91095	Cannonsburg, Pa.
P. R. R. 124791	Weirton, W. Va.
P. R. R. 502651	Weirton, W. Va.
P. R. R. 100915	Weirton, W. Va.
P. R. R. 52048	Bellefonte, Pa.
P. R. R. 40914	Newell, W. Va.
P. R. R. 50340	New Kensington, Pa.
P. R. R. 88827	Lancaster, Pa.
P. R. R. 517451	Chester, W. Va.
P. R. R. 54581	Middletown, Pa.
P. R. R. 94556	Emlenton, Pa.
P. R. R. 51649	Cannonsburg, Pa.
P. R. R. 573159	Cannonsburg, Pa.
P. R. R. 50670	Weirton, W. Va.
P. R. R. 42033	Jersey City, N. J.
P. R. R. 518675	Reading, Pa.
P. R. R. 504436	Weirton, W. Va.
P. R. R. 44900	York, Pa.

CARS DELIVERED BY PENNSYLVANIA RAILROAD TO HOBOKEN SHORE RAILROAD, SEPTEMBER 1933—Continued

Car number:	Origin
P. R. R. 33947	Rouseville, Pa.
P. R. R. 567263	Weirton, W. Va.
P. R. R. 280866	Warren, Pa.
P. R. R. 100901	Emlenton, Pa.
P. R. R. 95000	Emlenton, Pa.
P. R. R. 39252	Frankford, Pa.
P. R. R. 34082	Emlenton, Pa.
P. R. R. 566179	Cannonsburg, Pa.
P. R. R. 34028	Pittsburgh-Federal St., Pa.
P. R. R. 37376	Lancaster, Pa.
P. R. R. 42324	Cannonsburg, Pa.
P. R. R. 98948	Middletown, Pa.
P. R. R. 124897	Cannonsburg, Pa.
P. R. R. 91035	Cannonsburg, Pa.
P. R. R. 100810	Cannonsburg, Pa.
P. R. R. 123151	Cannonsburg, Pa.
P. R. R. 31796	Lancaster, Pa.
P. R. R. 569588	Emlenton, Pa.

1116 *Exhibit 40*

CARS RECEIVED BY PENNSYLVANIA RAILROAD FROM HOBOKEN MANUFACTURERS RAILROAD AFTER MOVEMENT VIA SEATRAIN LINES, SEPTEMBER 1933

(Supplementary to Exhibit 37)

Car number (from Exh. 37)	Correct car number	Origin	Originating line	Destination
PRR 83111	MP 83111	Marrero, La	TP/MP	37 St., New York
PRR 573043	PRR 573043	Harvey, La	TP/MP	Cannonsburg, Pa.
T & P 61560	T & P 61560	Plaquemine, La	T&P	Harrison, N. J.
SCOX 745	SCOX 745	Texas and Gretna, La.	T&P	Bush Terminal, N. Y.
RSE 441	BRX 441	Gretna, La	TP/MP	Harrison, N. J.
StL&SF 127401	SL-SF 127401	Monroe, La	MP	Bayonne, N. J.
PRR 55403	NYC 55403	Plaquemine, La	T&P	Rahway, N. J.
SCOX 714	SCOX 714	Texas and Gretna, La.	T&P	Brooklyn E D Terminal
R I 141435	R I 141435	Sterlington, La	MP	Trenton, N. J.
B&M 72509	B&M 72509	Moss Point, Miss.	(Dray) [1]	Jersey City, N. J.
PRR 60572	T&P 60572	Plaquemine, La	T&P	Harrison, N. J.
T&NO 51967	T&NO 51967	Monroe, La	MP	Bayonne, N. J.
NP 80924	NKP 80924	Moss Point, La	(Dray) [1]	Jersey City, N. J.
D & H 17309	D & H 17309	Moss Point, La	(Dray)	Jersey City, N. J.
MP 47252	MP 47252	Moss Point, La	(Dray) [1]	Jersey City, N. J.
T&P 50778	T&P 50778	Plaquemine, La	T&P	Flemington, N. J.
I G N 6284	I G N 6284	Sterlington, La	MP	Trenton, N. J.
AT&SF 121112	AT&SF 121112	Monroe, La	MP	Bayonne, N. J.
PRR 50340	PRR 50340	Moss Point, La	(Dray) [1]	Jersey City, N. J.
T&P 60731	T&P 60731	Plaquemine, La	T&P	Rayway, N. J.
SCOX 755	SCOX 755	Abilene, Tex	T&P	Brooklyn E D Terminal
I G N 16093	I G N 16093	New Orleans, La	L&A	Clarendon, Pa.
SCOX 757	SCOX 757	Abilene, Tex	T&P	Brooklyn E D Terminal

[1] Trucked by shipper from origin shown to New Orleans because of refusal of Southern Railway to furnish car of any ownership.

1117 *Exhibit 41*

CARS DELIVERED BY PENNSYLVANIA RAILROAD TO HOBOKEN MANUFACTURERS RAILROAD AND FORWARDED VIA SEATRAIN LINES, SEPTEMBER 1933.

(Supplementary to Exhibit 38)

Car number	Origin	Destination	Delivering line
PRR 511030	Newell, W. Va	Waco, Tex	MP Lines.
PRR 52024	Weirton, W. Va	New Orleans	TP-MP.
PRR 124789	Cartegie, Pa	Sweetwater, Tex	T & P.
PRR 91095	Cannonsburg, Pa	New Orleans	IC.
PRR 124791	Weirton, W. Va	New Orleans	TP-MP.
PRR 502651	Weirton, W. Va	New Orleans (Harvey)	TP-MP.
PRR 100915	Weirton, W. Va	New Orleans (Harvey)	TP-MP.
PRR 52048	Bellelonte, Pa	New Orleans (Harvey)	TP-MP.
PRR 40914	Newell, W. Va	New Orleans	L & N.
PRR 50549	New Kensington, Pa	New Orleans	TP-MP.
PRR 88727	Lancaster, Pa	Dallas, Tex	T & P.
PRR 517451	Chester, W. Va	New Orleans	TP-MP.
PRR 54581	Middletown, Pa	New Orleans	TP-MP.
PRR 94556	Emlenton, Pa	Waco, Tex	IGN.
PRR 51649	Cannonsburg, Pa	New Orleans (Harvey)	TP-MP.
PRR 578159	Cannonsburg, Pa	New Orleans (Harvey)	TP-MP.
PRR 30570	Weirton, W. Va	New Orleans (Harvey)	TP-MP.
PRR 42033	Jersey City, N. J	Harry's Station, Tex	T & P.
PRR 518655	Reading, Pa	Dallas, Tex	T & P.
PRR 504436	Weirton, W. Va	New Orleans (Harvey)	TP-MP.
PRR 44909	York, Pa	Mobile, Ala	L & N.
PRR 33947	Rouseville, Pa	Dallas, Tex	T & P.
PRR 567263	Weirton, W. Va	Harvey, La	TP-MP.
PRR 280866	Warren, Pa	Havana, Cuba	
PRR 100901	Emlenton, Pa	Dallas, Tex	T & P.
PER 95000	Emlenton, Pa	Fort Worth, Tex	T & P.
PRR 39252	Frankford, Pa	Dallas, Tex	T & P.
PRR 34982	Emlenton, Pa	Fort Worth, Tex	T & P.
PRR 506170	Cannonsburg, Pa	New Orleans (Harvey)	TP-MP.
PRR 34038 [1]	Pittsburgh-Federal St., Pa	Dallas, Tex	T & P.
PRR 37378	Lancaster, Pa	Dallas, Tex	T & P.
PRR 42324	Cannonsburg, Pa	New Orleans (Harvey)	TP-MP.
PRR 98948	Middletown, Pa	New Orleans	Public Belt.
PRR 124397	Cannonsburg, Pa	New Orleans (Harvey)	TP-MP.
PRR 91055	Cannonsburg, Pa	New Orleans (Harvey)	TP-MP.
PRR 100910	Cannonsburg, Pa	New Orleans (Harvey)	TP-MP.
PRR 523151	Cannonsburg, Pa	New Orleans (Harvey)	TP-MP.
PRR 31795	Lancaster, Pa	Dallas, Tex	T & P.
PRR 398588	Emlenton, Pa	Shreveport, La	T & P.

[1] Correct car number PRR 94028.

1118 *Exhibit 42*

HOBOKEN MANUFACTURERS RAILROAD COMPANY

vs.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

Docket No. 25728

STATEMENT REGARDING PER DIEM SETTLEMENTS

I

Mr. Brush testified that Seatrain Lines, Inc., has paid in per diem charges to Hoboken Manufacturers Railroad and New Or-

leans & Lower Coast Railroad for the period from October 6, 1932, to June 1, 1933, $46,138.32. He was requested to divide this as between the two railroads. Such division is:

To New Orleans & Lower Coast R. R	$31,797.32
To Hoboken Manufacturers R. R	14,341.00
	46,138.32

II

Mr. Brush was also requested to furnish a statement showing details of settlements between Hoboken Manufacturers Railroad and owning railroads and connecting Trunk Lines. This statement follows:

1119

A

During the period from October 1, 1932, to and including September 30, 1933, Hoboken Manufacturers Railroad received from Seatrain Lines, Inc., for per diem on cars while in possession of Seatrain Lines and Cuban railroads $25,741. Of this amount it paid to the car owners $18,929. The balance of $6,812 has remained with Hoboken Manufacturers Railroad as the result of a controversy between it and connecting Trunk Lines with regard to switching reclaim to be allowed to Hoboken Manufacturers Railroad.

B

The details of this difference of $6,812 are as follows:

Prior to the inauguration of Seatrain's service Hoboken Manufacturers Railroad had received a switching reclaim of $2.54 per car. (Formerly the reclaim was $3.21 per car.) With the beginning of Seatrain's service, however, the New York Central, Pennsylvania, and Erie refused to recognize Hoboken Manufacturers Railroad's right to switching reclaim on cars interchanged with Seatrain. Moreover, they refused to allow reclaim on local traffic switched by the Hoboken so long as Hoboken's reclaim statement included cars interchanged with Seatrain. The

1120 Lehigh Valley and Lackawanna allowed switching reclaim to the Hoboken on all cars until April 1933 and the Central Railroad of New Jersey continued to do so until May 1933. Since that time all of the Trunk Lines have refused settlement of per diem on a basis which would recognize Hoboken's right to switching reclaim either on local traffic or on traffic interchanged with Seatrain so long as Hoboken has claimed reclaim on the latter.

As a result of these circumstances, a situation has resulted which can be illustrated by taking the case of the Erie Railroad. During the period from October 1, 1932, to September 30, 1933, there was due from the Hoboken to the Erie Railroad for per diem on Erie Railroad cars, disregarding switching reclaim, the sum of $3,451.30. Of this sum $1,032 represented per diem paid by Seatrain to Hoboken for the time Erie Railroad cars were in Seatrain's possession and $2,419.30 represented per diem earned by Erie Railroad cars when on the line of the Hoboken Manufacturers Railroad, such cars including both cars handled locally on the Hoboken and cars handled by the Hoboken for interchange with Seatrain. Offsetting this amount of $3,451.30. Hoboken claims that it was entitled to receive from Erie Railroad for switching reclaim on both local cars and cars interchanged with Seatrain the sum of $4,470.24. Consequently, if the Hoboken is correct in its contention as to switching reclaim, instead of the Hoboken's owing to the Erie Railroad for per diem, there is due from the Erie to the Hoboken in a net settlement the sum of $1,018.94.

1121

Similarly, a net settlement on the same basis as of October 1, 1933, shows balances due the Hoboken from the Central Railroad of New Jersey of $996.82 and from the Delaware, Lackawanna & Western of $687.80.

On the other hand, on a similar net basis of settlement, balances were due from the Hoboken to the Lehigh Valley Railroad, New York Central Railroad, and Pennsylvania Railroad as of October 1, 1930, in the following amounts:

Lehigh Valley Railroad	$330.70
New York Central Railroad	2,985.62
Pennsylvania Railroad	1,184.21

Using the Pennsylvania Railroad as an example of this latter situation, the facts are as follows: During the period from October 1, 1932 to September 30, 1933, disregarding switching reclaim, there was due from the Hoboken Manufacturers Railroad to the Pennsylvania Company for per diem a total amount of $6,509.45. This was made up of $3,175 received by Hoboken from Seatrain for per diem earned on Pennsylvania Railroad cars when in the possession of Seatrain and Cuban railroads and the sum of $3,334.45 earned by Pennsylvania Railroad cars when on the tracks of Hoboken Manufacturers Railroad. Offsetting the total sum of $6,509.45, there was due to Hoboken Manufacturers Railroad for switching reclaim on what Hoboken considers the established basis the sum of $4,525.24, leaving a balance due

1122

the Pennsylvania Railroad under a net settlement of $1,984.21.

In the three instances stated, in which a net settlement would show a balance due to the Trunk Lines, namely, Lehigh Valley, New York Central, and Pennsylvania, Hoboken has offered to pay to the Trunk Lines such net balances, but payments of these net balances have been refused by the Trunk Lines so long as there is included therein any reclaim to the Hoboken on cars delivered to or received from Seatrain.

The foregoing summarizes the situation over a one-year period. Statements of per diem and reclaim due are rendered monthly by the Hoboken and in every instance of a monthly settlement where a net balance of per diem over reclaim has been shown to be due to a Trunk Line, payment of such net balance has been tendered by the Hoboken. The method of tender depends, of course, upon the method of settlement with each Trunk Line. In some instances, settlement is on a net basis; in other instances, settlement for per diem is made by check and a draft is drawn for the switching reclaim. Where such drafts have been dishonored, as for example in the case of the New York Central, the Hoboken
1123 has withheld its check.

Statement showing the details of the situation as to each of the Trunk Lines is attached hereto.

C

The controversy over reclaim concerns only the settlements with the New York Harbor Trunk Lines. Hoboken has promptly paid to all other owning roads all per diem received from Seatrain and per diem accruing on cars while on the tracks of the Hoboken.

1124 *Exhibit 43*

OUTSTANDING PER DIEM AND RECLAIM ITEMS

	Per diem due Trunk Lines	Reclaim due H. M. R. R.	Balance due Trunk Lines	Balance due H. M. R. R.
Central Railroad Co. of New Jersey	$481.00	$1,477.82		$996.82
Delaware, Lackawanna & Western	379.00	1,066.90		687.90
Erie Railroad	3,451.30	4,470.24		1,018.94
Lehigh Valley Railroad	987.80	657.10	$330.70	
New York Central Railroad	6,030.00	3,044.38	2,985.62	
Pennsylvania Railroad	6,509.45	4,525.24	1,984.21	
	17,838.55	15,241.58	5,300.53	2,703.56
Balance due		2,596.97		2,596.97
	17,838.55	17,838.55	5,300.53	5,300.53

1125 *Exhibit 45*

[Copy]

(Letterhead of)

SOUTHERN RAILWAY SYSTEM

OPERATING DEPARTMENT

W. S. Andrews, Assistant Vice President.

WASHINGTON, D. C., *October 22nd, 1932. a. m.*

SEATRAIN LINES, INC.,
No. 39 Broadway, New York, N. Y.

GENTLEMEN: The Southern Railway Company, and its subsidiary Lines, including the New Orleans & Northern RR., Alabama Great Southern Railroad, Cincinnati, New Orleans & Texas Pacific Railway, and Georgia, Southern & Florida Railway, hereby serve on you the following notice:

The attention of these Companies has been called to a plan of your Company to operate a transportation service between New York and New Orleans, and in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight cars, owned or leased by common carriers by railroad.

This is to notify and advise you that these companies do not consent to such use by your Company of railroad equipment owned or leased by these companies for movement under load in either direction between New York and New Orleans and between New York and Havana, whether billed directly or reconsigned or diverted, and that your company must therefore refrain from taking the same for the purpose in question.

These lines are willing for their equipment to be transported by sea between New Orleans and Havana, or other destinations in Cuba.

It will be appreciated if you will acknowledge the receipt of this letter and give us the assurance that in view of the unwillingness of these Companies to permit your Company to make such use of said property your Company will refrain from placing and transporting the same on its vessels.

Yours very truly,

(Signed) W. S. ANDREWS,
Assistant Vice President.

1126 (Letterhead of)

THE NEW YORK CENTRAL RAILROAD COMPANY

P. O. Address, 42nd St. Ferry, N. R., New York

A. H. Wright, Superintendent; O. O'Connor, Asst. Superintendent.

WEEHAWKEN, N. J., *October 4th, 1932.*

Mr. A. R. McGOWAN,
Supt., Hoboken Manufacturers Railroad,
Hoboken, N. J.

DEAR SIR: The attention of this Company has been called to a plan of Seatrain Lines, Inc., to operate in the near future a transportation service between New York and Havana and between New York and New Orleans via Havana, and in order to avoid the transfer of lading at the port, to transport by sea railroad equipment, principally freight cars owned or leased by common carriers by railroads. It also is understood that Seatrain Lines, Inc., has acquired the properties of your company and that your company and Seatrain Lines, Inc., intend to cooperate with each other in the transfer of railroad equipment from rail to vessel and from vessel to rail.

This Company has notified and advised Seatrain Lines, Inc., that this company does not consent to such use by that company of railroad equipment owned, leased, or controlled by this company and private car lines, and that Seatrain Lines, Inc., must, therefore, refrain from taking the said property of this company for the purpose in question.

This is to notify and advise you that your company must not deliver to Seatrain Lines, Inc., railroad equipment owned, leased, or controlled by this company which may be interchanged with your company.

We would appreciate it if you would acknowledge the receipt of this letter and give us the assurance that in view of our unwillingness to permit Seatrain Lines, Inc., to make such use of our property, your company will refrain from making delivery of our railroad equipment to Seatrain Lines, Inc.

Yours very truly,

(Signed) A. H. WRIGHT,
Superintendent.

1127 [Copy]

(Letterhead of)

SOUTHERN FREIGHT ASSOCIATION
101 Marietta Street
ATLANTA, GEORGIA, *November 28th, 1932.*

File 1–5484

HOBOKEN MANUFACTURERS RAILROAD COMPANY,
Hoboken, N. J.

DEAR SIRS: The undersigned, being Agent for the—
Atlanta, Birmingham & Coast Railroad Company.
Atlanta and West Point Railroad Company.
Atlantic Coast Line Railroad Company.
Central of Georgia Railway Company.
Charleston & Western Carolina Railway Company.
Clinchfield Railroad Company.
Florida East Coast Railway (W. R. Keenan, Jr., and S. M. Loftin, Receivers).
Georgia Railroad.
The Nashville, Chattanooga & St. Louis Railway.
Norfolk Southern Railroad (G. R. Loyall and L. H. Windholz, Receivers).
Piedmont and Northern Railway Company.
Seaboard Air Line Railway (L. R. Powell, Jr., and E. W. Smith, Receivers).
The Western Railway of Alabama.

has been authorized and instructed by each (hereinafter referred to as Railroad) to sign and transmit to you the following as its individual statement:

"The attention of this Railroad has been called to a plan of Seatrain Lines, Inc., to operate a transportation service between New York and Havana, and between New York and New Orleans via Havana, and, in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight cars, owned or leased by common carriers by railroad. It is also understood that Seatrain Lines, Inc., has acquired or controls the properties of your company, and that your company and Seatrain Lines, Inc., intend to cooperate with each other in the transfer of railroad equipment from rail to vessel and from vessel to rail.

"This railroad has notified and advised Seatrain Lines, Inc., that it does not consent to such use by that company of railroad, equipment owned or leased by this railroad, and that Seatrain Lines,

Inc., must therefore refrain from taking the said property of this Railroad for the purpose in question.

"This is to notify and advise you that your company
1128 must not deliver to Seatrain Lines, Inc., railroad equipment owned or leased by this Railroad which may be interchanged with your company."

I shall appreciate it if you will acknowledge the receipt of this letter and give me the assurance that in view of the unwillingness of those railroads to permit Seatrain Lines, Inc., to make such use of their property, your company will refrain from making delivery of their railroad equipment to Seatrain Lines, Inc.

Yours very truly,

(Signed) L. E. TILFORD,
Chairman.

1129 [Copy]

(Letterhead of)

LOUISVILLE & NASHVILLE RAILROAD COMPANY

OFFICE OF THE VICE PRESIDENT—OPERATION

T. E. Brooks, Vice President.

LOUISVILLE, KY., *December 2, 1932.*

MR. GRAHAM M. BRUSH,
President, Hoboken Manufacturers R. R. Co.,
No. 39 Broadway, New York, N. Y.

DEAR SIR: The Louisville & Nashville Railroad Company hereby serves upon you the following notice:

The attention of this Company has been called to a plan of the Seatrain Lines, Incorporated, to operate in the near future a transportation service between New Orleans and New York, and in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight cars, owned or leased by common carriers by railroad.

It is also understood that your company and Seatrain Lines, Inc., intend to cooperate with each other in the transfer of railroad equipment from rail to vessel and from vessel to rail.

This company has notified and advised the Seatrain Lines, Inc., that it does not consent to such use by that company of railroad equipment owned or leased by this Company for movement under load in either direction between New York and New Orleans, and between New York and Havana, whether billed directly or reconsigned or diverted, and that Seatrain Lines, Inc., must therefore refrain from taking the said property of this Company for the purpose in question.

This is to notify and advise you that your Company must not deliver to Seatrain Lines, Inc., railroad equipment owned or leased by the Louisville & Nashville Railroad Company which may be interchanged with your Company when destined to New Orleans, Havana, or intermediate coastwise points, whether billed directly or reconsigned, or diverted.

I will appreciate it if you will acknowledge receipt of this letter and give me the assurance that in view of the unwillingness of this Company to permit Seatrain Lines, Inc., to make such use of its property, in the manner shown, your Company will refrain from making delivery of its equipment to The Seatrain Lines, Inc., at New York.

Yours truly,

(Signed) T. E. BROOKS,
Vice President.

1130 [Copy]

NEW ENGLAND FREIGHT ASSOCIATION

510–526 South Station

File No. 563–314

Frank Van Ummersen, Chairman.

BOSTON, MASS., *Oct. 19, 1932.*

Arrangements for interchange of traffic with Seatrain Lines, Inc.

HOBOKEN MANUFACTURERS RAILROAD COMPANY,
Hoboken, N. J.

GENTLEMEN: The undersigned being an agent for the following named railroads—

Bangor & Aroostook Railroad.
Maine Central Railroad Company.
Grank Trunk Railway-New England Lines.
Boston & Maine Railroad.
Central Vermont Railway, Inc.
Canadian Pacific Railway.
Rutland Railroad.
Boston & Albany Railroad (New York Central Railroad Co., Lessee).
St. Johnsbury & Lake Champlain Railroad.
Montpelier & Wells River Railroad.
Quebec Central Railway Company.

has been authorized and instructed by each of the foregoing named railroads to sign and transmit to you the following as its individual statement:

"The attention of this Company has been called to a plan of Seatrain Lines, Inc. to operate in the near future a transportation service between New York and Havana, and between New York and New Orleans via Havana, and, in order to avoid the transfer of lading at the ports, to transport by sea, railroad equipment, principally freight car, owned or leased by common carriers by railroad. It also is understood that Seatrain Lines, Inc., has acquired the properties of your company, and that your company and Seatrain Lines, Inc. intend to cooperate with each other in the transfer of railroad equipment from rail to vessel and from vessel to rail.

"This company has notified and advised Seatrain Lines, Inc. that this company does not consent to such use by that company of railroad equipment owned or leased by this company, and that Seatrain Lines, Inc. must therefore refrain from taking the said property of this company for the purpose in question.

"This is to notify and advise you that your company must not deliver to Seatrain Lines, Inc. railroad equipment owned or leased by this company which may be interchanged with your company."

It will be appreciated if you will acknowledge receipt of this letter and give me the assurance that in view of the unwillingness of those companies to permit Seatrain Lines, Inc., to make
1130–a such use of their property, your company will refrain from making delivery of their railroad equipment to Seatrain Lines, Inc.

Yours truly,

(Signed) FRANK VAN UMMERSEN,
Chairman.

E: B

1131 *Exhibit 46*

I. C. C. Docket 25728—Hoboken Manufacturers R. R. Co. v. A. & S. R. R. Co. et al.

I. C. C. Docket 25878—N. O. & L. C. R. R. Co. v. A. C. & Y. Ry. Co. et al.

The following indicated portions of the record in I. C. C. Docket 25565—Investigation of Seatrain Lines, Inc., will be relied upon by defendants in the above entitled proceedings:

I.

Testimony of Graham M. Brush respecting the character and extent of Seatrain operations. This testimony appears at pages 21, 58–61 and 145–149 of the transcript.

II

Testimony of Graham M. Brush distinguishing between Seatrain operations and car ferry operations. This testimony appears at pages 75–78 and 88 of the transcript.

III

Testimony respecting the character of traffic handled by Seatrain:

Witness	Transcript pages
Graham M. Brush	112–113.
E. A. Hodkinson	980, 985–986, 988, 991.
W. J. Mathey	772, 858.
Norris W. Ford	567, 554, 561–562.
Joseph G. Kerr	1348–1349.
Joseph Marks	1329, 1331, 1332, 1338–1339.
E. J. Bachman	630, 653.
B. H. Stanage	1092–1093, 1095–1096.
A. L. Reed	872, 882–885.
Harvey Allen	1101–1102.
Wm. N. Webb	675–676.
C. V. Hanlon	685–686.
A. G. H. Moore	622.
C. E. Hochstedler	1166.

1132

IV

Testimony showing the effect of Seatrain service:

Witness	Transcript pages
Harvey Allen	1107–1109.
C. E. Hochstedler	1144, 1150–1151.
Wm. Simmons	1236–1237.
Carl Giesson	690.
John P. Magill	1181.

V

Testimony of Admiral Hutch Cone respecting construction loan obtained by Seatrain from the United States Shipping Board. This testimony appears at pages 1276 to 1300 of the transcript.

VI

The following decisions of the Interstate Commerce Commission will be relied upon to show the basis of rates applicable to car ferry lines which constitute extensions of lines of railroad:

Western Trunk Line Class Rates, 164 I. C. C. 1, 196.

Chicago Fire Brick Co. v. Director General, 91 I. C. C. 755, 756.

Bergstrom Paper Co. v. Director General, 93 I. C. C. 591.

NOVEMBER 10, 1933.

1133 *Exhibit 47*

LORD, DAY & LORD

25 Broadway

NEW YORK, *November 17, 1933.*

Hoboken Manufacturers R. R. v. A. & S. R. R. Co. et al., I. C. C. Docket No. 25728.

H. FLEMING, ESQ.,
Examiner, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR: I am in receipt of the statement enclosed with Mr. Lehman's letter of November 11th indicating the portions of the record in Docket 25565, Investigation of Seatrain Lines, Inc., which will be relied upon by defendants in the present proceeding.

The incorporation of this testimony by stipulation under Rule 13 of the Commission's Rules of Practice is in accordance with the understanding reached at the hearing and of course no objection is made thereto because of the manner in which the proof is tendered.

Some of this testimony was objected to on various grounds, largely on the ground of incompetency, at the time it was offered in Docket 25565. Of course the same objections to its admissibility are made and apply to the testimony when offered in this proceeding.

Moreover, with respect to the testimony specified in parts III and IV of the statement with respect to the character of traffic handled by Seatrain and the effect of Seatrain's service,
1134 further objection is made, which is, of course, not precluded by the stipulation as to the manner of presenting the testimony, on the ground that the testimony is irrelevant and immaterial to any issue before the Commission in the present proceeding except (a) in so far as this testimony is embraced in testimony already made a part of the present record on our request by stipulation at the hearing, and except (b) in so far as the testimony referred to is testimony of witnesses representing defendants, namely, Messrs. Hodkinson, Kerr, Marks, Stanage and Allen, and is offered and received for the sole purpose of showing the state of mind of the railroad officials as bearing upon the purpose of defendants in adopting Car Service Rule 4 to prevent the supposed competition of Seatrain Lines, Inc. Similar objection is made to such testimony in so far as it deals with rates or supposed rate policies or practices of Seatrain Lines, Inc. on

the ground that the reasonableness and lawfulness of regulations and practices as to car service do not depend on matters of rates.

In so far as the testimony of railroad witnesses offered by defendants indicates their state of mind and purpose, it is, of course, of no consequence whether their impression as to competition or possibility of competition with Seatrain is or was correct or whether as a matter of actual fact there was or is substantial competition or a possibility of competition between Seatrain Lines and the lines of defendant railroads.

1134–A Lest, however, the Commission notwithstanding the foregoing objection, shall consider that the existence or nonexistence, as a matter of fact, of actual and substantial competition between Seatrain Lines, Inc., and defendants is properly one of the issues of fact in the present proceeding and accepts the evidence tendered by defendants as proof upon this point, complainant for its protection and in rebuttal of such evidence, in accordance with the stipulation at the hearing, makes reference to and designates as testimony to be included in the record in this proceeding, the following additional evidence from the record in Docket 25565: Testimony of Mr. Bush, pages 177–178; Testimony of Mr. W. J. Mathey, pages 706–711; Letter copies at pages 1346–47; Exhibits 26 and 29.

Objection is made to the testimony of Admiral Cone specified in Section V of statement submitted by Mr. Lehman on the ground that it is irrelevant and immaterial to any issue in this proceeding. This objection was noted at the hearing when Admiral Cone's testimony was referred to (R. 241, 242). Lest, however, this testimony be received over the objection and defendants attempt to make an argument therefrom as to the understanding of Seatrain's plans for the use of its new ships, we designate as testimony to be included in this record in rebuttal of such

1135 testimony and as indicating defendants' understanding the testimony of William Simmons, Traffic Manager of Southern Pacific's wholly owned steamship line at pages 1209–11 of the record in Docket 25565.

In rebuttal of so much of Admiral Cone's testimony as relates to the character of Seatrain's ships and to indicate defendants' idea with respect thereto, we designate the following as testimony in Docket 25565 to be included in the record here: Testimony of William Simmons, pages 1240, 1241, 1259.

With respect to the decisions of the Commission referred to in Section VI of Mr. Lehman's statement, complainant does not agree that the reports of the Commission there referred to are to be taken as statements of fact in the present proceeding and also submits that any proof as to the basis of rates is irrelevant and immaterial to the issues herein.

Copies are being sent to counsel of record as listed below:
Thomas Healy, Esq., New York Central R. R.
T. D. Gresham, Esq., Texas & Pacific R. R.
Charles Spence, Esq., Missouri Pacific Railroad.
Roland Lehman, Esq., Trunk Line Association.
Henry Thurtell, Esq., Shoreham Bldg., Washington, D. C.
William Burger, Esq., Louisville & Nashville, R. R.
G. H. Muckley, Esq., Transportation Bldg., Washington, D. C.
W. N. McGehee, Esq., Southern Railway.

Very truly yours,

PMcC/wel
1136

Exhibit 47

[Copy]

OCTOBER 11, 1932.

Docket CCS 431 CS Gen.

COMMITTEE ON CAR SERVICE

DEAR SIR: I wired you this p. m. as follows:

"Meeting Committee Car Service definitely called thirty Vesey Street, New York City, ten a. m., Monday, October seventeen, consider Car Service Rule prevent interchange equipment with Seatrain Lines, incorporated, recently established between New York and Cuba; advise wire if you will be present."

This meeting is called at the request of Mr. M. J. Gormley as result of following request of eastern member railroads:

"Your attention is directed to the fourth paragraph of Page 2 of the minutes of meeting of September 23rd, 1932, of the Trunk Line Interstate Commerce Law Committee, which reads as follows:

"It is the sense of the meeting that the traffic executives be advised that they should not permit any arrangements of any kind with Hoboken-Seatrain, but should, by appropriate amendment of tariffs and car service regulations, prevent interchange of equipment with Seatrain Lines, Inc. Counsel have prepared forms of letters (attached hereto) to be sent by Chairman Lawrence on behalf of the carriers or by the individual lines, to Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Company, notifying those companies that they must not place or transport railroad cars or other equipment on vessels of Seatrain Lines, Inc. If not signed by Chairman Lawrence said letters are to be written and signed by individual lines and returned to Mr. Lawrence, who will trans-

mit same to Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Co."

"We feel that you should frame a rule to cover this situation and make a submission to the member roads by letter ballot."

and Mr. Gormley's reply, in part:

"You have undoubtedly since learned that the Interstate Commerce Commission have issued an order under date of October 4, providing that they upon their own motion 'enter upon an investigation into and concerning the lawfulness of the operation of vessels and of the transportation of property in interstate commerce by Seatrain Lines, Inc.; of the acquisition of control by Seatrain Lines, Inc., of the Hoboken Manufacturers' Rail-
1137 road Company,' and, further, that the proceeding 'be assigned for hearing at such times and places as the Commission may hereafter direct.'

"If upon further consideration it is your opinion we should immediately place the subject in line for action you suggest, I will be glad to call the Car Service Committee into session by telegraph. Will await your further advice."

Yours truly,

(Signed) G. W. COVERT.
Secretary.

Cy—Mr. J. J. Bernet, Prest., C. & O. Ry., Cleveland, O.
Mr. W. C. Kendall, Mgr., Car Serv. Div., Washington, D. C.
Mr. H. J. Forster, Secy., A. R. A., New York, N. Y.
Mr. W. S. Andrews, Asst. V. P., Sou. Ry., Washington, D. C.
Mr. G. Metzman, Mgr., F. T., N. Y. C. Lines, New York, N. Y.
Mr. J. D. Altimas, A. G. S. C. S., C. P. Ry., Montreal, Que.
Mr. M. J. Gormley, Chmn., Car Serv. Div., Washington, D. C.

H.

1138 WASHINGTON, D. C., *October 14, 1932.*

To Committee on Car Service:

Request has been made on the Car Service Division to call The Committee on Car Service together to consider the situation which has been precipitated by reason of the operation of the "Seatrain" handling traffic by boat—both contents and cars between New York and New Orleans, which service was inaugurated on a weekly basis beginning October 6th. The boats in service have a capacity of 100 cars each. Call is made at Havana in either direction.

Cars are delivered to the Seatrain at New York by the Hoboken Manufacturers Railroad, a switching line on the Jersey Shore of New York Harbor. At New Orleans interchange to the Sea-

train is made through the New Orleans & Lower Coast at a point about five miles south of the city on the west bank of the river.

The Hoboken and the New Orleans & Lower Coast are members of the Per Diem Agreement. The executive officers of Seatrain Lines, Inc., and the Hoboken Manufacturers are identical. It is understood that the Seatrain Lines, Inc., own the Hoboken Manufacturers Railroad.

The Car Service Division conferred with the officers of the Hoboken Manufacturers for the purpose of determining their understanding of obligation of the Hoboken in connection with Car Service and Per Diem Rules. There is no question but that they understand and expect to fulfill this obligation both as to per diem payments on railroad-owned cars and mileage payments on private line cars which such equipment is in the possession of the Seatrain.

It is reported that certain roads object to their equipment being delivered to the Seatrain by Hoboken. Question has been raised as to whether or not there are existing Car Service and Per Diem Rules which in any way prohibit, or which can be changed to prohibit, the delivery of railroad-owned equipment to Seatrain Lines. The question as to whether such interchange shall be made is a matter for the connecting railroads to decide. The question of fixing a rule, if such interchange is prohibited, is for the appropriate committees of the Transportation Division to work out.

There are also certain questions as to the application of Car Service and Per Diem Rules which must be satisfactorily fixed as between connecting trunk lines and the Seatrain Lines, or the switching connections at either terminal, in case cars of certain ownerships are interchanged to the Seatrain at New York for delivery to New Orleans and at New Orleans for delivery to New York.

The immediate questions before this Committee may, therefore, be stated as

(1) Preparation of a rule, or rules, if required, and if practical, which will serve to prohibit the interchange of railroad-owned cars to the Seatrain by the Hoboken Manufacturers or New Orleans & Lower Coast.

1138–A (2) Preparation of a rule, or rules, if required and if practical, which will serve to prohibit the interchange of railroad-owned cars to the unloading line and which would require long empty haul to deliver to the owner in accord with Rule 2. For example, if a Missouri Pacific car loaded with sugar is interchanged to the Pennsylvania through the Hoboken for delivery at Philadelphia, such car is Rule 2 and must necessarily be moved loaded or empty to the owner in accord with Rule 2. Pennsyl-

vania should have the privilege of returning such car to the Hoboken for return movement via Seatrain. Similar cases might be cited as applicable to other New York railroads.

(3) Question concerning cars of eastern roads' ownerships such as Lehigh Valley, Reading, Lackawanna, Jersey Central, Delaware & Hudson, delivered to Seatrain for movement to or via New Orleans. Assume that such cars may be used by any one of the New Orleans lines for loading to a point on the west end of the B&O, Erie, New York Central or P. R. R., the latter roads under Rule 2 would be obligated to return such cars to their owners. Is such delivery considered proper under the circumstances, or should Seatrain be obligated to return cars to the Hoboken?

(4) Should rules be prepared requiring Seatrain Lines to accept in return at both terminals all empty cars which have next previously been handled by it loaded and which cars are not released on home lines, or at junction points with the owner?

(5) Should Seatrain Lines be recognized for car service rule purposes as a line between New York and New Orleans, and, therefore, direct connection of all rail lines entering these two ports?

(6) There may be other incidental questions relating to detail of reclaims as between the New York railroads and the Hoboken Manufacturers, which the Committee will wish to consider.

M. J. GORMLEY.

Chgo. 10/21.32 L.

1139

Exhibit 48

AMERICAN RAILWAY ASSOCIATION

CAR SERVICE DIVISION

Transportation Building, 17th and H Streets NW.

WASHINGTON, D. C., *December 7, 1933.*

STATEMENT FILED BY W. C. KENDALL, CHAIRMAN, CAR SERVICE DIVISION, IN CONNECTION WITH TESTIMONY PRESENTED BY WITNESS BALLANTINE IN I. C. C. DOCKET 25728 ET AL., AND WHICH IS NOW MADE AS AGREED UPON BY MESSRS. McCOLLESTER AND MUCKLEY

On pages 132 and 133 of the transcript witness Ballantine is reported as stating:

"I know that the violation of Car Service Rules is quite general among all railroads, is not confined to Rule 4 by any means. It is quite general."

"It has been my experience, and it is my opinion, that Car Service Rules are observed in the breach quite generally."

On pages 162 and 163 witness Ballantine is reported as stating:

"Car Service Rules provide * * * No. 1 * * * Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable. No. 2 (first paragraph): Foreign cars at home on a direct connection must be forwarded to the home road loaded or empty."

"That is the portion of the Car Service Rules that I referred to when I said that they are observed in the breach for the reason that the record shows that substantial increases in the proportion of empties to loaded car-miles throughout the country as a whole exist; there has been a very substantial increase in that since 1920."

"A study made by the section with which I am connected, for the Federal Coordinator, for the first week in August of this year showed that for every 100 loaded box cars moving in the direction of traffic there were 20 empty cars moving in that direction. That is brought about by reason of the fact that they are returning the foreign cars empty and loading their own cars contrary to Sections Nos. 1 and 2 for the purpose of making a change in their net per diem balance."

"Q. Otherwise expressed, your explanation of the statement that, in your opinion the rules are observed in the breach would be that the rules are more generally broken than they are observed."

"Yes; I would say that is the situation."

1140 Witness Ballantine is not believed to be in a position to judge, either from personal observation or from records which have been made available to him in the course of any of his studies, as to the facts regarding Car Service Rule observance. He refers to a study being made by the Federal Coordinator, and which is based on certain reports which have been furnished to the Coordinator through the Car Service Division. I am entirely familiar with the statements which were furnished. These statements showed, in substance, the volume of loaded and empty car mileage made by boxcars separated by direction, and as between system and foreign cars for the first seven days of August, 1933, on certain portions of the main lines of twenty-nine railroads. There were no statements made by any of the railroads indicative in any way of Car Service Rule observance. It is not possible for anyone reviewing the statements, separately or as a whole, nor is it possible for the transportation officer of a single railroad, to know from the figures which these statements disclosed whether Rules were observed or violated merely by noting the figures as to

volume of the freight car mileage made. Any deductions therefrom as to Rule observance or otherwise are without basis of fact.

Mr. Ballantine also referred to the relationship between movement of loaded and empty boxcars in direction of traffic as indicative of violation of Rules and "for the purpose of making a change in their net per diem balance." This is deduction unsupported by any evidence as no information was available from statements made showing the points from which loads and empties moved, which would be necessary to any statement that Rules 1 and 2 had been violated. The mere fact that loads and empties are travelling in parallel in the direction of traffic means nothing unless all data are available which permit a thorough analysis. Such information was not then, nor is it now, available.

Witness Ballantine further stated (page 170) that in 1931 he made a very extensive study of one of the Western trunk lines.

1141 A study of any one of all the trunk lines in the United States would not produce evidence on which any statement as to a general question of Car Service Rule observation could justifiably be made.

No records are kept, so far as known, outside the Car Service Division upon which any statement can be made as to Car Service Rule observance or violation. Until March of 1930 such statements were kept by individual railroads and reported currently to the Car Service Division. In the interest of economy such statements were then discontinued, since which time the records of the Car Service Division are the only sources from which such information can be made available. It should be stated that the reports as rendered by the railroads, prior to their discontinuance, checked in entire consistency with the independent reports rendered by the representatives of the Car Service Division field force in their summarized form.

The Car Service Division maintains a field force numbering at the present time forty-five men located at strategic points throughout the country. These men are constantly in the field and are directed to report on Car Service Rule observance at points which are intentionally selected as those spots where loading is in volume and the more aggravated cases of Rule violation are likely to be found.

Witness Ballantine quotes Car Service Rule 1 and bases his statement on violations of the Rule. Neither Mr. Ballantine, nor anyone else, can judge as to a violation of Car Service Rule No. 1 unless they are at the point where the loading takes place, and at the time it takes place. From a reading of the Rule it will be noted that the possible violation is contingent upon the use of suitable cars being "practicable," and by practicable it is meant

"available." To illustrate: It is essential, in order that a railroad may fulfill its obligation to the shipper, that a proper foreign car be equally "available" with a system car when and as wanted in order that such foreign car may be used in lieu of the
1142 system when "practicable," and operating questions relating to the placement of the car are involved in every instance of potential violations of Car Service Rule 1. It is not, therefore, possible for anyone to state whether Car Service Rule 1 is violated except they are on-the-ground at the time that system cars are used, in lieu of other cars, for off-line loading.

For the above reason, and as a result of long experience in checking with individual railroads, the Car Service Division does not interpret Rule 1 as being violated in any instance except where its agents are on-the-ground and in a position to judge as to the availability of the foreign car for loading in lieu of the system cars. We are making constant checks of this character, and currently maintain records from reports required of field agents in the course of their various inspections, to indicate the extent to which system cars are used for loading off-line. From these records we quote the observation of the loading of 398,289 "system" cars during 1932, of which 16.4% were loaded to points off-line. For the first three quarters of 1933, of a total of 245,531 "system" cars loaded but 17.6% were loaded off-line. For the six months prior to March 1930, at which time records of Rule violations were received from individual railroads, the summarized report of all roads indicated about 25% "system" cars loaded were to off-line destinations. Inasmuch as data compiled by the Car Service Division show that for the entire year 1932 the percentage of system boxcars "at home" approximated 80%, and with substantially similar records for 1933, it is clearly indicative that there was no wholesale or deliberate loading of system cars off-line as alleged by witness Ballantine.

It should be clearly stated that we do not consider the above figures as representing the percentage of violations of Rule 1, but rather as a measure of the total number of system cars which are loaded beyond the limits of the home rails. The bulk of this off-line loading of system cars is found to be necessary to take care of traffic offered without delay and to meet demands of
1143 the public. The percentage of actual violations of Rule 1 is not determinable but it obviously is only a fraction of the percentages named above.

As to violations of Rule No. 2: Witness Ballantine did not quote the entire Rule, under which there are certain mandatory requirements, also six options for permissive use of foreign cars; nor did he mention Car Service Rule No. 3, which permits the use of foreign cars of that class under four options.

The records of inspection by the field force of the Car Service Division are very accurately maintained and will indicate as precisely as is possible the degree of observance of Rules in the handling of the foreign car. As previously stated, our forces are required to particularly inspect those points at which there is loading in volume and where it is reasonable to expect the greater amount of trouble with respect to Rule violations. Based on this record, out of 80,924 foreign cars loaded for the four quarters of 1932 our forces found that but 14.9% were loaded contrary to Rules; and similarly in 1933, for the months January to September, inclusive, out of 64,995 foreign cars loaded but 19.4% were observed as being loaded contrary to the Rules. The records of violation of Rules in use of foreign cars as reported for the six months prior to the discontinuance of reports as of March 1930 are as follows: Totalling above 500,000 foreign cars loaded by months, the record for October 1929 was 18.9%, November 16.6%, December 16.3%, January 1930 16.5%, February 16.6%, and March 16.3%.

The Car Service Division is frequently called upon to state its judgment as to the extent, expressed in percentages, of Car Service Rule observance, and we believe we are conservative, based on reports which are currently available to us, in saying that Car Service Rules are being observed from 80% to 85%. The data
1144 which we have assembled over a period of years indicate this degree of observance, and we know that our records are the only ones on which any statements of the kind can be made.

(Signed) W. C. KENDALL,
Chairman, Car Service Division.

1145 *Offer in evidence*

A. The two new ships are capable of carrying 4,000 tons of liquids in addition to 100 freight cars. The original Seatrains carried 2,200 tons of liquid in the ship's tanks. This is space for revenue freght. It does not include the tanks for bunker oil, water, and so on.

Q. Your ships are now operating in what service or in what services, Mr. Brush?

A. Our present operation is from New York to Havana, thence to New Orleans, returning from New Orleans to Havana to New York; the ships leaving New York and clearing for the foreign ports, entering Havana and again clearing from Havana for a foreign port.

Q. What is the length of the voyage from New York to Havana?

A. In time the voyage is three and a half days under the present operating schedule from New York to Havana, a distance of approximately 1,200 nautical miles.

Q. And from Havana to New Orleans?

A. From Havana to New Orleans the running time is approximately two days, a distance of 600 nautical miles.

Q. In those voyages do your ships go out to sea?

A. Yes, sir. The regular route the vessels take from Ambrose Lightship off Sandy Hook and Diamond Shoals Lightship off Cape Hatteras, then to the Hole in the Wall in the Bahamas, having cross the Gulf Stream, and from the Hole in the Wall to Jupiter Light, about 90 miles below Palm Beach.

1146 A. I am giving you a statement of facts.

Commissioner BRAINERD. Ask your questions of this witness and I will pass upon them, if there is any objection.

Mr. KNOWLTON. May I ask the Reporter to read the question, please?

(The following was thereupon read by the Reporter:)

"Q. (By Mr. KNOWLTON.) Were the coastwise operations contemplated when the Missouri-Pacific and Texas & Pacific became interested in Seatrains in a financial way?"

The WITNESS. In view of what I have said before, I think you will see that the Missouri-Pacific and Texas & Pacific had full knowledge that this type of ship and Seatrain Lines might engage in all kinds of coastwise transportation.

By Mr. KNOWLTON:

Q. Were coastwise operations contemplated when the Missouri-Pacific and the Texas & Pacific became interested—actual operations contemplated?

A. I do not see the difference in your questions, Mr. Knowlton.

Q. Had you any definite plans for going into coastwise operations of which you advised the Missouri-Pacific and the Texas & Pacific?

A. Yes; I think we had a great many plans for coastwise operations. That is what I tried to explain.

Mr. LARIMORE. Mr. Commissioner, I would just like to ask there, in order to get a clear understanding of it, this ques-

1147 tion:

Do you refer to the operations of the Overseas between Havana and New Orleans?

You asked if the Missouri-Pacific and the Texas & Pacific acquired stock at a time when coastwise service was contemplated. I don't know what investment he is referring to in his question.

Commissioner BRAINERD. I assume he is referring to the in-

vestment made by the Missouri-Pacific and the Texas & Pacific in the stock of Seatrain Lines, Inc. Is that it?

Mr. KNOWLTON. I did not mean to limit my question to Seatrain Lines, Inc. I meant to cover the Overseas corporation as well. I understand that the Seatrain Lines, Inc., took over the Overseas, and the Missouri-Pacific interest continued right through.

Commissioner. BRAINERD. To what interest do you refer, Mr. Knowlton?

Mr. KNOWLTON. Stock ownership.

Commissioner BRAINERD. In Seatrain Lines, Inc.?

Mr. KNOWLTON. In Overseas, which was transferred to the Seatrain Lines.

Commissioner BRAINERD. I had not heard any testimony about that.

Mr. MCCOLLESTER. That was to be gone into, Mr. Com-
1148 sioner, in connection with the Missouri-Pacific case. I thought it was not pertinent here inasmuch as this is an investigation of Seatrain Lines. But the history of that stock ownership will be dealt with when we come to the Missouri-Pacific application.

Commissioner BRAINERD. This may be answered now.

Mr. KNOWLTON. I do not want to confine my question to Seatrain Lines; I want to make it Seatrain Lines or Overseas, When the Missouri-Pacific and Texas & Pacific went into this was it a coastwise operation or a foreign operation?

Mr. LARIMORE. Again he says "when they went into this."

Commissioner BRAINERD. Ask him what operations they were engaged in.

The WITNESS, To answer your question, Mr. Knowlton, very strictly, no; that was not contemplated when they first went into Overseas, because we built a foreign ship which could not be engaged in coastwise operations. As the same time, I think I can help you by saying again that this was a plan to create a new type of water transportation and our field was North America. And we have at all times said that that was our field. When you asked me whether we contemplated something, all I can say is yes. We contemplated using these ships in a trade route in North America.

By Mr. KNOWLTON:

Q. Did you represent to the Missouri-Pacific and to the
1149 Texas & Pacific that the field was North America?

A. Absolutely; and always have to everybody.

Q. When was it that this Seatrain idea was developed, just approximately?

A. In 1925.

Q. That is near enough. Who carries the investment in the idle containers, the packages, or freight cars, or whichever you wish to call them, when they are moving under load on your boat?

A. Seatrain Lines.

Q. Those containers which are scattered in 12,000,000 hamlets, as I believe you expressed it, or 12,000 hamlets—who carries the investment in those while they are standing idle on the rails?

A. I presume the owner or the line on whose rails the car is standing.

Q. Why do you maintain a branch in Pittsburgh, as shown by your Exhibit No. 1?

A. We have traffic solicitors all over the world. Pittsburgh being an important center where there are plants and headquarters of concerns who are shippers, it is quite necessary to have a representative in Pittsburgh.

Q. In order to draw traffic from the plants in the Pittsburgh district?

A. Pittsburgh can ship through New York, it can ship
1150 through with the United Railways at Havana which, in turn, protects us while the cars are in Cuba.

Q. Does the Seatrain Lines have any interest in the United Railways?

A. No.

Q. Does it have any interest in the Seatrains?

A. No.

By Commissioner BRAINERD:

Q. Have you a list of your stockholders in the Seatrain? Has that been filed?

A. With the Commission?

Q. Yes.

A. I do not think so.

Q. Have you a list with you?

A. I think I have. If I haven't, I can get it.

Mr. MCCOLLESTER. If we haven't it here, Mr. Commissioner, may we furnish it within ten days?

Commissioner BRAINERD. I think that will be pertinent, if you will do that.

The WITNESS. It is on file with the Shipping Board.

Mr. MCCOLLESTER. That is, the Seatrain stockholders, you mean?

Commisisoner BRAINERD. Yes.

By Mr. BUCKLEY.

I understood you to testify that your distinction between a ferry and a Seatrain was that a ferry loads cargo or cars on the
1151 ship and you load it into hulls? Is that it?

A. That is my conception of a ferry. I never saw a ferry yet that did not load its cargo on the ship.

Q. Is your service in any way considered to be a bridge service between railroads?

Mr. McCollester. May I ask counsel what he means by bridge service?

Mr. Muckley. I am asking the witness. I will ask the witness what he means by stating on page 5 of Exhibit No. 1 the following:

"Although it is an ocean carrier, a Seatrain ship is actually a floating bridge—a connecting link for all railroads."

What did you mean by that?

The Witness. I meant to convey it is not necessary to discharge cars to load the cargo into the vessel's hold, and when the vessel reaches the port of destination to reload that cargo back into cars, that it actually goes through on a continuous movement without rehandling of the goods.

By Mr. Muckley:

Q. Isn't that also true of a car ferry even under your conception of it?

A. Yes; surely. They carry freight.

Q. Does a car ferry have any of the attributes of a bridge, in your opinion?

A. I think you have to define bridge. Car ferries are used across the Mississippi River, for example, and other very
1152 short bodies of water. On the other hand, car ferries are used in Europe to cross the Baltic.

Q. To cross the sea?

A. To cross the Baltic Sea, a distance of a hundred and some miles. Car ferries are used from Key West to Havana, a distance of about 90 miles. Of course, a bridge is impossible in those locations, but across the Mississippi River a bridge is very possible.

Q. Would you say the service to Havana on the Florida East Coast is a car ferry service?

A. Yes; I think that is a car ferry service. Their ships are car ferries.

Q. Then the question of distance has little, if anything, to do with your conception of a car ferry, because that is a considerable distance across there, isn't it?

A. I don't think distance has anything to do with it, as to whether it is a ferry or not. It is the type of the ship which determines whether it is a ferry.

Q. It is the type of ship and not what the ship does? Is that your opinion?

A. When you are asking me about a car ferry; yes. Incidentally, I think you can use ships which are not ferries to do the work of ferries.

Q. Do you consider that your service from New Orleans to Havana is car ferry service?

1153 A. No; absolutely not.

Q. You disagree with the Commission about that, do you?

A. I certainly do.

Q. You stated that a freight car was used as a container in your service and was used as a part of the package. Is that correct?

A. Well, it may be part of the package. It depends again upon the definition of a package. Goods may be packed once, twice, three, or four times.

Q. It is your own term, isn't it, that the freight car is a part of the package?

A. Take a tank car, for example, with liquid. I certainly think that is a container. You might term it a package, although in my conception a package is something very much smaller than a container.

Q. It is either a package or a container, in your opinion?

A. It is something with which to transport goods.

Q. When you transport traffic in these freight cars under rates filed with this Commission do you assess any freight rate on the weight of the container?

A. No.

Q. You do not?

A. No, sir.

Q. In the tanks to which you referred, Mr. Brush, where you say you can carry 4,000 tons of freight, do you carry all liquids in those tanks?

1154 A. I have been trying to distinguish between the physical characteristics in my conception of what a ferry is and what a vessel is.

Q. I am taking your conception. I do not admit you are right in it but I am using your own conception of it.

A. You cannot have two things at once. Because an animal has four legs, that does not prove it is a different kind of animal.

Q. You mean a seatrain cannot be a car ferry and a boat at the same time?

A. Not according to its physical characteristics; in my opinion it cannot.

Q. But you do carry your cargo on decks, do you not, different decks of your vessel?

A. Yes, sir.

Q. You have four decks, whereas other car ferries ordinarily so known in this country, have only one deck?

A. That is right.

Q. That is the distinction you make on it?

A. No; that is not the distinction I make.

Q. What is your distinction?

A. We carry cargo in the holds of the vessel in the way every ordinary oceangoing vessel does, whereas the car ferry carries all their cargo on deck and does not use the hold for transporting freight.

1157 Q. But it was so considered when the Canadian Company was first organized, was it not?

A. No, sir.

Mr. CAMPBELL. That is all.

Commissioner BRAINERD. These vessels are seagoing vessels, are they not?

The WITNESS. Yes, sir; they bear the highest rating of Lloyds' and the American Bureau for Ocean-Going Vessels.

Commissioner BRAINERD. In fact, one of them was built in England?

The WITNESS. Yes, sir; they could physically trade around the world.

Commissioner BRAINERD. How many vessels have you?

The WITNESS. Three, sir.

Commissioner BRAINERD. They are all of the same type?

The WITNESS. They are all of the same type, slightly varying dimensions and speed.

Commissioner BRAINERD. When were they built?

The WITNESS. The first one was completed at the end of 1928 and service started in January 1929; and the next two were completed five or six weeks ago, and put in service on October 6th and October 13th, respectively, out of New York to Havana and New Orleans, etc.

Commissioner BRAINERD. Does your pamphlet, Exhibit No. 1, describe the locomotive power which propels these vessels,

1158 and so forth?

A. No, sir; it is the ordinary marine machinery, with geared turbines. On our new vessels, water-tube boilers, 8,800 horsepower, a modern high-pressure steam propulsion unit has been installed. The original vessel has reciprocating engines and Scotch boilers.

By Mr. CAMPBELL:

Q. Is not the principal reason that you cannot operate across the Atlantic is because of the different gauges of the railroads of the different countries?

A. No, sir; the gauges are the same, Judge Campbell.

Q. So that the only handicap is the distance across the ocean, then?

A. No; a great many factors come into that problem. For example, where we get our efficiency over the ordinary vessel in the North American trades is the saving in terminal investment, saving in terminal time. Now, on a long voyage, the percentage of that terminal expense decreases, so that if you extend the voyage for 25,000 miles, although your terminal expense to load and your discharge your ship remains stationary in proportion to your total expense, and if you saved that, you have not diminished your expense very much.

Q. Can we sum it up in this way: That at present you think that you have all the business that you could handle in North America and it would not pay you to try to overcome the
1159 difficulties which face you in the Trans-Atlantic trade?

A. Yes, sir; I think that is a very fair statement. I think we have got a real service to perform here in North America, that should be done first. I doubt very much whether the other is practicable.

Commissioner BRAINERD. Mr. Brush, I asked you this morning if you would furnish the Commission with a list of directors, officers, and stockholders of Seatrain Lines, Inc.

The WITNESS. Yes, sir.

Commissioner BRAINERD. At that time I had not learned of the Overseas Railway.

The WITNESS. We will give you that too, sir.

Commissioner BRAINERD. Which, as I understand it, is a holding company for the Seatrain Lines.

The WITNESS. Not quite, sir. It is a holding company, and it holds Seatrain stock but Seatrain has other stockholders than Overseas Railway.

Commissioner BRAINERD. Then would you include in the information which you furnish a list of the officers and directors of both companies?

The WITNESS. Yes, sir.

Commissioner BRAINERD. The Hoboken Terminal Properties, Inc.—what is that company? What does it do and what does it own?

The WITNESS. The Hoboken Terminal Properties owns the stock of the railroad, and that is approximately all. It
1160 has disposed of its real estate. The purpose of the Terminal Company at the present time is to act as our stevedoring concern.

Commissioner BRAINERD. And the stock of that company is owned by Seatrain Lines, Inc.?

The WITNESS. The stock of the Terminal Properties is owned by Seatrain Lines.

Commissioner BRAINERD. The Hoboken Manufacturers' Railroad Company owns the Hoboken Shore Road?

The WITNESS. Yes, sir; that is the trade name.

Commissioner BRAINERD. It is described in your Exhibit No. 2?

The WITNESS. Yes, sir.

Commissioner BRAINERD. Cars that are used on the boats are the ordinary freight cars?

The WITNESS. Yes, sir.

Commissioner BRAINERD. And the cars that are owned by the various railroad lines in the United States?

The WITNESS. Yes, sir; and Cuba.

Commissioner BRAINERD. And perhaps private car lines, too?

The WITNESS. Yes, sir.

Commissioner BRAINERD. I think Mr. Boles has some questions, Mr. Brush.

Examiner BOLES. Have you given the date on which you acquired the Hoboken Manufacturers' Railroad?

The WITNESS. April 25, 1932.

1161 Examiner BOLES. What was the status of the Seatrain operations at that time? Where were you operating?

The WITNESS. We were solely engaged in foreign commerce, operating one vessel between New Orleans and Havana, Cuba.

Examiner BOLES. Had you as of that date determined to enter into the coastwise trade at the time you acquired this Terminal?

The WITNESS. We considered it possible at that time; yes sir.

Examiner BOLES. Is that one of the purposes for which you acquired the Terminal, to be used in this coastwise operation?

The WITNESS. In connection with these two new vessels?

Examiner BOLES. Yes, sir.

The WITNESS. No, sir; I would say that was not one of the purposes. It was the purpose, however, to acquire that railroad for future expansion of Seatrain, which, obviously, can be used to advantage in the Coastwise trades. Our two new vessels, however, have restrictions on their operation, and are subject to the control of the Shipping Board.

Examiner BOLES. You advised the Seatrain Lines, Inc., to acquire the Terminal Properties, did you not?

The WITNESS. Yes, sir. We bought that at public auction.

Examiner BOLES. The properties or the stock?

The WITNESS. We bought the stock of the Hoboken Manufacturers' Railroad Company and the Hoboken Terminal Properties.

1162 Mr. MCCOLLESTER. What date?

The WITNESS. March 28, 1932.

(Continuing former quotation)". * * * and, so far, we have kept out of that."

In the face of that policy the Seatrain knew that it could not obtain loans for the construction of these vessels on the basis of coastwise operations.

Mr. McCollester. Objected to, I move to strike.

Examiner Boles. Note the objection.

The Witness. However, there are many incidents which indicate that the Seatrain Lines, Inc., had in mind establishing service between domestic ports prior to and at the time they were negotiating with the Shipping Board for the construction loan for vessels to be used in foreign trade which was authorized the latter part of the year 1931.

As early as March 1929, the Seatrain Lines, Inc., were contemplating a service between Gulf ports and New York. In the latter part of that month, Mr. George Seely, President of the Galveston Wharf Company at Galveston, Texas, advised our General Agent at Galveston that one of the officers of the car ferry service then operating between New Orleans and Havana had asked Mr. Seely to ascertain the ten principal commodities and volume thereof handled by the coastwise lines operating between Galveston and New York.

Mr. McCollester. We will put it back to 1926, if you
1163 want to, Mr. Simmons.

The Witness. This was some time before.

Examiner Boles. You speak of car ferry service operating between Havana and New Orleans?

The Witness. Yes, sir.

Examiner Boles. What do you refer to?

The Witness. The Seatrain Service or Overseas service, the same interests as are now operating the service between New York and New Orleans.

Our General Agent asked me whether it would be in order to supply the Seatrain through Mr. Seely with the desired information and I advised him—"He can hardly expect me to furnish data to facilitate competition with us."

In the early part of May 1930, a party of Erie Railroad officials, including Mr. H. J. Bordwell, General Manager, and Mr. G. C. Manning, Freight Traffic Manager, made a trip to New Orleans at the suggestion of the Overseas Railways, Inc., which was the former name of the car ferry company, and one of the officials advised us that the Overseas Railways hoped to interest some large eastern railroad to tie in on a proposition to operate between New Orleans and New York, as well as between New York and Havana. I was also advised about the same time that the Seatrain Lines endeavored to interest the Pennsylvania Railroad

in the proposition to establish a New York-New Orleans
1164 service, a party of Pennsylvania Railroad officials making a trip to New Orleans for the purpose of inspecting the facilities established at that port for handling cars by car ferry.

Mr. McCollester. When was that?

The Witness. About the same time as the Erie——

Mr. McCollester. About what date?

The Witness. Early part of May, 1930, that this official advised me he was there.

Under date of September 23rd, 1932, the Seatrain Lines, Inc., made application to the U. S. Shipping Board for authority to operate between domestic ports, this application being reproduced on pages 11 to 14 inclusive of Exhibit No. 80. At the hearing before the Shipping Board on October 5th, 1932, the President of Seatrain Lines, Inc., stated specifically that the service in which they desired to engage was between New York and New Orleans. The reason assigned for the desire to engage in the trade between New York and New Orleans was that there had been a decrease in traffic between the United States and Cuba.

For several years prior to the negotiations with the U. S. Shipping Board for construction loan for two new car ferries, the Overseas Railways or Seatrain Lines, Inc., had in operation between New Orleans and Havana one foreign built car ferry with a capacity of approximately 100 cars.

1165 H. I. Cone, was sworn and testified as follows:

Direct examination by Mr. Thurtell:

Q. Admiral Cone, what is your official position?

A. I am a Commissioner of the Shipping Board.

Q. Will you kindly state how long you have been a Commissioner of the Board?

A. I have been a Commissioner of the Shipping Board since June 9, 1928.

Q. Would you give us, in a brief way, your previous experience with ships?

A. Well, I have been a Naval officer most of my life, and manager of a shipping line out of New York; and General Manager of the Fleet Corporation of the Shipping Board.

Q. That is sufficient, sir. During your occupancy of the office, have you been Chairman of the Shipping Board Committee on construction loans?

A. Yes, sir; I have been Chairman of the Construction Loan Committee of the Shipping Board and Commissioner in charge of the Bureau of Construction and Finance, and in general charge of all construction loan finance activities of the Shipping Board.

Q. Are you familiar with the various steps in the granting of

the Seatrain loan, from the time the application was first
1166 made or negotiations were first started?

A. I am.

Q. In your testimony before the Senate Appropriations Committee on March 28th, it is noted that on pages 926 to 929 there appear copies of the recommendations of the majority of your Loan Committee, and also a minority report on the Seatrain Lines. Will you please state if these represent the formal reports or recommendations which were before the Board when it approved the Seatrain Lines' loan?

Mr. McCollester. I object, Mr. Examiner. I interpose an objection to any testimony relating to proceedings before the United States Shipping Board, on the ground that it is not the function of this Commission to determine the validity of the Acts of the United States Shipping Board.

Examiner Boles. As I understand, this testimony is offered for the purpose of showing that it was the intention of these vessels to be operated in foreign commerce.

Mr. Thurtell. That is correct.

Examiner Boles. He may answer.

Mr. McCollester. Note my exception please.

The Witness. I would like to have you state your question again.

Mr. Thurtell. Would you be good enough to read the question, Mr. Reporter?

(Pending question read by Reporter.)

1167 The Witness. I would have to have copies of the document which you mentioned to see. I will answer it by saying, I do not remember the numbers of pages of public documents of that kind.

By Mr. Thurtell:

Q. You could not at this time state whether those represented the information which was before the Board upon which it acted?

A. No, sir, I could not.

Q. In both the majority report and the minority report, it appears to be stated quite clearly——

Mr. McCollester. We object.

Mr. Thurtell. What is that?

Mr. Larimore. We object to him testifying.

Mr. Thurtell. I am not testifying. I am laying the foundation for a question. Here are the reports, if you want me to read those.

Examiner Boles. You may read what is stated in that report and ask him as to his knowledge of that.

By Mr. THURTELL:

Q. I will put the question in this way: Was it not stated clearly in the requests that were made to the Shipping Board for this loan that this loan was to be used in the construction of ships which would be used in foreign commerce?

Mr. MCCOLLESTER. Just a minute, Admiral. Please do not answer. I interpose an objection to that, Mr. Examiner.
1168 In addition to my general objection as to testimony in proceedings before the Shipping Board, I object on the ground that they are not relevant to this inquiry and beyond the jurisdiction of this Commission; not only that, but I interpose the further objection that it has not been shown whether or not these requests were oral or written, and if they are written, written documents are the best evidence.

Examiner BOLES. Objection sustained on that latter ground.

Mr. THURTELL. Mr. Examiner, I will not ask you to change your ruling, but I want to call your attention to this matter. We are here inquiring into the Seatrain, its inception, and everything about it, the conditions under which this loan was granted by the United States Shipping Board, and that certainly is a matter that is pertinent to this inquiry. I will put my question——

Examiner BOLES. Have you copies of these documents that were presented to the Shipping Board containing these recommendations, and have you copies of these documents about which you are asking him?

Mr. THURTELL. My question relates to matters that were the subject of inquiry before the House Committee of Congress and the Senate Committee of Congress, and before those Congressional committees, this witness testified.

Examiner BOLES. You have not copies of these documents
1169 about which you are asking?

Mr. THURTELL. I have not with me at this moment, but I can put this question in such a way that I am sure there is not any real objection to it upon the ground that it is a leading question, or a question that may not be properly asked.

By Mr. THURTELL:

Q. Admiral Cone, as a member of the Shipping Board, was it your impression of the representations that were made to you by the Seatrain that the purpose of this loan was to construct ships that should be used in foreign trade or in domestic trade?

Mr. MCCOLLESTER. Objection.

Examiner BOLES. Objection overruled.

Mr. LARIMORE. Wait a minute. The impression——

Mr. THURTELL. I want his impression.

Mr. LARIMORE. Wait a minute. The impression that this witness might have gotten from a request—the Shipping Board speaks through its records. Its views and impressions do not float around in the air, in a nebulous way, but it speaks through its records. Any request for a loan must be made through the procedure prescribed by the Board. Without introducing the request for the loan, or the records of the Board, but to put a member of the Shipping Board on the stand and ask him what impression he got from what took place—that is improper. I have been par-
1170 ticipating in litigation for 32 years, more or less, and I never saw anything like that, even in a J. P. Court.

Mr. THURTELL. I have not had that long experience, which is to my disadvantage, but, at the same time, I have participated both as an examiner and attorney before the Interstate Commerce Commission. I am calling this witness, and I am asking him as to the testimony that was put before them, the representation that was made to the Board, as to the purpose to which these ships were going to be devoted. When he gets through, you may say it is his personal impression and not an impression of the whole Board.

Mr. LARIMORE. I want to state this and then I am through: The Shipping Board is a body that keeps a record of what it does, if it complies with the law—and the presumption is that it complies with the law. It establishes certain rules which an applicant for loans must follow, and the presumption is, if it made this loan, that the applicant followed those rules. All those things are matters of record with the Shipping Board and are available to Mr. Thurtell. Now instead of bringing those records in here, through which, and only through which, this Board can speak, he places a representative of that Board on the witness stand and while keeping the record, so to speak, of the Board behind him, which record would develop the facts, he asks this witness an impression, what
1171 impression he got from the proceeding the Board had, and expects—or else he would not ask the question—expects him to make up this matter as to what the record shows. How you can give effect to such testimony, I cannot see.

Examiner BOLES. I do not care to hear any more.

Mr. LARIMORE. All right.

Examiner BOLES. Can you change that word "impression"?

Mr. THURTELL. Yes, sir.

By Mr. THURTELL:

Q. Admiral Cone, what representations were made to the Shipping Board, in your presence, respecting the uses to which they expected to put these ships?

Mr. MCCOLLESTER. Objection. Mr. Examiner, I feel that the question whether the proceedings before the Shipping Board

should be gone into and passed upon by this Commission is a question as to which, before it gets into the record at all, we are entitled to have the ruling of the Commission. I say that with all due respect to your Honor, but it seems to me that this presents a very serious question, not only for us— because it is serious for us—but a serious question for the Commission itself, as to whether the Commission is going to determine whether the Shipping Board proceeded properly.

Mr. THURTELL. We are not asking that.

Examiner BOLES. We are not attempting any showing of that kind, as I understand it. The only thing being asked here is as to the purpose for which the loan was made. That is proper to this proceeding. That question is involved and will be
1172 involved.

Mr. MCCOLLESTER. Mr. Examiner, on that point, the loan has been made. That is a fact, of course.

Mr. THURTELL. For certain purposes.

Mr. MCCOLLESTER. And whether or not having received that loan, the operation of the ships is now lawful, is a proper inquiry in some tribunal, but it is not a proper inquiry here. Whether the loan in the beginning was sought for some purpose or some other purpose is entirely immaterial. The question is, whether those ships are lawfully operating at the present time. If they are lawfully operated, they are entitled to continue to operate.

Examiner BOLES. Off the record, Mr. Reporter.

(Informal discussion off the record at this point.)

Examiner BOLES. You may proceed, Mr. Thurtell.

Mr. MUCKLEY. Mr. Examiner, may I call attention also to the fact that this testimony is admissible, if for no other reason at all than in order to rebut the statements of Mr. Brush that the Shipping Board knew that these vessels were to be operated in coastwise service at the time they made loan. He testified to that in this record two or three times.

Mr. MCCOLLESTER. On cross examination and over my objection.

Mr. MUCKLEY. His statement is in the record. We want to show by this witness that that statement is wrong.

Examiner BOLES. You may proceed.

1173 Mr. MCCOLLESTER. Of course this witness is giving his own personal impression.

Mr. THURTELL. That goes to the weight of his testimony.

Mr. MCCOLLESTER. Is he being asked as to the impression of the Shipping Board or the impression of Admiral Cone?

Mr. THURTELL. I would like to have the Reporter go back to my last question before this long conversation started.

(The previous question as above recorded was read by Reporter as follows:

"Q. Admiral Cone, what representations were made to the Shipping Board, in your presence, respecting the uses to which they expected to put these ships?")

Examiner BOLES. You may answer.

The WITNESS. Shall I answer?

Examiner BOLES. Yes, sir.

Mr. MCCOLLESTER. I except to the ruling.

Examiner BOLES. Note the exception.

The WITNESS. Representations were contained in a preliminary application for a construction loan by the Seatrain dated August 11, 1931.

Mr. MCCOLLESTER. That was in writing, Admiral?

The WITNESS. That is in writing.

Mr. MCCOLLESTER. We object to the total testimony.

Examiner BOLES. Proceed.

The WITNESS. In this preliminary application for a con-
1174 struction loan I quote:

"The loan on two vessels to be built and operated on the ocean mail route New Orleans, La., to Havana, Cuba."

I quote further:

"For the purpose of building new vessels to be operated in the above-mentioned ocean mail route."

It runs all through this written application, that the purpose for this loan is for the construction of vessels to operate between Cuba and the United States.

Examiner BOLES. What is the date of that application?

The WITNESS. August 11, 1931. After considerable negotiation with me personally, and others in my office, a construction loan contract was signed by the Seatrain Company in which the following paragraph appears:

"The vessels will be operated in maintaining service on lines between New Orleans, La., and Havana, Cuba, and in other exclusive foreign service between Atlantic and/or Gulf ports and Cuba, or in such other service or services as the Board may by resolution hereafter authorize, and not otherwise."

Nothing was mentioned to me, or came to my notice, to lead me to believe that there was an intention to operate these ships in other than foreign service. Does that answer your question?

Mr. THURTELL. Yes, sir. Did your Board not hold a public hearing with respect to this application?

1175 The WITNESS. We did.

By Mr. THURTELL:

Q. Is this a copy of the notice sent out with respect to that hearing? (Handing paper to witness).

A. Yes, sir.

Q. Would you care to read that?

Mr. McCOLLESTER. May I see it?

Mr. THURTELL. Yes, sir. (Handing paper to counsel).

By Mr. THURTELL:

Q. Will you kindly read that notice into the record?

A. (Reading.) "August 22nd, 1931, United States Shipping Board, Washington, D. C.

"Seek operators' views on loan application.

"Competitors of applicants for construction loans in aid of building new ships for the New Orleans-Havana trade and Gulf-Pacific trade have been advised of pending applications and given until September 1st to file statements pertinent to the situation. It has been stated to these operators that the Board's Committee on construction loans will make subsequent recommendation to the Shipping Board to hold a hearing at which representatives of each interested company will be invited.

"Applicants for the loans in question are the Overseas Railways, Inc., and the Gulf-Pacific Line."

This is a press release.

Q. Was that notice issued in response to certain protests
1176 that had been filed by——

A. That notice was gotten out by the press room of the Shipping Board to hand to the newspaper men.

Q. Was it the policy of your Board at that time, insofar as you understood its policy, to make loans to coastwise ships or for the building of ships to enter the coastwise service?

A. The general policy of the Board was against the granting of loans to ships engaged in coastwise or intercoastal trades.

Q. Why so?

A. On the theory that those trades were thoroughly protected from competition by foreign flag ships, and that if there was any business to warant the establishment of trade routes in these protected trades, American capital would be coming forward and American ships would be put on the routes.

Q. And none but American ships could participate in this coastwise trade, could they?

A. None but ships built in America.

Q. After the hearing to which you have referred, did your Board's Traffic Bureau, Bureau of Traffic, study the United States to Cuba traffic to determine if that traffic justified the loan sought?

A. This is getting rather involved—I am not in charge of our traffic bureau.

Mr. McCOLLESTER. I sympathize with you, Admiral.

Examiner BOLES. If it is within your knowledge, please
1177 answer. If it is not, all right.

The WITNESS. There was a study made in the Board of the traffic available between Cuba and the United States, which study was made available to me and the Construction Loan Committee, to determine the advisability of loaning on these ships, with particular regard as to whether they would be good security on that trade route.

By Mr. THURTELL:

Q. Would you mind saying what was the advice contained in the report? Was it that it was a good loan or a poor loan?

A. I do not remember. The report is in some record.

Mr. THURTELL. We filed that report, Mr. Examiner, during the testimony of Mr. Green.

By Mr. THURTELL:

Q. Did the Seatrain represent in your hearing that the Florida East Coast traffic estimates were not correct, and of no value, and that the essence of the traffic support for the Seatrain loan would be the capture of Cuban sugar traffic from foreign tramps?

Mr. MCCOLLESTER: I object.

Mr. THURTELL. This question, your Honor, goes to the question as to whether representations were made to the Board by the Seatrain as to where they expected to get this traffic to keep up these ships in the foreign trade.

Examiner BOLES. He may answer.

Mr. MCCOLLESTER. I object on the ground that it is not
1178 the best evidence, besides my objection as to the relevancy.

The WITNESS. I would like to make a little statement off the record here, if I could. Could I?

Examiner BOLES. Yes, sir.

(Informal discussion off record.)

Mr. THURTELL. Mr. Examiner, if the Admiral does not remember, I am glad to withdraw the question.

Examiner BOLES. If he does not remember, he does not need to answer the question.

The WITNESS. I do not remember.

By Mr. THURTELL:

Q. All right. Did the Seatrain negotiations, or the application on their behalf, at any time indicate that these Seatrains were to be built for or used in the coastwise trade?

A. They did not.

Q. Did any traffic studies made by the officers or employees of the Board, as to the desirability of recommending the loan, take into account possible support to be derived from coastwise trade?

A. It did not.

Q. Did the Board, according to your best recollection, in approving the loan understand that the ships were to be used, or might be used, in the coastwise trade?

Mr. McCollester. I object to the witness stating what the Board thought. I have no objection to him stating what he
1179 thought, except my general objection.

Mr. Thurtell. I am asking for his best recollection.

Examiner Boles. Objection will be sustained as to that question.

By Mr. Thurtell:

Q. I will put the question in this way: Did you, acting as a member of the Shipping Board, in response to the application for this loan, understand that the ships to be used were to be used, or might be used, in the coastwise trade?

A. I did not understand that they were to be used in the coastwise trade.

Mr. Thurtell. Mr. Examiner, that concludes my questioning.

Mr. Lehman. I would like to ask one question on direct.

By Mr. Lehman:

Q. Admiral Cone, did you expressed the opinion before a committee of Congress to the effect that the vessels in question would probably become obsolete before the expiration of 20 years?

A. My opinion, expressed before that committee, must appear in the hearing.

Q. Let me refresh your recollection. I will read a portion of the testimony to you. Question put by Senator Smoot:

"Do you have any apprehension of the failure of the type of ship that is under consideration?" And your reply:

"I have no apprehension as to the security, because I think this concern is solvent and probably will remain so, I do
1180 have an apprehension that this concern will find before the 20 years is up that these two vessels will be entirely obsolete." Do you recall that as your testimony?

A. That is correct.

Q. Do you still hold to that view?

A. I do.

By Mr. Muckley:

Q. Admiral Cone, would it be too much to request you to file a copy of the application of the Seatrain Lines with the Commission, at this hearing, or is that a private document of the Shipping Board?

Mr. McCollester. Which application?

Mr. MUCKLEY. The loan application of August, 1931.

The WITNESS. They are all published in that public document right there, if you want to get them.

Mr. MUCKLEY. I do not think the loan application is, Mr. Examiner.

The WITNESS. I have no objection.

Examiner BOLES. Off the record.

(Informal discussion off record.)

Mr. MUCKLEY. Mr. Examiner, may I supply copies of that application to the parties of record within ten days?

Examiner BOLES. That will be permitted, yes, sir.

Cross-examination by Mr. MCCOLLESTER:

Q. Admiral Cone, whatever may have been your impression as to the original application and the purposes
1181 for which the loan was made, it is a fact, is it not, that the Shipping Board has approved the operation of these two Seatrain ships in the service between New York and New Orleans, via Havana, for a period of six months?

A. They have.

Q. Now, Admiral, am I correct in my impression that the Shipping Board has no jurisdiction to make loans to railroads?

A. No.

Q. You loan only for building ships, do you not?

A. That is so.

Q. Would you consider these Seatrain ships a railroad?

A. That is a large question. I could not answer it now.

Q. They are seagoing ships, capable of going to sea?

A. Oceangoing ships.

Q. Oceangoing ships. In making a loan, does the general form of construction have to be approved by your committee before a construction loan is recommended or approved?

A. Yes, sir.

Q. And you did approve the general construction of these ships?

A. Yes, sir.

Q. Does your committee also have to be convinced that the ships can be efficiently and economically operated before you will approve loans for their construction?

A. Yes, sir.

1182 Q. And you so determined with respect to these Seatrain ships, did you?

A. You mean that it was economically sound?

Q. That the ships themselves could be economically operated.

A. As ships?

Q. As ships.

A. Yes, sir.

Mr. McCollister. I think that is all, Admiral. Thank you.

Examiner Boles. Any further cross-examination?

Mr. Larimore. I would like to ask a question.

By Mr. Larimore:

Q. Would most any ship carrying freight become obsolete in 20 years?

A. Usually that is about the life of the usefulness of a ship.

Mr. Larimore. That is all.

Redirect examination by Mr. Lehman:

Q. In your opinion, would this type of ship be likely to become obsolete much sooner than the ordinary type of oceangoing vessel, Admiral?

A. I believe I can answer all that by reading the minority report, or dissenting vote that I cast when the loan was granted, which covers the whole point involved. Would that be proper?

Examiner Boles. That is all right in response to the question. You may read it.

1183 . The Witness. (Reading). "This application is for a loan for the purpose of building two new ships for operation between New Orleans and Havana on Mail Route No. 56. Our Traffic Bureau report shows that there is not sufficient traffic available on this route to adequately support these two ships, which makes it necessary to extend the service, as provided in Paragraph 6, to other Gulf and Atlantic ports. It is believed that the granting of this loan at this time to extend the operation of these seatrains between North Atlantic and other Gulf ports and Cuban ports, with the aid of construction loan funds, might retard rather than help the development of the American Merchant Marine. While the proposition may look attractive at this time, there does not appear to me to be any reasonable assurance that competition might not develop improvements that would make obsolete two vessels of the same age on which we have loans. At the present time there is before the Interstate Commerce Commission an application by the Florida East Coast Railway looking toward placing oceangoing ferries in competition with these Seatrains, which may lead to a solution of this problem in another way. The Board has been informed of all the protests for and against this loan, and is aware of the objections to hasty action raised by Congressman Wood, Chairman of the Appropriations Committee, and by Congressman Montet of Louisiana.

"(Sgd.) H. I. Cone."

1184 . Notwithstanding this minority report, the Board decided, by a majority vote of five to two, to grant this loan. That seems to cover the whole thing.

Mr. LEHMAN. I do not wish unduly to press that question, Admiral, but it does not seem to me that your dissent quite covers what I had in mind. I wanted to know whether, in your opinion, these types of vessels, because they represented a new idea, would not, in your opinion, become obsolete quicker than the usual type of oceangoing vessel.

The WITNESS. I think they will.

By Mr. MUCKLEY:

Q. Admiral, I am reading from page 927 of the Treasury Report of the Hearings before the Sub-Committee of the Committee on Appropriations, United States Senate, on the Treasury and Post Office Department Appropriation Bill, 1933. This is a report on H. R. 9699. Apparently the report I am reading from is addressed:

"From the Committee on Construction Loans to the United States Shipping Board, Subject: Seatrain Lines, Inc. Application for Construction Loan."

On page 927 the following appears:

"Having in mind that the proposed vessels are of a special type not adaptable to ordinary service in regular cargo trade routes, and that specially designed terminal facilities are designed for them, this Committee would not ordinarily consider that a construction loan was justified in this case. In view,
1185 however, of the fact that the loan, if granted, will be additionally secured by the revenue to be received by the applicant for the performance of ocean mail contract service, as hereinafter provided for, this Committee is of the opinion that the construction of the two vessels for the service intended can properly be considered the basis of a loan from the Construction Loan fund."

That report appears to have been signed by H. I. Cone, E. C. Plummer, and Albert H. Denton.

Was that the committee which considered that matter and made a recommendation to the Shipping Board?

The WITNESS. That was a report signed by E. C. Plummer and Albert H. Denton.

By Mr. MUCKLEY:

Q. Does not your name appear there?

A. My name is not signed. That is evidently a mistake. There was the same difference of opinion in the committee—which I am glad to say frequently occurs—that there was in the Board.

Q. The report that I read from, then——

A. That was a majority report of the Committee on Construction Loans, of which there were three members.

Q. Apparently, would you say, from what I have said, that the approval even of Messrs. Plummer and Denton, was based in part at least upon the fact of the mail contract?

Mr. LARIMORE. Wait a minute. Their report speaks for
1186 itself, what it is based on.

The WITNESS. Here is their report.

Mr. LARIMORE. You certainly would not ask this witness to state to the contrary, would you?

By Mr. MUCKLEY:

Q. Was the mail subsidy considered as the basis for the loan, the contract in effect?

A. That report was submitted to the Board and is the report from the Construction Loan Committee that the Board acted on.

Q. And at the time the Board acted, was this mail contract given consideration?

A. The report itself says—would it not be well to read that? The report says:

"To be used in aid of the construction of two new vessels to be used in ocean mail contract service on Route No. 56 from New Orleans, La., to Havana, Cuba, and for other foreign trade service."

Mr. LARIMORE. What else?

The WITNESS. "* * * in support of its application, the applicant submits plans and specifications," and so forth.

I would like to put a copy of this in as an answer to that. It shows itself whether it was considered or not.

Mr. MUCKLEY. We would be glad to have a copy of that in the record.

Examiner BOLES. I think it would be well to let that report go in, if you will handle it the same way.

1187 Mr. MUCKLEY. If you will give me a copy of it, Admiral, I will file it.

Mr. McCOLLESTER. Subject to my objection.

Mr. MUCKLEY. Within ten days, Mr. Examiner?

Examiner BOLES. Within ten days.

Mr. McCOLLESTER. Admiral, will you state the date of your minority report which you read?

The WITNESS. They are all dated.

Mr. McCOLLESTER. Is the minority report going in too?

Mr. MUCKLEY. I will put that in too. That is all.

Examiner BOLES. Anything further?

Mr. McCOLLESTER. I have one or two questions.

Re-cross-examination by Mr. McCOLLESTER:

Q. I am interested, Admiral Cone, in your reply to Mr. Lehman's question, in which he sought to elicit from you the statement which I understood you gave, that Seatrain ships would

become obsolete more rapidly than other cargo ships. Is that what you intended to say?

A. I gave as my opinion that these special types of ships, that are only available for carrying special types of cargo, and which use special terminals, in my opinion, are bound to become obsolete more quickly than the ordinary type of vessel that can carry cargo anywhere, and use any available terminal.

Q. Will you state why, in your opinion, a vessel designed
1188 to carry railroad cars will become obsolete more rapidly than any other kind of vessel, unless you anticipate that the railroads are going to go out of the transportation business and freight will not be carried in railroad cars?

A. I think my report covers that. I do not mean to say that vessels carrying railroad cars will necessarily be obsolete before any other ones. I am talking about these particular vessels.

Q. These are designed to carry railroad cars, are they not?

A. Yes, sir. Other vessels may be designed to carry railroad cars also.

Q. Has the Shipping Board approved loans for the construction of vessels other than these Seatrain vessels, which are now, or are presently, to be used both in foreign and in intercoastal trade?

A. It has.

Q. Can you give some examples?

A. There are a number of high-speed large combination passenger and freight vessels that have been built under the Construction Loan, that will be used both in coastwide and foreign trade. The loans were granted due to the special value of these vessels.

There are also a number of tankers which are especially valuable for national defense service, which are free to be used in either coastwide or foreign trade.

1189 Mr. McCollester. That is all.

Mr. Thurtell. That is all.

Examiner Boles. That is all.

(Witness excused.)

Mr. McCollester. In connection with the future cross-examination of Mr. Simmons, I should like to ask that the Southern Pacific supplement their Exhibit No. 83 by a statement separating the railway operating revenues and railway operating expenses of the Southern Pacific Steamship Lines, as shown on the three pages of that exhibit, as between freight and passenger.

Examiner Boles. Any objection to doing that?

Mr. Muckley. I do not know whether it can be done. You say revenue and expenses?

Mr. McCollester. Yes, sir.

Mr. MUCKLEY. I do not know whether it can be done.

Mr. MCCOLLESTER. You report them to the Interstate Commerce Commission separated according to the Commission's formula?

Mr. MUCKLEY. I do not know whether it is done or not. If it can be done, I have no objection to it.

Mr. MCCOLLESTER. I assume that the information on Exhibit No. 83 is taken from the reports to the Commission, is it not?

Mr. MUCKLEY. So far as I know, it is.

1190 *Exhibit 100*

AUGUST 11, 1931.

Admiral HUTCH I. CONE,
Chairman, Committee on Construction Loans,
United States Shipping Board, Washington, D. C.

MY DEAR MR. CHAIRMAN: We wish to make Preliminary Application for a construction loan on two new vessels, to be built and operated on the Ocean Mail Route, New Orleans, La., to Havana, Cuba, certified by the Postmaster General to the United States Shipping Board on July 29, 1931.

Seatrain Lines, Inc., was caused to be organized in Delaware, June 13, 1931, by Over-Seas Railways, Inc., for the purpose of building new vessels to be operated in the above mentioned Ocean Mail Route, and to take over the assets, liabilities and operations of Over-Seas Railways, Inc.

Citizenship

Upon the fulfillment of the terms of the contract between the two corporations, providing for the transfer of the assets, liabilities and patents of Over-Seas Railways, Inc., and the raising of additional capital by Seatrain Lines, Inc., the securing of the Mail Contract and the necessary construction loans, Over-Seas Railways, Inc., a Delaware corporation, will hold a majority of the stock of this corporation. All of the minority stockholders of Seatrain Lines, Inc., will also be citizens of the United States. All of the officers and directors of Seatrain Lines, Inc. are citizens of the United States.

Financial Data

As this corporation has not commenced operations, the statements of Over-Seas Railways, Inc., have been used as a basis for the necessary operating and financial data required by the Board. Balance Sheet and Income Statements are enclosed herewith.

1191 **Vessel Characteristics**

The general characteristics of the proposed vessels are as follows:

Length between perpendiculars	455 ft. 0 ins.
Beams, molded	63 ft. 6 ins.
Depth, molded	38 ft. 3 ins.
Mean Draft (side cargo tanks empty)	22 ft. 0 ins.
Displacement at 32 ft. 0 ins. Mean Draft	13,745 tons.
Deadweight at 22 ft. 0 ins. Mean Draft	8,445 tons.
Trial Speed at 22 ft. 0 ins. Mean Draft	15½ knots.
Sustained Sea Speed	14 to 14½ knots.

Shaft Horsepower-normal 6,600, with 20% continuous overload capacity.
Machinery—located aft.
Power Plant—Cross Compound Turbines.
Boilers—Water Tube with Convection type Superheaters, 400 lbs. pressure, 700° F. temperature.
Fuel—Oil.

Duplicate set of Plans and Specifications are being forwarded under separate cover.

New Type of Vessel

Over-Seas Railway, Inc., was organized in Delaware in May 1927 and commenced operations with the S. S. "Seatrain" between New Orleans, La., and Havana, Cuba, in January 1929. This vessel might be termed an improved "car ferry," but, in reality, it is a new type of vessel, of small hull design and excellent seagoing characteristics, with a capacity of ninety-five loaded railway cars carried on four decks. It is the first car-carrying vessel capable of being operated independently of a railroad, the ordinary type being incapable of producing sufficient ocean revenue, because of the few cars carried, to pay operating expenses. The ordinary type of car-ferry is also restricted to operations on
1192 protected waters. Incapable of being operated as independent carriers in ocean trade, such vessels have only been used in various parts of the world as "bridges" or traffic feeders for the railroads owning them.

Additional Vessel Required

Shortly after the commencement of operations with the S. S. "Seatrain," the directors of Over-Seas Railways, Inc., decided that an additional vessel should be built and operated parallel to

the S. S. "Seatrain" in order to fully develop the commerce between the Mississippi Valley region of the United States and Cuba. Plans and specifications were prepared and bids obtained from foreign and domestic shipyards, which confirmed the previous experience of the owner that shipbuilding prices in this country for this type of vessel were 100% higher than those abroad.

Application for Mail Contract

Because of the differential in building costs, it was felt that an application for Government aid should be made to warrant the construction of an additional vessel in an American yard, the so-called Jones-White Act having become law while the "Seatrain" was under construction. Under date of September 12, 1929, Over-Seas Railways, Inc., applied to the Post Office Department for the certification of an Ocean Mail Route from New Orleans, La., to Havana, Cuba. Various hearings were held and investigations made by Governmental Departments for the purpose of ascertaining the importance of this route for the commerce of the United States and how such route could be most advantageously maintained and developed. Because of the large volume of new commerce created since the inauguration of the service with the S. S. "Seatrain," as well as many material increases in sales of commodities brought about by the more efficient, faster, and safer method of transportation, they concluded that the "Seatrain" type vessel should be used to maintain and further develop the commerce between these ports.

Two New Vessels To Be Built

During the course of the negotiations for a mail contract, it was suggested that the Government would be even more favorably inclined if two new vessels of this type were constructed. The volume of commerce then flowing between these ports did not warrant the addition of a second new vessel immediately, but after careful consideration, Over-Seas Railways, Inc., amended its proposal, agreeing to construct one new vessel within two years, and the second new vessel within four years, believing that conditions would improve in the meantime. This amended application received the favorable approval of the Government, but, in view of the relatively long period of time before the completion of the new vessels, it was decided that the award of the mail contract should be delayed until general business con-
1193 ditions improved unless the construction could be started on both vessels in the immediate future.

To Build in America or Abroad?

In spite of the precipitous drop in volume of tonnage moving to Cuba, Over-Seas Railways, Inc., has shown a steady growth in volume handled, as follows:

	1929	1940	1941
Tonnage handled to Cuba	73,875	89,683	[1] 110,422
Tonnage handled from Cuba	85,741	76,895	[1] 131,906

[1] Estimate based on first six months of operations, actual tonnage being one-half the estimated figures.

With such a record of performance under prevailing conditions, with operations being carried on at a profit after all charges, and having the firm conviction that another vessel would be needed to properly continue the development of the Cuban trade, the directors were faced with a choice of building two vessels immediately or building another vessel abroad.

Problem in Connection With the Construction of Two Vessels Immediately

The immediate construction of two vessels instead of one required reasonable assurance that sufficient additional traffic could be obtained to warrant the operation of an additional vessel.

Homeward Cargo

With respect to obtaining additional traffic for the second new vessel, the success of any freight service to Cuba depends upon the ability of the line to obtain a steady flow of sugar to the United States. With the "Seatrain" and one new vessel drawing upon the limited supply of sugar from the Province of Havana for homeward cargoes, it was questionable how much additional traffic could be obtained for a third vessel through the Port of Havana. The final decision of the United Railways of Havana on making permanent new "through rates" on raw sugar in connection with "Seatrain" service, which have been made applicable in the past few weeks, opening up the movement of raw sugar through the Port of Havana from practically all points on their lines as far east as Santa Clara, the center of the Island, will have a decided effect on traffic available for the new vessels at the Port of Havana.

1194

Outward Cargo

With respect to traffic from the United States to Cuba, the situation is also far from clear. A recent Permissive Order

of the Interstate Commerce Commission with respect to export and import rail rates through Southern ports will have a decided influence on the flow of Cuban traffic. What the new rates to and from the various ports will be, will not be known until December. Certain unification of rail terminal facilities and changes in rates at the Port of New Orleans will also have a material bearing on the ability of "Seatrain" type vessels to handle more low grade commodities to and from the industrial centers of the South.

Ports of Call

With these and other equally important matters pending, no final decision has been reached as to ports of call. In any event, it was decided that sufficient traffic could be obtained by adding another Cuban or American port or both, depending upon the outcome of these various traffic matters. It might be mentioned that the proposed new vessels will provide the first service with American built vessels capable of successfully competing with foreign tramp steamers in the carriage of Cuban sugar in substantial volume to the United States.

Number of Voyages per Annum

Because of the desire of the Post Office Department to limit the mail pay and because of the uncertainty as to possible additional ports to be served, it was mutually decided to limit the number of mail pay voyages to one hundred (100) per annum, which would enable both new vessels to be operated in the New Orleans-Havana trade and another American or Cuban port (or possibly both with the increased speed of fourteen (14) knots, depending upon trade conditions). In any event, the Mail Contract will provide for the operation of both new vessels in the foreign trade between New Orleans, La., and Havana, Cuba. If another port is added in the schedule, we can assure the Government that a second foreign trade route will be established and maintained.

Use as Naval Auxiliary

Having developed a new type of vessel, it was deemed important to ascertain whether such type would be of value to the Navy in times of National emergency. Plans were, therefore, submitted to the Navy Department and, after careful study, Over-Seas Railways, Inc., was advised by the Honorable Charles F. Adams, Secretary, that this type of vessel was of particular value to the Navy Department. Copies of this correspondence are enclosed for the records of the United States Shipping Board.

The original plans submitted to the Navy Department
1195 called for thirteen knot vessels. This speed did not fit in with the plans of the Department for the use of this type of vessel. As a consequence, the power has been raised from 4,250 S. H. P. to 6,600 S. H. P., the ships lengthened by fourteen feet, the beam increased by one foot six inches and the depth increased by nine inches.

Mail Pay does not Compensate for Building Differential

The increased building cost of the larger and faster vessels required by the Navy has not been determined, as the new plans and specifications have just been completed and sent to the shipyards for final prices. In this connection it might be mentioned that the amount of mail pay for one hundred (100) voyages per annum would not even cover the full building differential on the new vessels as originally designed for thirteen knots. Furthermore, the S. S. "Seatrain," which has been declared eligible for mail pay, will, in effect, receive nothing in mail pay upon transfer to the American flag, as will be required under the Mail Contract. Permission for the transfer is being asked of the Board in a separate application.

Additional Information

We shall be pleased to furnish any additional information required to pass upon this Application.

Yours very truly,

SEATRAIN LINES, INC.,
By GRAHAM M. BRUSH,
President.

GMB:WJP.

1196 *Exhibit 101*

UNITED STATES SHIPPING BOARD

WASHINGTON, *November 27, 1931.*

Memorandum for Committee on Construction Loans and Sec. 23, M. M. Act, 1920: Commissioner Cone, Commissioner Plummer, Commissioner Denton

The Shipping Board, at a meeting on November 27, 1931, adopted the attached resolution and report authorizing a loan from the Construction Loan Fund to be used in aid of the construction of two new vessels for the Seatrain Lines, Inc.

SAMUEL GOODACRE,
Samuel Goodacre,
Secretary.

Copies to: Chairman; President Crowley, M. F. C.; General Comptroller; General Counsel; Disbursing Officer; Director, Bureau of Construction; Director of Insurance.

1197 Whereas the Seatrain Lines, Incorporated, a Delaware corporation, hereinafter called "applicant" on October 7, 1931, applied to the United States Shipping Board for a loan from the Construction Loan Fund to be used in aid of the construction of two (2) vessels in a shipyard in the United States and in connection with said application has offered to enter into written contracts with the Sun Shipbuilding and Dry Dock Company for the construction of said two (2) vessels in accordance with plans and specifications submitted therefor; and

Whereas the Board has determined that the construction of said vessels is desirable and necessary for the promotion and maintenance of the American Merchant Marine, that the plans and specifications submitted show that said vessels will be of the best and most effecient type and will be fitted and equipped with the most modern, most efficient and most economical machinery and commercial appliances for the purpose of the service in which the vessels are to be operated (Ocean Mail Contract Service on Route #56 from New Orleans, Louisiana to Havana, Cuba, and other foreign trade services) which service is deemed desirable by the Board.

Resolved, that the Shipping Board authorize two (2) loans, each in amount not to exceed three-fourths of the cost of each of the vessels (exclusive of commercial appliances, spares and other equipment, and Supervising Architect's fees) and not to exceed $1,152,187.00, whichever may be the lesser, plus three-fourths of the actual cost of outfitting and equipping each vessel with commercial appliances, spares and other equipment, and Supervising Architect's fees and not exceeding $37,500 for each vessel, whichever may be the lesser amount from the Construction Loan Fund authorized by Section 11, Merchant Marine Act, 1920, as amended, and Sec. 302 of the Merchant Marine Act, 1928, pursuant to the authority of the provisions of the Second Deficiency Act, Fiscal Year, 1928, and/or "Independent Offices Appropriation Act, 1932," and Sec. 11, Merchant Marine Act, 1920, as amended, and Sec. 302 of the Merchant Marine Act, 1928, each of said loans to be used in aid of the construction in a shipyard in the United States of each of said vessels, in accordance with the plans and specifications heretofore or to be filed by said Applicant with the Shipping Board, each Loan to bear interest at the minimum rates set forth in the amendment to Sec. 11 of the Merchant Marine Act, 1920, approved February 2, 1931, for contracts thereafter entered into, payable semiannually, and the principal of each loan to be repaid in twenty (20) annual installments as nearly equal as possible, subject to the

conditions set forth in a report dated November 27, 1931, from the Committee on Construction Loans of this Board and also subject to the following conditions:

(1) That the Applicant will execute a separate Loan Agreement for each of said Loans in form satisfactory to the Board and approved by the General Counsel.

(2) That the provisions of paragraph (1) and paragraph
1198 (c) under paragraph (1) of said report from the Committee on Construction Loans be embodied in each of the Loan Agreements and failure to perform the provisions of said paragraphs in the manner and at the time stipulated shall constitute a default under the provisions of each Loan Agreement and any mortgage or mortgages given pursuant thereto, but that failure to receive sufficient mail revenue to repay the full amount of the Loans shall not release the Applicant from its obligations to repay the full amount of the Loans with interest.

(3) That the Applicant will secure each of said Loans and advances made thereon by the execution and delivery of the Notes, Deeds of Trusts, and/or mortgages on the vessels required to be executed and/or furnished under the terms of said Loan Agreements, including a blanket mortgage on both of said vessels when the last vessel has been completed.

(4) That no advance be made on either Loan unless and until the plans and specifications to be submitted by the Applicant shall be approved by the Secretary of the Navy, and also unless and until the Applicant has complied with paragraph 4 of said Committee's report.

(5) That the Builder shall furnish to the Board a satisfactory Surety Bond in the amount of $307,015 for each vessel to be approved by the General Counsel.

Resolved further, that the Board's Committee on Construction Loans and Sec. 23, Merchant Marine Act, 1920, be, and it is hereby, authorized to take any steps necessary to carry into effect the purpose and intent of this resolution. The Disbursing Officer is hereby authorized on vouchers or warrants signed by Commissioner Cone, or in his absence any member of the Board's Committee on Construction Loans, and Sec. 23, Merchant Marine Act, 1920, to make advances on the loans. All notes, mortgages and other necessary documents shall be deposited with the Disbursing Officer of the Board, and when thus deposited he is charged hereby with their custody and with the collection of interest and principal as they mature. In case of default, the fact of the default shall, within ten (10) days thereafter, be reported by the Disbursing Officer to the Board.

Resolved further, the supervision of the loans (apart from payments of interest and principal) with respect to executory respon-

sibilities imposed on the Seatrain Lines, Incorporated, and on the yard or yards with which contracts are placed, is hereby referred to the Committee on Construction Loans and Sec. 23, Merchant Marine Act, 1920, with power; provided, however, power is not hereby delegated to release any part of the debt incurred or interest thereon, or to modify the time for the payment of interest or principal. No cancellation or satisfaction, in whole or in
1199 part, of any mortgage, deed of trust, or other documents on said vessels securing these loans, shall be executed by any official of the Board except pursuant to a resolution of the Board containing specific reference to these loans and authorizing such cancellation or surrender; this provision, however, does not preclude the surrender of notes when and as paid.

Resolved further, this resolution shall not be deemed a contract; nothing herein contained shall impair the full freedom of the Board to revoke or modify it at any time prior to the execution and delivery by the Board of the formal loan agreements between the Board and the Seatrain Lines, Incorporated.

1200 NOVEMBER 27, 1931.

From: Committee on Construction Loans.
To: United States Shipping Board.
Subject: Seatrain Lines, Incorporated—Application for Construction Loan.

Under date of October 7, 1931, the Seatrain Lines, Incorporated, a corporation of the State of Delaware, submitted to the Shipping Board an application for a loan from the Construction Loan Fund to be used in aid of the construction of two new vessels to be used in Ocean Mail Contract Service on Route No. 56 from New Orleans, Louisiana, to Havana, Cuba, and for other foreign trade services. In support of its application the applicant submitted plans and specifications of the proposed vessels, various other information with respect to the corporate and financial structure of the corporation, lists of officers and stockholders and certain exhibits intended to show the financial condition and standing of the corporation.

This Committee had previously received from the applicant a preliminary application for a loan following receipt of which various other ship-operators were advised of the pending application and requested to submit statements setting forth any remarks pertinent to the situation which they might wish to make. After receiving a number of such statements, your Committee referred them to the Shipping Board which held hearings on

September 22, 1931, and gave all parties desiring it an opportunity to be heard.

The Committee on Construction Loans has carefully considered the subject application and all other information furnished therewith and in support thereof and has also caused to be made a careful study of the traffic conditions between ports of the United States and Cuba, particularly between New Orleans and Havana, and submits the following report:

The Committee is satisfied that the applicant corporation is a citizen of the United States as defined under existing laws; that the applicant proposes to build the vessels, in aid of whose construction the loan is requested, in a shipyard of the United States; that the proposed vessels, if built from plans and specifications submitted by the applicant and which have been approved by the Chief of Naval Operations of the Navy Department but whose approval is qualified with the statement that the Navy Department does not look with entire favor upon the design of the vessel and qualifies its approval with the understanding that such approval is not to be considered a precedent, will be of the best and most efficient type for the intended service and will be fitted and equipped with the most modern, most efficient, and most
1201 economical engines, machinery, and commercial appliances, and that the service in which it is intended to operate these vessels is necessary and desirable for building up and maintaining the foreign commerce of the United States.

The Committee has caused to be made by the Disbursing Officer an investigation into the financial conditions of the applicant. The Committee has thoroughly considered the financial exhibits submitted in support of the application and has also considered the report of the Disbursing Officer as to the financial condition of the applicant corporation. The Committee is of the opinion, concurred in by the Disbursing Officer, that under certain provisions hereinafter listed the applicant will be in a sound and satisfactory condition financially and that this condition will justify the proposed loan.

The applicant corporation is prepared to enter into a contract with the Sun Shipbuilding and Dry Dock Company for the construction of the proposed vessels in accordance with plans and specifications which, as previously stated, have been approved by the Navy Department and which are satisfactory to this Committee. The proposed vessels will be freight-carriers so arranged as to carry approximately one hundred loaded freight cars with facilities ashore for loading and unloading the cars without rehandling their contents. The proposed vessels will be approximately 473 feet in length, 63 feet, 6 inches beam, and 22 feet draft, with deadweight tonnage of approximately 8,445 tons.

They will be equipped with geared turbine propelling machinery having a normal S. H. P. of 6,500 and a speed of approximately 15 knots. The cost of each vessel will be approximately $1,586,250, including commercial appliances and other necessary equipment. Competitive bids were received by the owner from at least five shipbuilders and the Committee has examined the bids submitted and has based its recommendation for the loan on the lowest bid received.

Having in mind that the proposed vessels are of a special type not adaptable to ordinary service in regular cargo trade routes and that specially designed terminal facilities are required for them, this Committee would not ordinarily consider that a construction loan was justified in this case. In view, however, of the fact that the loan, if granted, will be additionally secured by the revenue to be received by the applicant for the performance of Ocean Mail Contract Service, as hereinafter provided for, this Committee is of the opinion that the construction of the two vessels for the service intended can properly be considered the basis of a loan from the Construction Loan Fund.

After careful consideration of all protests which have been received from various protestants against granting a loan to the subject corporation to aid in the construction of vessels of the type specified, your Committee has come to the conclusion
1202 that such protests fail to show that any material damage to American flag vessels will be done, in the way of encroaching on trade now enjoyed by them, by the addition of the proposed new vessels and that vessels of the type proposed appear to be particularly well adapted to compete against foreign vessels which have been, and are now, carrying a large portion of the exports and imports of the United States to and from Cuba.

In view of the above facts and findings, the Committee recommends that the above-mentioned application, dated October 7, 1931, for a loan from the Construction Loan Fund be approved and that the said loan be authorized subject to the following terms and conditions, and to the terms and conditions set forth in the attached proposed resolution, which has been prepared and approved by the General Counsel and which is herewith submitted for the consideration and approval of the Shipping Board.

1. Financial Arrangement: (a) The applicant corporation shall guarantee that thirty-one days after the construction loan contract has been signed, $725,000 cash will be paid into the company on the $1,450,000 stock that has been subscribed, and shall further guarantee that at the time the vessels are ready for operation the balance of $725,000 stock subscription will be paid in in cash.

(b) Immediately after the signing of the construction loan contract, the corporation shall submit evidence to show that there has been turned over to it all of the assets of the Over-Seas Railways, Inc., in accordance with the agreement dated June 15, 1931, and amendment thereto dated September 25, 1931, between the Over-Seas Railways, Inc., and Seatrain Lines, Inc.

(c) The mail revenue, or such an amount as is necessary thereof, shall be set aside in escrow, under an agreement satisfactory to the Committee on Construction Loans and to the General Counsel, to provide sufficient funds to insure the repayment of interest and principal of the loan, or for other purposes in the constructive development of the applicant's business as the Shipping Board may authorize by special resolution.

2. Amount of Loan: The administration of the loan will be facilitated by granting a separate loan for each vessel. Each loan should be for an amount not to exceed three-fourths of the cost of construction of each of the two vessels and not to exceed $1,152,187, plus an amount not to exceed $37,500 which latter amount is to cover not more than three-fourths of the cost of equipping each vessel with commercial appliances, spares and other equipment, and architects' fees.

3. Repayment and Interest: The principal of the loans shall be repaid in twenty annual installments as nearly equal as
1203 possible, with interest thereon payable semiannually. Interest should be at the minimum rates provided in the amendment to the Merchant Marine Act of 1928, approved February 2, 1931.

4. Investment by Owner: No part of the loan should be advanced unless and until the Owner has expended on the construction of the vessel to which the loan relates the amount of the difference between the proposed cost of the vessel and the amount agreed to be loaned to the end that an equity may thus be created as added security to the Government for advances made by it on construction accounts.

5. Security for Loan: The Committee on Construction Loans should be authorized and directed to require and secure from the Owner such securities for the loans as it may deem necessary, including temporary and permanent notes, deeds of trust, mortgages, etc., and including finally such preferred mortgages as are required by law.

6. Service: The vessels shall be operated in the performance of ocean mail contract service on Route No. 56 and in other exclusive foreign service between Atlantic and/or Gulf ports and Cuba, unless otherwise authorized by the Shipping Board.

7. Insurance: Adequate and proper insurance on the vessels shall be required both during the period of construction and there-

after, so long as any amount remains due on the loan. Such insurance should be in amounts, forms of policies, and with companies acceptable to the Board.

8. Classification: The vessels shall be required to have the highest classification of the American Bureau of Shipping so long as any amount remains due on the loan.

9. American Flag: The vessels shall be required to be documented under laws of the United States immediately on their completion and to remain so documented for a period of twenty years thereafter and so long as there remains due any amount on account of the loan.

10. American Citizenship: If the ownership of the stock of the applicant should at any time be such that the applicant is not a citizen of the United States as defined by existing law, it should be provided that the Board, at its option, can declare all outstanding notes due and payable.

11. Bond: The contractor agrees to furnish a construction contract performance bond in the amount of $307,015 for each vessel, the bond to be endorsed by a surety company satisfactory to the Board.

1204 12. Plans and Specifications: The final plans and specifications to be furnished by the applicant will be submitted to and must be approved by the Secretary of the Navy before any advances are made under this loan.

13. Counter Claims: Provision shall be made that the borrower must make payments due on the loan promptly as they accrue without deducting anything due the obliger by the Government in connection with other matters.

14. Authorization to Committee on Construction Loans: Appropriate authority should be given the Committee on Construction Loans to modify and extend the provisions above suggested except as to the amount, period of payment, and rates of interest, so that the documents in the case may contain as full and complete provisions as practicable to secure payment of the loan with interest. The Committee should also be given appropriate authority to direct and supervise the taking of the necessary steps to carry into effect the purpose and intention of the loan and the executory matters arising from and under the actual making of the loan.

H. I. Cone.
(Sgd.) E. C. Plummer.
E. C. Plummer.
(Sgd.) Albert H. Denton.
Albert H. Denton.

1205 NOVEMBER 24, 1931.

From: Commissioner Cone.
To: The Shipping Board.
Subject: Seatrain.

This application is "for a loan for the purpose of building two new ships for operation between New Orleans and Havana on Mail Route 56."

Our Traffic Bureau report shows that there is not sufficient traffic available on this route to adequately support these two ships, which makes it necessary to extend the service, as provided in Paragraph 6, to other gulf and Atlantic ports. It is believed that the granting of this time to extend the operation of these seatrains between North Atlantic and other Gulf ports and Cuban ports with the aid of construction loan funds might retard rather than help the development of the American merchant marine.

While the proposition may look attractive at this time, there does not appear to me to be any reasonable assurance that competition might not develop improvements that would make obsolete two vessels of the same age on which we have loans. At the present time there is before the Interstate Commerce Commission an application by the Florida East Coast Railway looking toward placing ocean going car ferries in competition with these seatrains, which may lead to a solution of this problem in another way.

The Board has been informed of all the protests for and against this loan, and is aware of the objections to hasty action raised by Congressman Wood, Chairman of the Appropriations Committee, and by Congressman Montet, of Louisiana.

(Sgd.) H. I. CONE.

1206 Interstate Commerce Commission

No. 25728[1]

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

*Submitted*_____ *Decided*_____

Upon complaints alleging that defendants' rules, regulations, and practices, particularly Car Service Rule 4 of the American Railway Association, by refusing to permit defendants' railroad cars to be delivered to the vessels of Seatrain Lines, Inc.,

[1] This report also embraces No. 25878, New Orleans and Lower Coast Railroad Company v. Akron, Canton & Youngstown Railway Company, et al.

a water carrier with which complainants connect, violate Section 1 (4 and 11), Section 3 (3), and Section 7 of the act, Found: That the Commission has no jurisdiction of the matters in controversy, and that even if the act could be construed as according jurisdiction, the rules, regulations, and practices complained of are not unreasonable, unduly prejudicial, or otherwise unlawful. Complaints dismissed.

H. H. Larimore, C. M. Spence, Parker McCollester, and Frank J. Clark for complainants.

Parker McCollester and Frank J. Clark for Seatrain Lines, Inc., intervener.

Wm. C. Burger, W. N. McGehee, G. H. Muckley, Henry Thurtell, Alfred P. Thom, Alfred S. Knowlton, Roland J. Lehman, and J. R. Bell for defendants.

Report proposed by Harris Fleming, examiner

Filed, March 30, 1934

The complaints in these proceedings were filed by different carriers but are otherwise practically identical, and were heard upon one record. As amended, they allege that Car Service Rule 4 of the American Railway Association, hereinafter called the A. R. A., and certain other rules, regulations, and practices of defendants, violate various provisions of the Interstate Commerce Act,
1206X namely, Section 1 (4) and (11), Section 3 (1) and (3), and Section 7.[2]

Complainants ask the Commission to require defendants to cease and desist from such violations of the act and to establish reasonable rules, regulations, and practices in conformity with provisions of the act. Seatrain Lines, Inc., a corporation owning and operating steamship vessels as hereinafter described, intervened in behalf of the complainants.[3] The allegation respecting Section 3 (1) was abandoned and will not be considered.

Car Service Rule 4 provides that—

"Cars of railroad ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owners filed with the Car Service Division."

[2] The Commission in its discretion may direct that the carrier's rules and regulations with respect to car service be incorporated in the schedules showing rates, fares, and charges for transportation, and be subject to any and all of the provisions of the act relating thereto, but the Commission has not as yet exercised this power, and the Car Service and Per Diem Agreements are only filed with the Commission as a matter of information and are not incorporated in schedules showing rates, fares, and charges for transportation. See Fairmont & Cleveland Coal Co. v. B. & O. R. R. Co., 62 I. C. C. 269.

[3] The complainants are the Hoboken Manufacturers' Railroad Company and the New Orleans & Lower Coast Railroad. Each is a common carrier railroad, and in individual reference will hereinafter be called the Hoboken and Lower Coast, respectively, while the intervener will be termed Seatrain.

The other rules, regulations, and practices assailed are described as:

"(a) The rules, regulations, and practices of the several defendants in refusing, pursuant to Car Service Rule 4 or otherwise, to permit their cars to be delivered to the vessels of the Seatrain Lines, Inc., * * *"

and

"(b) Other rules, regulations, and practices of defendants insofar as they relate to the delivery of their cars to the vessels of Seatrain."

Certain of the facts here presented are made part of the record by agreement. Various portions of the record in the case
1207 referred to in the second succeeding paragraph are stipulated into the present record, and, subject to certain exceptions hereinafter pointed out, all facts set forth in the report in that case are by agreement made part of the present record.[4] Reference to that report is accordingly made for a full statement of those facts and they will be restated here only insofar as necessary for a clear understanding of the issues presented. Some of the facts bearing upon the issues generally will be here stated.

Hoboken is a terminal switching line about a mile and a half in length, operating along the waterfront of New York Harbor in the city of Hoboken, N. J. At its northern end it has track connection with the Erie Railroad Company and through the Erie interchanges cars with all of the trunk line railroads serving New York Harbor. The interchange, except in the case of The Delaware, Lackawanna and Western Railroad Company is accomplished over what is known as Belt Line 13, operated jointly by the several trunk lines. This complaint serves a large number of industries and piers and has a specially arranged pier and a car elevator or crane for the interchange of cars with the vessels of Seatrain, which pier is Seatrain's New York Harbor terminal. The Lower Coast extends southwardly from Algiers, La., opposite New Orleans, La., on the west bank of the Mississippi River, to Buras, La., 60 miles distant. At its northern end it connects directly with the Texas and New Orleans Railroad Company and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, and through them interchanges cars with all of
1208 the trunk line railroads reaching New Orleans. At Belle Chassee, La., about 10 miles south of New Orleans, it serves a pier equipped with a specially constructed car elevator for the

[4] The only exceptions are taken by defendants who do not agree with a statement therein that the Seatrain method of operation avoids "delays and expenses incident to ordinary steamship operation," and to a further statement therein respecting payment of per diem by complainants to car owners and reimbursement thereof to complainants by Seatrain.

transfer of cars between its rails and vessels of Seatrain, which point is Seatrain's New Orleans terminal.

In Investigation of Seatrain Lines, Inc., 195 I. C. C. 215,[5] it was found, among other things, that Seatrain is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act; that it is a common carrier by water engaged in the transportation of property partly by railroad and partly by water; that Seatrain and the Hoboken are used under a common control, management, and arrangement for continuous carriage or shipment of property; that Seatrain and the Lower Coast are used under a common arrangement for such continuous carriage, and that Seatrain is therefore subject to all the provisions of the act applicable to such a carrier. It was also found that it directly or indirectly owns the capital stock of the Hoboken.

Both complainants are associate members of the A. R. A. and signers of the Per Diem Rules Agreement.[6] Over-Seas Railways, Inc., the predecessor of Seatrain was refused membership in
1209 the association because it was a water carrier and in view of that fact Seatrain has not applied for membership.

The defendants embrace substantially all the Class 1 railroads of the United States, all being members of the A. R. A., an agency for its member railroads. A relatively small number of defendants have consented to the delivery of their cars by complainants to Seatrain, and the allegations with respect to refusals to permit such delivery do not apply to those defendants. Such roads are made defendants for the reason that they are members of the association through which Car Service Rule 4 was adopted and reference herein to defendants will include only the defendants other than just indicated.[7]

Car Service Rule 4 is a new rule of that association adopted November 15, 1932, former Rule 4 being now Rule 5. Before Rule 4 became effective, complainants asked for its suspension but the petition was denied December 15, 1932.

While the car service rule assailed does not specifically mention Seatrain, the service of that carrier was primarily, if not wholly, the reason for its adoption. Circulars of the A. R. A., following the adoption of this rule, disclose that in giving their consent or refusal to delivery to Seatrain, a car owner may permit its cars

[5] That proceeding embraced Dockets nos. 25565 and 25546. The findings noted above pertained to certain issues in the first-named docket and the proceeding is otherwise still pending.

[6] Articles of organization of the A. R. A. provide that carriers which operate less than 100 miles of road are only eligible for associate membership. Such membership carries no voting rights, though it is necessary before such carriers may gain admission to the Per Diem Agreement.

[7] Carriers which have consented to the delivery of their cars for use in all of Seatrain's operations include, among others, the Missouri Pacific Lines, and the Texas and Pacific Railway Company, which carriers own certain stock in Seatrain.

to be used between certain of Seatrain's terminals and refuse such permission between certain other terminals of that carrier.

In New Orleans and Havana Car Ferry Service, 188 I. C. C. 371, decided October 17, 1932, the Commission considered an application of the Florida East Coast Railway Company seeking an order permitting the operation by the Florida East Coast
1210 Car Ferry Company of car-ferry service between New Orleans and Havana, Cuba. When that record was made, Seatrain had not superseded Over-Seas but with respect to Over-Seas' operation between the points referred to it stated, among other things, that this carrier published no tariffs, that some of its rates had been, and then were, kept secret, and that it had repeatedly made special allowances to shippers, paid rebates, and discriminated between large and small shippers. Complainants now state that in view of the findings in Docket No. 25565, "Seatrain has filed with the Commission its tariffs covering both its joint rates with rail carriers and its port to port rates as well, so that it is a common carrier by water subject to the provisions of the Act and the jurisdiction of the Commission." However, Seatrain has participated in no through routes or joint rates in connection with defendants,* and this carrier owns practically no cars.

There are no sailings of Seatrain vessels direct between New York and New Orleans, all being scheduled to move through Havana, "the ships leaving New York and clearing for the foreign ports, entering Havana and again clearing from Havana for a foreign port." This situation is described in Docket No. 25565 as follows:

1211 "Since October 6, 1932, Seatrain, in addition to carrying traffic in railroad cars between Hoboken and Havana, and New Orleans and Havana, has been engaged in transporting freight in railroad cars between Hoboken and New Orleans via Havana. The cars moving between Hoboken and New Orleans remain in the vessels at Havana."

The relief here sought contemplates an extensive use of American cars in Cuba. Thus it appears that the traffic which has been transported by Seatrain to interior Cuban points is handled with-

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*In the brief, complainants question the defendants' testimony that they participate in no through routes with Seatrain, but their position is apparently based on the claim that at least some through routes exist by reason of available combination rates. In the report in Docket no. 25565 it is stated:

"Freight moving from interior points in New England and trunk line territories does not move on through bills of lading. The originating rail carrier issues a bill of lading covering the movement to Hoboken. The eastern trunk lines have refused to join in through rates with Seatrain and to issue through bills of lading. They have also refused to issue through export bills of lading covering shipments of traffic to Cuba. Complaints filed by Seatrain, the Hoboken, and the New Orleans & Lower Coast, nos. 25727, 25728, and 25878, respecting the use of railway equipment and the establishment of through routes, and through rates, proportional rates, etc., are pending."

That report also describes the rail billing to the ports and Seatrain's billing beyond.

out transfer of lading at the Cuban port; also that Seatrain has a contract with the United Railways of Havana which provides for use of American cars only within Cuba, except when none are available, in which instances, by special arrangement, Cuban cars are used. Cuban cars could thus find their way into the United States. However, such cars are not suitable for use in heavy freight trains of the United States, and through regulation of the traffic, none has as yet moved to this country, and complainants consider that such a case should never arise.[9] Neither Seatrain nor the Cuban railroads are members of the A. R. A. or subscribers to its Freight Car Interchange Rules Agreement (M. C. B. Rules) though the contract referred to provides that such American cars in Cuba shall be handled in accordance with the rules and "Agreements" of that association, "as they may be applied to Cuba."

Seatrain vessels and loading devices are not patented, but the idea embodied by the Seatrain vessels for carrying cars and for transferring cars from railroad tracks or from the deck of another ship to tracks laid on Seatrain's vessels is patented, and this carrier has the exclusive right to use these patents. A description of the vessels, loading facilities, loading and unloading operation, and the manner in which cars are held in place and pro-
1212 tected from weather while in the vessels, is found in the report in no. 25565. Such vessels are physically capable of operating in trade routes around the world and, according to complainants' representative, their legitimate sphere of activity would extend to all trade routes in North America. In its advertising literature entitled "Out to Sea on Rails," Seatrain is described as "a sea-going railroad running hundreds or even thousand of miles across the ocean to some far distant point with a train of freight cars a mile long. Among other things, the following also appears:

"Although it is an ocean carrier, a Seatrain ship is actually a floating bridge—a connecting link for all railroads. In the case of Cuba, Seatrain has literally added to North American railroads, 2,626 miles of standard gauge Cuban trackage.

* * * * * * *

"Millions of suitable containers were already available—the freight cars on every railroad and siding in North America, Central America, and Cuba. Most of the cargoes which vessels carry move to and from the seaboard in freight cars anyway. Furthermore, the freight car is an excellent package, for the railroads have spent a century in developing it to transport all sorts of

[9] Occasionally Cuban traffic destined to this country has moved to the Cuban port in Cuban cars and been transferred to American cars at the Cuban ports.

products, including liquids, perishables, bulk goods, and every other form of commodity. No other package can compare with the low cost and efficiency of the American freight car.

* * * * * * *

"These vessels were built to supplement the "Seatrain New Orleans," operating between New Orleans and Havana, and to extend the service from Havana to New York. With ships running between New York and Havana and New Orleans and Havana, Seatrain service is available between practically every point in the United States and Cuba. In addition, by continuing the vessels beyond Havana, a weekly New York-New Orleans service is established."

During the period between October 6, 1932, and June 1, 1933, $46,138.32 per diem was paid by Seatrain to the complainants. The per diem paid by Seatrain to Hoboken covering the time that cars were in the possession of Seatrain and the Cuban railroads from October 1, 1932, to and including September 30, 1933, was $25,741. Of this amount Hoboken paid to the car owners $18,929 and the balance has been retained by Hoboken as the result of a controversy between it and the trunk lines regarding the amount of switching reclaims to be allowed Hoboken.

1213 Subsequent to the filing of these complaints a number of trunk lines filed a suit in the District Court of the United States for the southern district of New York, seeking an injunction to prevent Hoboken and Seatrain from "appropriating" their equipment. In that suit the answer pleads lack of jurisdiction, alleging that the jurisdiction is exclusively with the Commission.

Jurisdictional Questions [10]

Upon the hearing defendants moved to dismiss the complaints on the ground of lack of jurisdiction and this motion is now renewed. It is their position that the act confers no authority upon the Commission to grant the relief asked in connection with any of the traffic; and that with respect to traffic to and from Cuba, authority to grant such relief is specifically withheld, inasmuch as Cuba is a foreign country.[11]

Defendants insist that the act nowhere gives the Commission authority to require them to supply Seatrain with their equipment or to turn such equipment over to complainants for Seatrain's use. Among other provisions of the act particularly relied upon by complainants are Sections 1 (4, 6, 10, and 11), Section 3 (3), and

[10] In the main, the parties have not segregated their testimony directed to the jurisdictional questions from that directed to other issues. All testimony hereinafter referred to has been considered in connection with all issues as to which it has any proper bearing.

[11] Provisions of the act alleged to be violated, and also various other provisions particularly referred to by the parties, are shown in the Appendix to this report.

Section 6 (13). Defendants assert that Section 1 (4), at least primarily, relates to the obligation owed shippers by railroads subject to the act, while Section 1 (11) relates to the obligation owed by carriers to each other. They refer to Oyler & Son v. American Ry. Express Co., 83 I. C. C. 160, where the relief in reality sought was the establishment of a carload express refrigeration service involving the furnishing of the necessary refrigerator equip-
1214 ment. The Commission held that the provisions of the act under which it might require common carriers to equip themselves with adequate facilities for performing their car service "applies only to common carriers by railroad."

They point out that the exchange and interchange of equipment embraced in "car service" defined in Section 1 (10) is restricted to that equipment when "used in the transportation of property," and that it clearly relates only to the use of such equipment as is operated upon the rails of carriers by railroad and was never intended to include its use as mere containers or packages under circumstances in which the car would be "taken for a ride" in an ocean-going vessel. In other words, they contend that defendant rail carriers are asked to provide freight cars, for use by Seatrain, as containers and not for rail transportation purposes, and to enable this water carrier, solely by reason of such use of railroad freight cars, (1) to enter the field and appropriate traffic which would otherwise move via all-rail routes or via existing break-bulk routes, and (2) during the time the cars would be in the vessels of the water carrier, remove them from transportation use and utilize them, for its own protection, for warehousing purposes. Such use they assert is exactly parallel to the use of railroad equipment by shippers for warehousing purposes, which practice has been repeatedly condemned by the Commission, and against which practice the Code of Demurrage Rules was particularly directed in providing charges much in excess of per diem rates. The demurrage rules, they further point out, allow no shrinkage of charges during the period when equipment is plentiful.

Referring to Wm. C. Scofield, et al. v. Lake Sh. Mich. So. R'y. Co., 2 I. C. C. 90, defendants contend that the word "facilities," as referred to in Section 3 (3) of the Act, does not embrace car equipment; that this provision is restricted to the providing
1215 of facilities for the interchange of traffic and thus has no affiliation to the matter of interchange of equipment between rail carriers and Seatrain.[12] It was there said:

"A careful consideration of this provision of the statute has brought us to the conclusion that it refers only to facilities be-

[12] The language of the present act is the same as then in effect except that certain changes, not here pertinent, are made, and that the provision that the carriers there described shall not "unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper" is added.

tween connecting lines at terminal points for the interchange of traffic and passengers. The term "facilities" as here used does not embrace car equipment for the origination of and transporting of freight along the line of the carrier in the sense in which it is here contended for by the petitioners."

1216 They also contend that no such authority as is here asked was contemplated by the act, that the statutory right of equal facilities for interchange of equipment is reciprocal, and in the absence of express statutory enactment, authority to require interchange of equipment with water carriers cannot be inferred, referring to S. C. Capehart & J. Smith v. L. & N. R. R. Co., et al., 4 I. C. C. 265. The Commission there said as to Section 3 (3):

"* * * this clause requires of such common carriers the performance of duties that, * * * are reciprocal and valuable to each other * * *. In the absence of express language to that effect it cannot be inferred that Congress intended to require a common carrier engaged in interstate commerce to extend the valuable aid and facilities enumerated in this clause to another common carrier, operating a connecting line, which is not subject to the provisions of the Statute, and which cannot be required to make any return whatever on its part in the shape of similar service and facilities to the interstate carrier from which it has received these benefits. * * * The words "tracks and terminal facilities," in the connection in which they are used in this clause, evidently refer to a rail carrier, either an all-rail carrier, or a carrier part rail and part water, but not to an independent water line."

Defendants further assert that even under the enlarged powers of the Commission over rail and water traffic, resulting from the Panama Canal Act, no such jurisdiction as claimed exists. Thus while Section 6 (13a) empowers the Commission to direct rail carriers to make suitable physical connections between their lines and docks at which interchange of property with boat lines may be effected, it is pointed out that nothing is there said about interchange of equipment between rail lines and boat lines. While Section 6 (13d) provides that rail carriers, subject to the Act, which enter into arrangements with any water carrier operating from a port in the United States to a foreign country for the handling of through business between interior points of the United States and such foreign country, may be required to enter into similar arrangements with any or all other lines of steamships operating "from said port" to the same foreign

1217 country, they contend that the water carriers which these provisions of the act sought to place upon an equal basis are those operating from the same ports. Complainants and Seatrain refer to no water carrier with which defendants inter-

change cars for movement over routes competitive with their own except the Florida East Coast Car Ferry Company. That carrier operates between Key West, Fla., and Cuba and between New Orleans and Cuba, but it has been held to be in reality an extension of a line of railroad. See Peninsular & Occidental S. S. Co., 37 I. C. C. 432, and New Orleans and Havana Car Ferry Service, supra.

In this connection it is stressed that the type of transportation employed by Seatrain was not known or contemplated at the time of the adoption of these various provisions of the act; that the design and method of loading its vessels is unlike the design and method of loading any other type of vessel operated by water carriers; that one of complainants' principal witnesses knew of no other water service in which cars are hauled outside of the United States, or for the distances involved in Seatrain service; and that in the reply to requests for suspension of "Seatrain Tariff No. 1," dated September 30, 1932, Seatrain recognizes "that the transportation service which it offers is something entirely new and presents problems which have not been in contemplation of the regulatory statutes heretofore enacted." Defendants refer to Docket no. 25565, in which, refusing to accept the broadened construction of the act contended for, the Commission said:

"* * * The word 'ferry' was used in the Act entitled 'An Act to Regulate Commerce,' approved February 4, 1887; Congress reexamined its use of the word in Transportation Act, 1920, Sec. 400. We assume that Congress is including and maintaining ferries in the term 'railroad' had in mind the type of vessel then currently commonly known as a ferry, and not a vessel which, as we have seen, is of a type then unknown and which is still unique in function. Bridge Proprietors of Bridges v. Hoboken Land & Improv. Co., 1 Wall. 116."

1218 Also to Sta-Shine Products Co. v. Station WGBB, 188 I. C. C. 271, in which the question was considered as to whether various broadcasting rates, rules, regulations, and practices were within the provisions of the act. The Commission stated that it could not be presumed that Congress was attempting to regulate a mere potential service, one that might or might not be developed, and particularly a service distinct and different from the character known at the time of the enactment of the legislation.[13]

Complainants take the position that each of the provisions of

[13] In that proceeding the Commission also referred to McBoyle v. U. S., 283 U. S. 25, in which the Court said:

"* * * When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used * * *."

the act indicated apply to "every common carrier subject to the Act"; that they are not limited to requiring the providing of "facilities" for through routes between rail carriers only; that they establish that railroads may not make a distinction between common carriers because some may be water carriers while others are railroads; that their effect is to impose on railroads the duty to establish and observe reasonable rules and practices for the use by rail carriers of cars either for transportation over their own lines, or for forwarding via their connections, "whatever be their character." Conceding that a railroad's right of private property in its cars is to be protected to the extent that the railroad is entitled to a reasonable return upon the investment in such cars and reasonable compensation from other carriers when its cars are used by them, they assert that subject to this qualification, the manner in which cars may be used and the parties who may use cars, are to be determined entirely by the reasonable needs of the public in
1219 securing an adequate national transportation system, and that the Commission is clothed with the discretion of determining the reasonableness of such needs; also that even if interchange between the trunk line carriers and Seatrain be regarded as indirect, inasmuch as it must be accomplished through complainants' lines, these provisions of the act make no distinction between direct and indirect interchange. This position, as to interchange of equipment between a railroad and a water carrier, is based on the view that the requirements of the act as to such interchange contain no "express exception" with respect to water carriers.

Complainants cite numerous cases in which interchange of equipment has been required between rail carriers, but it is unnecessary to discuss these. Recognizing that Seatrain has been held to be a water carrier, they further refer to certain cases in which the Commission considered the relations between various railroads and water carriers with which they interchange cars. However, contrasted with Seatrain's status as an independently owned water carrier and a carrier which may not be considered as a car ferry, the water carriers referred to in those cases were in each instance not only owned by the railroad with which they interchanged cars, but all were car ferries and thus extensions of the lines of those railroads.

Analyzing certain of the provisions of the act particularly relied upon, the following appears:

1. Prior to 1910, Section 1 (4) did not include the word "facilities";

2. By the 1910 amendment this paragraph was broadened to also make it the duty of all common carriers subject to the act to provide reasonable facilities for operating through routes; also to make reasonable rules and regulations with respect to

the "exchange, interchange, and return of cars used
1220 therein." However, the powers of the Commission respecting car service, prior to May 29, 1917, had marked limitations. See United States v. Pennsylvania R. R. Co., 242 U. S. 208;

3. What are now generally known as the car service provisions of the act are embraced in paragraphs 10 to 17 of Section 1, generally referred to as the Esch Car Service Act, added by the Act of May 29, 1917, and amended later by the Transportation Act, 1920. These provisions apply only to "carriers by railroad subject to the Act";

4. While the provisions above quoted in the 1910 amendment remained in paragraph 4 until the 1920 amendment, the latter amendment undertook to eliminate all provisions of paragraph 4 relating to interchange of equipment, inasmuch as provision for these services had been made in the paragraphs relating to car service.

It thus seems clear that it was the intention of Congress to thus segregate car service provisions of the act, to broaden their scope generally, but to restrict their application to railroads as defined in the act;[14] also that the word "facilities," as now appearing in paragraph 4, does not embrace car equipment in the sense contended by complainants.

It further appears that while complainants in reality recognize that the duties described under Section 1 (11) are only imposed upon common carriers by railroad subject to the act, they nevertheless contend that the provision was so restricted "because Congress recognized that it is generally, if not universally, the railroads that have the cars." But they urge that the limitation does not mean that the car service rules shall relate to interchange only with other railroads subject to the
1221 act. Similarly, they urge that there is nothing in paragraph 10 "to exclude entirely its application to car service where a water carrier is concerned." Thus they argue that the words "supply and distribution" in that provision do not mean supply and distribution only to other railroads but that they likewise relate to supply and distribution to shippers; also that the term "interchange" as there used does not mean only interchange with another railroad. They further assert that the jurisdiction, which they contend is given the Commission over the equipment of railroads under the various provisions of the act to which they refer, is entirely compatible with the plain purposes of the act considered in its entirety.

[14] As hereinabove shown, railroads, as defined in Section 1 (3), include ferries but not include water carriers such as Seatrain.

The key to complainants' position is largely indicated by the following statement in their brief:

"In other words, the duty to permit the interchange of cars is correlative to the duty to provide for the through transportation of freight. And since the Act imposes as great an obligation to provide for the through transportation of freight by rail and water as by rail alone, it imposes an equal obligation to provide the facilities reasonably required for the through movement of freight in both cases. Ordinarily, where a water carrier is concerned, this duty does not involve the interchange of cars because the common type of water carrier is not equipped to take cars. In such a case, it is the railroad's duty to provide facilities for the unloading, handling, and interchange of freight appropriate to break-bulk operations. * * * But, if the interchange of cars is, because of the nature of the water carrier, the appropriate method of accomplishing the through transportation, it follows that the duty to permit interchange of cars to accomplish such through transportation must be as great where the connecting carrier is a water line as where it is a rail carrier."

No cases are referred to which support the complainants' position that the Commission has authority to require railroads to turn over their equipment to independent water carriers. In State of New York v. N. Y. C. R. R. Co., 95 I. C. C. 119, the Commission considered a complaint of the State of New York, seeking, under Section 6 (13), to compel The New York
1222 Central Railroad Company to provide transportation service between the public terminal of the Erie Barge Canal at Buffalo and shippers located at various points on the defendant's lines. The terminal in question included various tracks and a physical connection by switching tracks existed between it and defendants' lines. The service demanded included the furnishing of rolling stock, motive power, and the placing and removal of cars on the tracks within the terminal, incident to moving traffic between the terminal and defendants' lines. The Commission granted the relief asked, and that finding was sustained in United States v. New York Central R. Co., 272 U. S. 457. The court stated that "The Panama Canal Act is by its terms supplemental to the Act to Regulate Commerce, and its obvious purpose was to extend to rail carriers connecting with water carriers in interstate commerce the requirements of Section 1, par. 9, of the earlier acts * * * for furnishing switching and car service to lateral branch railroads and private sidetracks * * *." Complainants rely particularly upon this case, but, as just indicated, it involved a wholly different situation from that presented in the present case. The traffic there in question was unloaded and then reloaded upon the terminal, and while

the case concerned interchange of traffic and the defendant was required to move its own cars upon that terminal in order to facilitate that interchange, there was no request for the interchange of the carrier's equipment and no issue concerning interchange of equipment. Section 1 (9) contains no provisions respecting interchange of equipment and the general car service provisions of the act relating thereto were not before the Court.

Considering also an issue in that case as to whether the jurisdiction conferred by Section 6 (13) was limited to interstate transportation, or also embraced intrastate transportation, the Court held that taking into consideration the nature and
1223 extent of the commingling of interstate and intrastate commerce, and the difficulty of segregating the freight passing through the terminal, it was clear that Congress, in employing the broad language used in Section 6 (13), intended to confer upon the Commission power to regulate the entire stream of commerce. There is thus also nothing in the opinion respecting that issue which supports complainants' position.

In this connection defendants further attack the Commission's jurisdiction on the ground that defendants participate in no through routes with Seatrain and none have been prescribed. Asserting that Section 1 (4) is directed largely to the duties of common carriers with respect to the furnishing of transportation, the establishment of through routes, and the making of reasonable rules and regulations respecting the operation of such routes, and that Section 1 (11) pertains more particularly to the duties of such carriers with respect to the furnishing of safe and adequate car service and the establishment and enforcement of just and reasonable rules, regulations, and practices pertaining to those services, they urge that there is nothing in those or any provisions of the act to indicate that cars, in any event, shall be supplied for transportation of property when no through routes of movement exist by voluntary act of the carriers or by order of the Commission. As to this issue defendants are clearly correct, at least to the extent that the complaints are prematurely filed.[15]

1224 With respect to Cuba, defendants refer to the specific denial of jurisdiction, beyond the limits of the United States, of transportation to or from a foreign country. They thus insist that through routes and joint rates can not be prescribed on traffic to and from Cuba, and that the use of the rail defend-

[15] Complainants make the following statement:

"If the Commission shall conclude, however, contrary to our contentions, that defendants are under a duty to permit complainants to deliver their cars to Seatrain only where they are themselves parties to through routes via Seatrain, and for the purposes thereof, it may be that where the existence of through routes has not yet been admitted by defendants, the present action is premature and that the Commission should withhold decision herein until it has determined such issues in the pending case, Docket no. 27727 above referred to. But certainly it should not dismiss the present complaint on the ground that the Commission has no jurisdiction in the premises. * * *"

ants' cars can not be required in connection with such traffic inasmuch as Cuba is a foreign country. It is contended that if the complaints were sustained Seatrain would have the right to appropriate the equipment of defendant carriers and "take it around the World."

Complainants contend that the fact that Seatrain operates to and from Cuba is not a factor or characteristic to distinguish the interchange service under consideration from that ordinarily observed by defendants, since defendants permit their cars to be freely delivered to other carriers for the transportation of freight to Mexico, to Canada, and to Cuba itself via the Florida East Coast Car Ferry; because the A. R. A. per diem rules expressly contemplate and provide for interchange of cars with railroads in Cuba; and because all the defendants, without objection, for four years permitted their cars to be delivered to Seatrain and its predecessor for transportation to Cuba, and a few now give that consent, their refusal being only directed to transportation between New York and New Orleans. However, this testimony, though relevant in considering the issue respecting the reasonableness of complainants' request, if there is no bar to the Commission's jurisdiction, has no bearing upon the question of whether the act may be construed as according such jurisdiction.

Complainants further state that while, of course, they make no claim "that the Act can operate extraterritorially," such an order as sought by them "would not be an attempt to exercise
1225 authority extra-territorially." In other words, while conceding that defendants cannot be required to furnish cars "outside the United States for transportation without the boundaries of this country," they contend that the provisions of the act apply because the "interchange with Seatrain takes place here," and that while they recognize that "the fact of the foreign destination is an element going to the question as to what may be a reasonable rule or regulation * * *," it does not bar the Commission's jurisdiction. However, while the act of physical delivery of such cars would take place in the United States, their delivery is in reality sought for use in the movement of foreign traffic, and such an exercise of jurisdiction would, to say the least, not comply with the real intent of the act. Complainants point out that Rule 6 of the Code of Per Diem Rules, applicable only to cars interchanged within Canada, Cuba, or Mexico, provides that if a subscriber to the rules delivers a railroad-owned freight car to a nonsubscriber, it shall be responsible to the owner for the per diem accruing on the car while on such nonsubscriber road. But what the rail carriers may voluntarily do does not extend the jurisdiction of the Commission unless such jurisdiction attaches by reason of Section 3 of the act.

Based upon the same grounds as pointed out with respect to Cuba, defendants also attack the jurisdiction of the Commission to grant the relief asked in connection with traffic between New York and New Orleans. In other words, they assert that such traffic is through a foreign country inasmuch as Seatrain operates through the port of Havana and the vessels stop at that port. Defendants refer to numerous cases in which the Commission has found that it may not prescribe through rates from a point in the United States to another point in the United States if such movement is through a foreign country. However, in each of these
1226 cases the movement through the foreign country was a rail haul within the actual land boundaries of such countries; and, at least to that extent, the situations there were different from the situation presented in the present case. It may be said here that no authority is offered to support this specific contention of defendants and, in fact, little discussion is directed to it. If defendants' position in this respect is meritorious, it will necessarily be a fundamental issue in the pending proceeding in which through rates are asked, and such an issue could not be decided here without having a far-reaching effect upon that case. Under these circumstances, and in view of the conclusions herein reached upon other issues, this issue will not be further discussed.

Issue as to Reasonableness of Rules and Practices [16]

In support of their position that the matters complained of are unreasonable, complainants offered testimony to the following effect:

1. The first Seatrain-type ship brought out by Over-Seas Railways, Inc., commenced operations in 1929, between New Orleans and Havana. This carrier applied for membership in the A. R. A., but while it was advised that it was ineligible inasmuch as it was a water carrier, an understanding with that association was reached that the Lower Coast would be responsible for the payment of per diem on the cars to the owners thereof during the time they were in the possession of Over-Seas and of the Cuban railroads. In June 1931, consideration was given by Over-Seas, or Seatrain,[17] to the possibility of constructing an additional
1227 ship or ships and the opening of a service out of the port of New York, in connection with railroads serving that port. Various trunk lines were consulted, and while they understood that this water line's operations necessitated delivery of their cars to

[16] In connection with this and other issues subsequently considered herein the parties, as hereinabove indicated, rely to a considerable extent upon testimony discussed in connection with jurisdictional issues.

[17] Seatrain succeeded Over-Seas sometime during 1931 and continued to operate the original vessel between New Orleans and Havana.

its ships, at least a number of such rail carriers represented that they desired the establishment of that service and no trunk line indicated any objection thereto. Following those negotiations Seatrain borrowed $2,380,000 from the United States Shipping Board to complete two additional vessels, and construction of those ships was begun. It was the consensus of opinion of the eastern trunk line carriers that Seatrain should maintain a terminal at a dock served by the Hoboken so as to be independent of any particular trunk line and yet afford all trunk lines access to Seatrain ships, and as an investigation disclosed that Hoboken was in financial difficulties it was considered necessary to acquire it and the stock was purchased. After its acquisition, $160,000 was invested in revamping its various facilities, though these improvements would not have been made "if the defendants' cars were not to be interchanged with Seatrain's vessels." In order to equip itself to interchange cars with Seatrain, Lower Coast had spent approximately $300,000 for additional facilities and improvements; and to insure complete understanding, Hoboken and Seatrain consulted officials of the A. R. A. in the matter, and, about the middle of September 1932, they advised Hoboken and Seatrain that they were satisfied with the arrangements.

A contract was then entered into between Seatrain and Hoboken by which Seatrain undertook to reimburse Hoboken for the per diem accruing on cars when in possession of Seatrain and Cuban railroads, to handle cars delivered by Hoboken to it only in accordance with the car service rules, and to cover the
1228 marine risk to cars by insurance. The testimony is to the further effect that it was only after these new ships had been completed that either the complainants or Seatrain were advised that any railroad would object to the delivery of its cars to Seatrain.

The first of the two new vessels was launched just prior to the date last named, namely, on September 13, 1932, and during the period from 1929 to the date of Seatrain's operations from New York no railroad indicated to this carrier or complainants that they had any objection to the delivery of cars to Seatrain or its predecessor, for the water movement between New Orleans and Cuba. During that period 18,159 loaded cars of various railroads were handled over that route by Seatrain and its predecessor, upon which per diem at the regular per diem rates of the A. R. A. were paid to the owning roads, and the consent of an owner was not a condition precedent to such delivery.

Complainants explain that the history of the various events and the conduct and representations of the defendants referred to is not intended to support any claim that defendants are estopped to deny complainants' right to deliver their cars to Seatrain,

though they consider that complainants and Seatrain were entitled to rely upon these matters, and that they evidence the unreasonableness of the rules and practices assailed.

2. Asserting that the per diem and car service rules are predicated upon the assumption that there shall be a free interchange of railroad cars between carriers, complainants contend that Rule 4 and defendants' refusals are unreasonable because adopted for the sole purpose of preventing a diversion of traffic from their own rails to the route of Seatrain, or, in other words, adopted "for the purpose and with the result of interfering with the business of a supposed competitor." That this was the plain object of
1229 the rule, they assert, is evidenced by the fact that it was the only reason given for its adoption by certain of the trunk lines with whom they conferred, following the receipt of notice that such roads would no longer consent to their use by Seatrain; also by the fact that some defendants have consented to the use of their cars by Seatrain between certain of its terminals though refusing such consent between certain other terminals of that carrier.

3. Referring to circular letters from the A. R. A. to member roads as authority for the view of that association that car service rules have three purposes, namely, to return owners' cars to home territory for proper maintenance, to meet the demands of traffic, and to avoid wasteful movement, complainants undertake to establish that "Rule 4 and defendants' refusals are unreasonable from the standpoint of proper 'car service' considerations." Thus, it states there is now a great surplus of cars, and was when Rule 4 was adopted; and that Seatrain is willing to furnish its proper quota of cars "if and when there is a car shortage" and defendants have been fully advised of this fact; that cars delivered to Seatrain are subject to less wear, tear, and damage than when delivered to rail carriers; and that owners of cars are amply protected against marine risks by insurance carried by Seatrain for the benefit of complainants. It is further asserted that each complainant has entered into contracts with Seatrain, that it will permit cars to be loaded and will handle them only in accordance with the car service rules, and Seatrain has in turn secured a similar contract from the Cuban railroads. Pointing out that the average cost of freight train car repairs is a very considerable item, and that the cost of repairs on cars in the possession of a foreign line must be deducted in settlement of per diem claims, complainants undertake to
1230 show that there would be practically no such deduction on cars while in the possession of Seatrain though there would be extremely large deductions with respect to cars handled all rail between the same origin and destination, the car owner thus receiving much greater compensation on the cars handled via the

Seatrain route. They further argue that the route via Seatrain offers to the defendant railroads an opportunity to secure net revenue from cars which under present conditions would otherwise remain idle.

4. Complainants assert that the rules and practices assailed are unreasonable compared with defendants' established practices in connection with delivery of their cars to other carriers. Thus, they assert that Rule 4 represents defendants' first attempt to make the securing of consent a condition precedent to the delivery by a railroad of a car belonging to another carrier, and that except as to Seatrain, none of defendants has refused or does now refuse to permit a railroad to deliver one of its cars to a connecting carrier either by rail or by water.

Complainants' contention in this connection is predicated upon the further view that there are no circumstances justifying different practices as between Seatrain and other carriers, generally. The specific contentions are:

(a) The fact that Seatrain operates to and from Cuba is not a distinguishing fact and there is no distinction as between Seatrain and rail carriers from the standpoint of risk to equipment, compensation for the use of equipment, or any other strictly car service considerations.

(b) There is no distinction between Seatrain and other water carriers to which delivery of cars is permitted, justifying
1231 different treatment. By this testimony complainants undertake to establish that in transportation by Seatrain there is less risk of loss or damage than in transportation by various other water carriers, also urging in this connection that at the time Rule 4 was adopted defendants themselves considered Seatrain as a car ferry. However, the fact remains that the Commission has found that Seatrain is not a car ferry.

(c) It is stated that as required by the act defendants interchange cars with many other carriers that own no railroad cars and that they refuse to permit interchange with no other carrier because it does not own cars. Thus they contend that the fact that Seatrain own no equipment is no distinguishing characteristic.

5. Complainants offer other evidence by which they seek to show the injury which they consider the rules assailed would inflict upon defendants themselves and upon the public interest. Testimony is offered by the traffic manager of the Manufacturers' Association of Connecticut, an organization composed of 800 manufacturers, that Seatrain service would be definitely in the interest and to the advantage of shippers and receivers of freight on the Atlantic seaboard, in that it would enable certain of the Association's industries to more nearly meet the competition of midwestern manufacturers on traffic to the Southwest; also that the Seatrain route

would open up new markets and new sources of supply of certain raw materials moving in bulk. He further refers to advantages which he considers would be afforded to those shippers who have preferred to ship all-rail only because they were unwilling to incur additional cost of boxing or crating necessary to properly protect their goods shipped in connection with the break-bulk routes.

1232 Another witness testifying for the Boston Chamber of Commerce and the New England Traffic League states that Seatrain service would make available to New England industry certain markets not now open to them. The representative of the Southern Pine Association expressed the view that while its shippers cannot ship all-rail to eastern markets in competition with Pacific Coast producers shipping through the Panama Canal, the use of the Seatrain route would afford the possibility of movement to such markets, thus affording northern and southern rail carriers some haul to the ports. Other shippers or associations offering testimony similar in some respects to that indicated include the Jefferson Island Salt Company, with works at Jefferson Island, La., the Celotex Company, the Atlantic and the Federal Seaboard Terra Cotta Companies in New Jersey, and the Shreveport Chamber of Commerce.

Summing up certain of their other contentions, complainants state that with respect to freight reaching the port of New York for movement by water, the New York harbor defendants, by permitting delivery of cars to Seatrain, would be saved the expense of unloading freight or placing it on lighters, and of making delivery by lighter to the break-bulk coastwise lines; also that the non-break-bulk service would eliminate their loss and damage risk from handling, and that it would afford defendants a means to recover some of the traffic now handled to and from the ports by truck for movement over the break-bulk coastwise lines, and that it would further benefit shippers in that a rail and water movement would be permitted of bulk freight which could not be handled by the break-bulk routes. As their facilities are not sufficient to make possible the transfer at the ports of all freight to be interchanged with Seatrain, complainants urge that unless large

1233 investments were made for increased facilities, the transfer of traffic from defendants' cars to other cars to complete the through transportation would result in a congestion of their terminals and impose an unreasonable burden on them. They thus urge that such rules and practices are unreasonable in that they would prevent important economies in transportation, would defeat the non-break-bulk feature of the Seatrain route, and would deprive the public of the benefits of a new and improved transportation service which the public desires.

Defendants contend that neither of the complainants is entitled to the use of equipment owned by defendant rail carriers by virtue of participation in the Car Service and Per Diem Agreements filed with the A. R. A. and the Commission. Insisting that such rules apply only to interchange of equipment between railroads, defendants direct attention to the fact that the Articles of Organization of the association provide that its membership "shall consist of carriers which operate American steam railroads"; that the Car Service and Per Diem Agreement promulgated by this association provides that the subscribing railroad promises and agrees with each railroad company severally which subscribes and files a counterpart thereof with such association, that the subscriber will abide by and enforce the rules prescribed for the handling of and settlement for freight cars included in the Codes of Car Service and Per Diem Rules, also promulgated by it; and that the Code of Per Diem Rules is described in its caption as "Governing Settlement for the Use of Railroad Owned Freight Cars Between All Common Carrier Railroads, Except as Provided For in Appendix B" (which exception embraces short-line roads as there described).

Complainants recognize that as these rules were promulgated before the existence of such a carrier as Seatrain, they were
1234 designed to take care of the interchange of equipment between railroads alone, and defendants insist that complainants' membership entitles them only to such rights and privileges as pertain to the exchange of equipment between themselves and other railroads and not to the use of equipment for delivery to Seatrain.

It is urged that the Car Service rules of the A. R. A., together with the per diem rules, were formulated for the purpose of providing a basis of compensation and method of handling such equipment as was freely and voluntarily exchanged between steam railroads, and complainants concede that there is nothing in such rules to compel the interchange of equipment. It is pointed out that the powers of the A. R. A. are specifically limited; that it does not exercise powers by virtue of which it may "make commitments" which can bind the member railroads; that under its articles of organization it has only the power "by recommendation to harmonize and coordinate the principles and practices of American railroads with respect to their construction, maintenance, and operation"; and that the plenary powers agreed to by subscribing to the Car Service and Per Diem Agreements relate only to cooperation in the car service matters between the member railroads and the Commission and not to negotiations between officials of the association and individual member railroads providing for the movement of equipment via the routes of water

carriers. It is thus contended that the agent could not exceed the powers conferred by its principals, and that as subscribers to the car service rules, complainants were well aware of the limitation of power of any official of the association; moreover, that no authority was in fact conferred upon complainants by any such officials. The entire correspondence upon the subject, they assert, merely indicates "discussion as to administration of the
1235 rules without any consideration of the question whether or not equipment would be freely interchanged or withheld by member railroads."

As to the negotiations referred to between Seatrain and the eastern trunk lines, defendants contend that no actual authority for the use of the equipment of the eastern trunk lines was ever approved by those carriers; that the character or extent of negotiations had between Hoboken and those carriers is thus of no consequence here, as these negotiations created no contractual relationship; and that the most that can be said of them is that they were of a preliminary character looking toward an agreement which was never consummated. They further point out that the Shipping Board has construed the loan agreement under which it advanced moneys hereinabove noted to Seatrain, as depriving that carrier of the privilege of engaging in coastwise trade unless such action should be authorized by future resolution of that Board, and that permission of that Board to engage in such traffic was only formally asked on September 23, 1932;[18] also that this loan agreement and also Seatrain's application for such loan was subsequent to the discussions hereinabove referred to between Seatrain and the eastern trunk lines. Defendants thus assert that as Seatrain was fully informed of the uncertainty of its right to engage in coastwise traffic when it obtained this construction loan, any claim that it was misled to its detriment by representatives of the trunk line carriers is wholly without weight.

1236 As to the alleged advices of the A. R. A. to Seatrain, the record establishes that while the contract hereinabove referred to as made by that carrier with Hoboken was subsequent to its conferences with representatives of this association Seatrain's arrangement with Hoboken for the use of equipment of defendant rail carriers was actually concluded prior to such discussions. Defendants accordingly contend that the inauguration of the Seatrain's service between New York and New Orleans was thus not contingent upon the consummation of such negotiation, and that complainants' claims that they were misled

[18] A resolution adopted on Oct. 6, 1932, by the Shipping Board authorized Seatrain to carry on coastwise trade between New York and New Orleans via Havana for a period of 6 months from the date of said resolution. By resolution adopted April 7, 1933, it authorized the continuance of the Seatrain coast-wise service until 30 days after the effective date of the final orders of the Commission in Dockets nos. 25565 and 25546.

to their injury by such negotiations is wholly without merit.

1237 Vigorously resisting the allegations that the rates assailed are unreasonable, defendants point to the facts shown in their testimony respecting the jurisdictional issues. They direct attention further to the facts shown as to per diem payments and say that the New York Central, the Pennsylvania, and the Erie railroads have never received any per diem from Hoboken and various other important trunk lines have not received any per diem from that complainant since early in 1933. However, they say they are not particularly interested in the matter of per diem and that their interest lies in preventing the use of their cars by Seatrain. Replying to complainant's assertion that through per diem payments they would receive adequate compensation for the use of their cars, they insist that such claim is fallacious as such compensation would take no consideration of (1) the sacrifice of traffic entailed in Seatrain's use of the equipment, (2) the inability of Seatrain to reciprocate by the furnishing of any equipment of its own, (3) the fact that investment in equipment is carried by defendants through idle periods, whereas the compensation which Seatrain is willing to pay only covers the carrying of the investment during the time that the cars are actually moved in Seatrain vessels, and (4) the failure of Seatrain to return empty cars.

Defendants state that there is no merit in complainants' claims that the furnishing of equipment to Seatrain would result in any advantages to them. Complainants' testimony in that connection respecting comparative net revenue to the car owners, when used in all-rail transportation, on the one hand, and moving via Seatrain, on the other hand, is also attacked as based on impractical and incorrect assumptions and as representing a wholly theoretical and erroneous result. The calculations of complainants from which its deductions are made have not been hereinabove discussed

1238 in any detail, nor is it necessary to specifically discuss the grounds advanced by defendants in attacking the accuracy of such calculations. Admittedly the comparative figures used by complainants are based on averages and hypothetical situations and they are of little or no value here.

Defendants consider that from a legal standpoint they are protected against the demands here made by and in the interest of Seatrain and that the question as to the amount of traffic which Seatrain has diverted from the rail carriers is of secondary importance. However, to rebut the contentions that Seatrain is in fact their "benefactor" they submit evidence indicating the extent to which the traffic of other carriers has been so diverted. Thus, of 432 cars which moved via Seatrain during the period October 1932 to March 1933, they state that at least 267 would have moved all-rail had it not been for the Seatrain service. Their

further deduction from the investigation which disclosed these figures is that 62 percent of the traffic handled by Seatrain has been exclusively diverted from the rail carriers and that a substantial portion of the remaining 38 percent has "been enticed" by Seatrain away from the water carriers or the rail-and-water carriers operating routes in conjunction.

As to Cuban traffic, referring to the recent overthrow of the government of Cuba, to the revolution, strife, and bloodshed that has recently existed in the Island, to the lack of the Commission's jurisdiction over such equipment while used on the Cuban railroads and its inability to protect the owning carriers against the destruction of their property while there, they insist that it would be most unreasonable to order them to supply equipment for such use.

Fundamentally the Code of Per Diem Rules was devised to afford proper compensation to a railroad car owner for the use of its cars by another railroad, taking the fact into consideration, however, that the providing of cars by carriers is a reciprocal duty. The Commission has in many instances required
1239 railroads to furnish equipment to other railroads which own no equipment, particularly certain of their short line connections, but those instances are exceptions to the general rule and considered justified in the public interest and because it would have been economical waste to have required such other lines to furnish equipment. The average time each car is in possession of Seatrain is not disclosed nor does the record indicate the average time during which cars transported to Cuba are in possession of Seatrain or on Cuban soil. However, the number of cars handled by Seatrain in the past, as hereinabove indicated, has been very considerable, and by this and other pending proceedings that carrier seeks to engage in the traffic to a very much larger extent in the future. It would seem to follow from the above that if the Commission had jurisdiction to accord the relief here asked and found complainants' request to be reasonable, it would nevertheless be powerless to require Seatrain at any time to furnish equipment regardless of the extent to which cars were demanded by that carrier of the rail lines.

There is a marked controversy between the parties respecting the practices of the various carriers under Car Service Rule 4. Complainants contend that the duty of defendants to permit free interchange of cars is not confined to cases where the through route is one to which the owning road is a party; in other words, that it is their duty "to permit their cars to be used and to be interchanged freely between connecting carriers wherever such connecting carriers operate through routes, subject, of course, to such reasonable provisions for home routing of cars and otherwise and provisions

for compensation as may be necessary to secure efficient operation of the national transportation system."[19] They testify that
1240 without waiving their contention that the rule is unlawful they have endeavored to comply with it to the extent that on traffic loaded on their own rails they have used only cars of consenting railroads, or cars in their possession for delivery to Seatrain for return movement empty and which they would otherwise have to deliver to Seatrain. In other respects they say there has been no enforcement of or compliance with Rule 4 and they undertake to show that such violation of the rule is chargeable to defendants. According to complainants there has been an increasing practice on the part of defendants to place their own cars for loading to earn per diem and to return empty the cars of other roads. In that respect and in other ways they assert defendants have violated this and other car service rules of their association. They thus argue that defendants "are not in a position to urge that Car Service Rule 4 is a rule which the complainants are obligated to observe."

Defendants testify that an analysis made in the month of August 1933 discloses that approximately 50 percent of the cars which were transported by Seatrain were appropriated in violation of Rule 4. Vigorously challenging complainants' testimony, they offer testimony to establish that no violation of the rule occurs when the cars are on their lines and that both the complainants and the Missouri Pacific and Texas & Pacific have repeatedly violated the rule. The testimony offered by the parties in connection with this issue has been fully considered. It need not be discussed in greater detail, though it may be noted that no shippers and no railroads other than complainants, are here attacking defendants' rules, regulations, and practices; also that except in a few minor particulars unnecessary to be here discussed, complainants' testimony, as hereinbefore indicated, is in reality only offered to support their view, that the specific car service rule assailed, together with other rules, regulations, and practices of defendants
1241 supporting or adopted to support that specific rule, is unreasonable.

In reply to the contention that cars on Seatrain vessels are used as containers, complainants urge that regardless of the fact that the car is not in movement on rails, its essential function remains the same, namely, to hold the freight while it is in transportation. They thus urge that tank cars, when hauled by rail-

[19] They urge that Car Service Rule 4 conflicts with Car Service Rules 2 and 3 which read:

"(2) Foreign cars at home on a direct connection must be forwarded to the home road, loaded or empty;

"(3) Foreign cars at home on other than direct connections must be forwarded to the home road, loaded or empty."

road, are both vehicles and containers, and that when grain is transported in a boxcar in bulk instead of in bags, the car constitutes a container for the grain and it is no less so when the car is on a railroad track than when it is in the hold of a Seatrain ship. In other words, it is their position that the cars are just as much used for transportation purposes when they are on such ships as when hauled by a railroad locomotive.

Issues under Section 3 (3)

In support of their position that Section 3 (3) is violated, complainants rely in part upon their construction of other provisions of the act hereinabove set forth and decisions of the Commission in which this particular provision has been considered. But those proceedings had to do with complaints of railroads against other railroads, or in which certain of the parties were connecting water carriers owned by railroads.

Complainants state that they are the only railroads in the United States which are prohibited by defendants from delivering defendants' cars to a connecting carrier; that Seatrain is the only carrier, by rail or water, to which they have refused to permit their cars to be delivered; and that these facts "at once suggest the unequal treatment of complainants and Seatrain." While the complainants apparently consider that proof of competition between the alleged preferred and prejudiced party, and resulting damage to the latter, is unnecessary in considering this
1242 issue, they nevertheless assert that the testimony establishes both competition and damage.

As to these matters it appears:

(a) That as rail equipment is not furnished the break-bulk carriers, there is, of course, no claim that the rules and practices assailed unjustly discriminate in favor of or unduly prefer those carriers;

(b) That according to complainants there is no substantial competition between the routes via Seatrain and the routes of the all-rail lines, as to traffic between the Northeast and the South and Southwest;

(c) That the only competition which complainants undertake to point out is in connection with Cuban business originating at or destined to interior or southern points in the United States, handled over routes of complainants in connection with Seatrain, on the one hand, and, on the other hand, over routes of some of the defendants in connection with the Florida East Coast Car Ferry Company;

(d) That the water line last referred to differs from Seatrain in that it is a car ferry. Moreover, it owns 675 boxcars and re-

frigerator cars, for which it expended considerably in excess of $2,000,000;

(e) That as hereinabove stated, with the exception of that ferry company, complainants and Seatrain refer to no water carrier with which defendants interchange cars for movement over routes competitive with their own; and that while the complainants claim that the delivery of equipment of defendants to ferries operating on the Great Lakes and Chesapeake Bay, and their refusal to permit the use of such equipment by Seatrain, constitutes unjust discrimination, they concede there is no competition between Seatrain and such other carriers;

1243 (f) That there is no showing of substantially similar circumstances and conditions surrounding the transportation in connection with Seatrain and in connection with alleged competitive carriers; and

(g) That the specific testimony as to damage seems to be restricted to the claim that defendants' practices have prevented the movement of considerable traffic via the route of complainants and Seatrain.

Defendants emphasize these facts respecting alleged competition between routes participated in by Seatrain and routes participated in by the Florida East Coast Car Ferry Company, though they insist that the existence or nonexistence of such competition is a matter of no importance here, as the Commission has no jurisdiction over the movement of the traffic or the supply of equipment for traffic moving to Cuba; also that there is now showing of undue prejudice or of damage to complainants from any alleged unlawful acts of defendants. As between traffic moving in connection with Seatrain and traffic moving in connection with the Florida East Coast Car Ferry, or car ferry routes on the Great Lakes or Chesapeake Bay, defendants also point out that while Seatrain operates on the basis of the break-bulk or rail-and-water routes, the car ferry routes are in reality extensions to rail lines and operate upon the basis of all-rail rates; also that in certain cases where such rates have been considered, the Commission specifically stated that "Car ferry routes and distances across Lake Michigan should be treated the same as rail routes and distances."

Section 7

Complainants contend that their testimony establishes that "Rule 4 and defendants' refusals" constitute a "combination"

1244 or "agreement" of defendants to interfere with the operation of the Seatrain route; in fact, that they were a phase of a "campaign" to accomplish that purpose, such campaign embracing

attacks before the Shipping Board, defendants' efforts to have the Commssion reject Seatrain's tariffs, their refusals to establish joint rates with or issue through bills of lading via Seatrain, their objections to concurrence of Seatrain in various agency tariffs, and their filing of schedules eliminating Seatrain from the southern classification.[20] Stated otherwise, it is their position that Rule 4 is itself an "agreement" and that apart from the A. R. A., and even if that rule had not been adopted, there is proof of such concerted action sufficient to establish a combination or agreement of many of the defendants.

Defendants admit that they refused to participate in through routes of Seatrain and have refused to permit their equipment to be appropriated by Seatrain, or its associated carriers, but they insist they are not compelled, either at common law or under any provision of the Interstate Commerce Act, to participate in such routes or to supply such equipment. They thus contend that their efforts to retain their own traffic and equipment have been lawful and proper and that they have committed no unlawful act in their relations with complainants or Seatrain. While taking the position that concerted action on their part to attain a lawful end would be entirely legal and proper, they nevertheless assert that such action was in fact not taken inasmuch as most of the trunk-line carriers, the New England carriers, and the southeastern carriers, at various dates prior to the adoption of Car Service Rule 4, informed Seatrain and the complainants that equipment
1245 owned by such defendant carriers would not be permitted to be used in Seatrain service, and the policy of the southeastern roads, with respect to Seatrain, is not uniform today.

Defendants point out that the same mechanical means exist for the transfer of freight between their lines and Seatrain as exist for the transfer of freight between the lines of such carriers and the vessels operated by any of the other water lines serving like ports; that complainants were advised by the A. R. A. that they would be expected to transfer the lading from cars moved in violation of Rule 4 into cars owned by carriers who assented to the use of their equipment in Seatrain service; and that inability of complainants to effect such transfer is not the fault of defendant carriers. Defendants in fact urge that if any conspiracy may be said to exist with reference to this matter, it lies in the attempt of complainants and Seatrain to appropriate equipment of defendant carriers without their consent and with full knowledge of defendants' refusals.

[20] Such schedules were approved in Participation of Seatrain Lines in Classification, 194 I. C. C. 309.

CONCLUSIONS AND FINDINGS

The conclusions are reached:

1. That the Commission, under the express limitations of the act, is without jurisdiction to grant the relief asked in connection with traffic to and from Cuba;

2. That the act gives the Commission no authority to accord the relief asked in connection with any of the traffic under consideration and that were this otherwise, the complaints are prematurely before the Commission;

3. That even if the act accorded jurisdiction of the matters in controversy, the rules, regulations, and practices assailed are not unreasonable, unduly prejudicial or preferential, or otherwise unlawful.

1246 The Commission should find that it has no jurisdiction of the matters here in controversy and that even if the act could be construed as according jurisdiction, the rules, regulations, and practices assailed are not unreasonable, unduly prejudicial, or otherwise unlawful.

The complaints should be dismissed.

1247 APPENDIX

Section 1 (1) and (1a) of the Act provides:

"That the provisions of this Act shall apply to common carriers engaged in * * *. The transportation of * * * property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, * * * or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation * * * takes place within the United States."

Section 1 (3) provides:

"* * * The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all * * * terminals, and terminal facilities of every kind * * * including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

and that—

"The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumen-

talities and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery * * * and handling of property transported * * *."

Section 1 (4) provides:

"It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof * * *."

1248 Section 1 (6) provides:

"It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce * * * just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, * * * of * * * bills of lading, * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper * * * upon just and reasonable terms, * * *."

Section 1 (10) provides:

"The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act."

Section 1 (11) provides:

"It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; * * *."

Section 3 (3) provides:

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates,

fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

1249 Section 5[1] provides that it shall be unlawful for any railroad or other common carrier subject to the Act to have an interest of any character in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier does or may compete for traffic. It is further provided that the Commission may determine questions of fact as to the competition or possibility of competition and may, under conditions there specified, authorize the installing of new service and, with respect to such service other than through the Panama Canal, extend the time during which such service by water may be continued; also that in case of such extension, the rates, schedules, and practices of such water carrier shall be filed with it and shall be subject to the Act and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation.

Section 6 (13) provides:

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

"(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made * * *.

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

* * * * *

"(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such

1250 foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements

[1] Part of the Panama Canal Act.

with any or all other lines of steamships operating from said port to the same foreign country."

Section 7 provides:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

(*Note:* Italic indicates allegation that such provisions are violated.)

1275 Before the Interstate Commerce Commission

I. C. C. Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY,

v.

ABILENE & SOUTHERN RY. CO., ET AL.

I. C. C. Docket No. 27878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY,

v.

AKRON, CANTON & YOUNGSTOWN RY. CO., ET AL.

Petition for modification of finding and legal conclusions upon which based, as stated in report of Commission, dated February 5, 1935

(Filed Feb. 21, 1935)

This petition is directed to that portion of the report of the Commission rendered February 5, 1935 which relates to dockets 25728 and 25878 respecting the use of railroad-owned equipment by Seatrain. The complaints considered in these two dockets were "dismissed without prejudice to the filing by complainants of petition for further consideration, or new complaints, after No.
1276 25727 * has been disposed of, if the conclusions reached in that case warrant such action." The reason for the proviso

*Seatrain Lines, Inc. v. A. C. & Y. Ry. Co., involving request of Seatrain for through routes, joint rates thereover, etc.

that complainants may submit petition for further consideration is that the Commission in dockets 25728 and 25878 held that it lacked jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers did not exist and that "whether such through routes exist, and, if not, whether they should be established, are issues in No. 25727, not yet decided."

While, as stated, the complaints in 25728 and 25878 were dismissed, the finding and legal conclusions stated therein will eventually govern the delivery of railroad-owned equipment to Seatrain. It is, therefore, necessary to urge modification of the finding and conclusions of the Commission despite the fact that the complaints in question have been dismissed. The finding which it is respectfully requested be reconsidered is No. 6, reading as follows:

"That we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such through routes are established pursuant to our order or voluntarily, to require the rail carriers parties thereto to interchange cars with the water carrier, if that is the reasonable and appropriate method of interchanging traffic moving over such through routes."

In reaching the above stated finding, the Commission discussed the possible application of the provisions of Sections 1 (4), 3 (3) and 1 (11) of the interstate commerce act to the interchange of equipment between rail and water carriers. The Commis-
1277 sion made no finding based upon the provisions of Section 3 (3) and very properly did not even suggest that the defendant rail carriers were guilty of discrimination. It stated that the provisions of Section 1 (11) apply only to railroads, saying "* * * the act of February 28, 1920, also amended the car service act so as to provide that the provisions thereof should apply only to railroads * * *" (13). It appears, therefore, that the above quoted finding of the Commission was wholly based upon the provisions of Section 1 (4). The finding of the Commission that it possesses jurisdiction over the delivery of equipment to Seatrain by virtue of the provisions of Section 1 (4) is plainly erroneous because:

(a) The provisions of Section 1 (4) apply only to facilities necessary for the operation of routes by rail.—Section 1 (4) requires that common carriers subject to the Act shall "provide reasonable facilities for operating through routes." However, the obligation thus expressed relates only to the furnishing of railroad equipment for the operation of rail routes. It does not apply to the delivery of rail equipment for the operation of water routes.

Rail carriers were not obliged at common law to participate in through routes with connecting carriers or to permit their equipment to move beyond their own rails. A. T. & S. F. Ry. Co. v.

Denver & N. O. R. R. Co., 110 U. S. 667, 680; Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 553–554. In A. T. & S. F. Ry. Co. v. D. & N. O. R. R. Co., supra, the Supreme Court said:

1278 "* * * we have not had our attention called to a single case where, if more than a connection of tracks was required, *the additional requirement was not distinctly stated and defined by the legislature*" (676–677).

* * * * *

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, *in the absence of statutory regulations to the contrary*, determine for himself what agencies he will employ" (680). [Italics ours.]

The obligation to deliver equipment beyond their own rails (either to other rail carriers or water carriers) must, therefore, be found in the statute. Such authority must be clearly expressed and can not rest upon inference or implication.* The provisions of Section 1 (4) make no reference to the furnishing of equipment to water carriers. In the absence of express language to that effect, it cannot be inferred that Congress intended that the word "facilities" should be applied to interchange with a water carrier.

1279 Capehart & Smith v. L. & N. R. R. Co., 3 I. C. C. 278, 4 I. C. C. 265. The Commission does not possess the necessary power to order delivery of railroad-owned equipment to a water carrier in the absence of express statutory language to that effect.

(b) The words "exchange, interchange and return of cars" were eliminated from the provisions of Section 1 (4) by Act of February 28, 1920.—Whatever may be said with reference to the duty of rail carriers to establish through routes in behalf of shippers, and to provide facilities for the operation thereof, it is obvious that the duty owed by them to other rail carriers in the matter of the operation of through routes was covered by the use of the words "exchange, interchange and return of cars" in Section 1 (4). But, as acknowledged by the Commission, these words were removed from the provisions of Section 1 (4) by the Act of February 28, 1920.

In its discussion, the Commission states that the duty imposed by Section 1 (4) upon all common carriers to establish through

*When relief is sought solely or mainly in the interest of common carriers engaged in transportation, the right asserted should not rest upon any doubtful construction but should clearly appear to have been conferred. Kentucky & Indiana Bridge Co. v. L. & N. R. R. Co., 37 Fed. 567, 633, appeal dismissed, 149 U. S. 777.

Whenever an intention has been manifested that connecting carriers shall have the power to run their cars over the lines of others, or to require one carrier to haul over its lines the cars of another, such intention has been expressed in unequivocal terms. Oregon Short Line and U. N. Ry. Co. v. Northern Pacific R. R. Co., 51 Fed. 465, 475; 61 Fed. 158, 161; Little Rock & Memphis R. R. Co. v. St. Louis-Southwestern R. R. Co., 63 Fed. 775, 780.

routes and provide reasonable facilities for operating same was not changed by the elimination of these words. In so finding, defendants submit the Commission committed grievous error. To argue that the removal of the words in question was without effect is to contend that their presence in the Act was entirely futile and that their elimination merely constituted an idle gesture on the part of Congress. Such cannot be the case. It is plain that the language in question was removed from the provisions of Section 1 (4) because it was considered that the provisions of the Car Service Act, adopted May 29, 1917, as amended in 1920, provided full and complete regulation with reference to the interchange of equipment between rail
1280 carriers. Upon the enactment of the Car Service Act, it was deemed that the matter of interchange of equipment between rail carriers need no longer be covered in Section 1 (4). The provisions of the Car Service Act were thought to provide all necessary regulation and rightly so.

Further proof that the provisions of Section 1 (4) related only to rail carriers and were not intended to cover the interchange of equipment between rail and water carriers could not be imagined than the elimination of the words "exchange, interchange and return of cars." The elimination proves that these words related only to the interchange of equipment between rail carriers and that they were removed because the interchange of equipment between rail carriers had been sufficiently taken care of in the Car Service Act, adopted May 29, 1917, as amended, February 28, 1920.

(c) The Commission has no power to enforce the duties stated in Section 1 (4).—The duties imposed by Paragraph 4 of Section 1 of the Act are enforceable only in the courts and cannot be enforced by the Commission which has not been clothed with the power and responsibility of requiring carriers to supply the transportation referred to therein.

The Commission itself interpreted the provisions of Paragraph 4 of Section 1 in this manner, and its interpretation was upheld by the Supreme Court. In United States v. Pennsylvania R. R. Co., 242 U. S. 208, the court had under consideration the question whether the Commission possessed the necessary authority to compel a rail carrier to supply equipment under the terms of
1281 Section 1 (4). The court made reference to the fact that the Commission itself had taken the view that it did not possess the authority to take such action, and stated that it concurred in this view of the matter. It said:

"But this casts us back to our general considerations to which we may only add that there was no question of the duty of carriers either under the Act of 1887 or under the amendment of

1906. It was their duty under both to furnish the instrumentalities of transportation. The question is whether under the latter, as under the former, jurisdiction to enforce the duty was at common law in the courts or under the statute and in the Commission; and we have seen that it was the view of the Commission that the remedy was in the courts and that the amendment of 1906 was not intended to and did not change the remedy. In other words, that Congress in effect accepted the explanation of the Commission and approved its decisions. We repeat, the amendment of 1906 was drawn by and recommended by the Commission, and it may be assumed was not intended to have nor given larger import in the law than it had in the recommendation. United States v. Louis. & Nash. R. R., 236 U. S. 318, 333, et. seq.

"There was amendment in 1910, *not of Section 1 in any particular relevant to our discussion*, but of Sections 13 and 15 * * *" (227). [Italics ours.]

The decision of the court in United States v. Pennsylvania R. R. Co., supra, is conclusive that the Commission does not have the necessary authority to enforce the provisions of Section 1 (4). It is true that the court held that the Commission did not have the power to require a railroad to furnish to a shipper a particular and unusual type of car. However, in the course of its opinion, the court approved the view of the Commission that the law-making power had not "clothed the Commission with the responsibility of directing a carrier to supply itself with any particular kind of equipment or cars, or, in fact, any equipment or cars at all for the transportation of freight over its line" (221), and stated "we need not pause to distinguish its application in the cases to special equipment as distinguished from common equipment" (233).*

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From the law above stated, it seems clear that the contested finding of the Commission is erroneous. Analysis of the discussion contained in the report of the Commission upon which this finding is based reveals that the Commission fell into error by assuming an improper premise and building thereon. The Commission first assumed that it possessed the power to enforce the delivery of rail equipment to water carriers prior to the adoption of the Car Service Act of May 29, 1917, and the Act of February 28, 1920, and then concluded that because it formerly possessed such power that it had not been deprived thereof by the subsequent legislation. However, the Commission never originally possessed the power to order delivery of railroad-owned equipment to water carriers,

*See also Scofield v. L. S. & M. S. R. R. Co., 2 I. C. C. 67, 76; Jones v. St. Louis & S. F. R. R. Co., 12 I. C. C. 144; Louisville & Nashville R. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, affirming 172 Fed. 117; and Hines v. Henaghan, 265 Fed. 831, wherein it has been held that shippers must resort to the courts for the enforcement of the duties stated in paragraph 4 of Section 1 of the Interstate Commerce Act.

and, therefore, its authority was not lessened by the subsequent legislation. It was not lessened because it never enjoyed the power.

1283 Defendant rail carriers do not contend that the power of the Commission over the interchange of equipment between rail carriers was lessened by the subsequent legislation. They concede that the authority of the Commission over interchange of equipment between rail carriers was substantially increased by the Acts of May 29, 1917, and February 28, 1920. They argue only that the latter legislation was restricted to the interchange of equipment between rail carriers. This fact the Commission itself has stated. In Oyler & Son v. American Railway Express Co., 83 I. C. C. 160, 162, it said:

"In R. R. Commissioners of Florida v. Southern Express Co., 44 I. C. C. 645, 649, we found that we were without authority to require the carriers to acquire refrigerator cars for use in express service. Although the law has been changed since that decision, the provision of the interstate commerce act under which we may require common carriers to equip themselves with adequate facilities for performing their car service applies only to common carriers by railroad."

Further errors in the discussion of the law also exist. The Commission stated that prior to the enactment of the Car Service Act, it had held that the duty to establish through routes included through routes with water lines as well as with other rail lines, and that in several cases it had required the establishment of such through routes, citing Flour City S. S. Co. v. Lehigh Valley R. R. Co., 24 I. C. C. 179; Pacific Navigation Co. v. Southern Pacific Co., 31 I. C. C. 472, and Chattanooga Packet Co. v. Illinois Central R. R. Co., 33 I. C. C. 384 (12).

1284 It is quite true that the Commission ordered the establishment of through routes between rail carriers and water carriers in the cases cited, although analysis of the decisions reveals that the action of the Commission was based principally upon the provisions of Section 3, 6 and 15 rather than the provisions of Section 1 (4). However, the cases are not in point. They do not answer the question whether rail carriers are obliged to deliver equipment to water carriers which is the issue involved in this proceeding.

It should also be noted that the foregoing cases were decided by the Commission between June 4, 1912, and March 9, 1915, and thus before the Act of February 28, 1920, by which the words "exchange, interchange and return of cars" were eliminated from the provisions of Section 1 (4) of the Act. The cases cited by the Commission do not, therefore, support the view that rail carriers are obliged to deliver equipment to water carriers after

the passage of the Act of February 28, 1920, even though it were conceded (which it is not) that the provisions of Section 1 (4) required such action prior to the legislation in question.

The Commission further states that it has held that the duty to maintain through routes carries with it necessarily the power to enforce rules which would permit the free interchange of cars between carriers, referring in this connection to its decisions in Missouri & Illinois Coal Co. v. Illinois Central R. R. Co., 22 I. C. C. 39, cited with approval in C. R. I. & P. Ry. Co. v. United States, 284 U. S. 80 (12).

Here again the point considered by the Commission and the court has no application. We are concerned in
1285 this proceeding only with the interchange of cars between railroads and water carriers and not with the interchange of cars between railroads.

The Commission also states that while the interchange of cars was ordinarily between railroads, there was also some interchange of cars by the railroads and various transportation and car ferry companies which, like Seatrain, had been held to be water carriers within the meaning of Section 5 (19–21 of the Act), citing in this connection Pennsylvania Co. Operation of Transportation Co., 34 I. C. C. 47; Grand Trunk Ry. Co. of Canada Operation of Car Ferry Co., 34 I. C. C. 49; Buffalo, R. & P. Ry. Co. Operation of Car Ferry Co., 34 I. C. C. 52, and Grand Trunk W. Ry. Co. Operation of Car Ferry Co., 34 I. C. C. 54.

The Commission overlooks the fact that what rail carriers may voluntarily do, they may not be compelled to do, and that defendant rail carriers have never been ordered by the Commission to supply equipment to the car ferries in question. In none of the cases cited was the compulsory delivery of equipment by rail carriers to the car ferries under consideration.

Moreover, the car ferries in question are properly regarded as extensions of lines of railroad. Peninsular & Occidental S. S. Co., 37 I. C. C. 432, 433–434; New Orleans-Havana Car Ferry Service, 188 I. C. C. 371, 388; Marquette & Bessemer Dock & Navigation Co., 187 I. C. C. 177, 178, and Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382, 389, whereas Seatrain has been expressly held by the Commission not to be a car ferry or extension of a line of railroad. In Investigation of Seatrain Lines,
1286 Inc., 195 I. C. C. 215, 222, the full Commission considered this precise question at considerable length, and stated:

"The vessel used by Seatrain is far larger and of a different type than the vessel envisaged when the word 'ferry' or 'car ferry' is mentioned. Its method of operation is not the method used in operating any other ferry here or elsewhere in the world."

* * * * *

"It is suggested that Seatrain service may be considered as an extension of the lines of railroad of the Hoboken and of the Missouri Pacific. Unless Seatrain vessels are ferries used by or in connection with a railroad, and therefore to be included in the term 'railroad,' they do not constitute an extension of a railroad" (222).

Having held that Seatrain is not a car ferry or extension of a line of railroad, the Commission may not properly base its conclusions with reference to the interchange of equipment between the rail carriers and Seatrain upon the ground that Seatrain is a car ferry. If Seatrain had been classified by the Commission as a car ferry, it would have been obliged to secure a certificate of convenience and necessity under Section 1 (18) of the Act to operate. Having been held not to be a car ferry, and not required to secure permission under Section 1 (18), it is incorrect to require rail carriers to supply equipment to Seatrain based upon the fact that Seatrain is a car ferry.

The mere fact that the car ferries in question and Seatrain are both regarded as water carriers within the purview of the Panama Canal Act is not significant. They may both be water
1287 carriers within the meaning of the Panama Canal Act but they are not both extensions of lines of railroad, and it is the latter classification under which equipment is delivered to the car ferries. In other words, equipment is delivered to the car ferries because they are extensions of lines of railroad—not because they are water carriers under the Panama Canal Act.

The statement is made by the Commission that in Capehart & Smith v. L. & N. R. R. Co., 4 I. C. C. 265, and American Hawaiian S. S. Co. v. Erie R. R. Co., 152 I. C. C. 703, it held that Section 3 (3) of the Act could not be invoked by a common carrier not subject to the Act; and that in Pacific Navigation Co. v. Southern Pacific Ry. Co., 31 I. C. C. 472; Chattanooga Packet Co. v. Illinois Central R. R. Co., 33 I. C. C. 384, and Colonial Navigation Co. v. N. Y. N. H. & H. R. R. Co., 50 I. C. C. 625, it found that failure to establish through routes with water carriers not subject to the Act was unduly prejudicial under Section 3.

Whether or not the provisions of Section 3 (3) were enacted for the benefit of common carriers not subject to the Act need not be decided in this proceeding inasmuch as Seatrain is subject to the Act. However, defendant rail carriers protest the statement by the Commission of apparently conflicting decisions with reference to this matter without any attempt to reconcile them. Thus to leave the matter unsettled merely adds to the difficulty involved in consideration of the report.

It is significant that the Commission found that the provisions of Section 3 (3) may not be availed of by common carriers not sub-

ject to the Act in the Capehart and American Hawaiian
1288 cases, wherein the question was actively discussed and considered, and that it found that the provisions of Section 3 (3) applied to common carriers not subject to the Act only in the Pacific Navigation, Chattanooga Packet and Colonial Navigation cases, wherein the issue was not even raised.

Defendant rail carriers submit that under the terms of Section 3 (3), common carriers subject to the Act are only admonished to avoid discriminating against other carriers subject to the Act, and that they are not prohibited from discriminating against carriers not subject to the Act. This is clear upon a consideration of the wording of Section 3 (3) itself and the frequent use of the word "their" indicating that the prohibition against discrimination was to apply only between "their" lines of railroad, that is, lines of railroad subject to the Act.

In two cases decided subsequent to those enumerated by the Commission, it has been held that the provisions of Section 3 (3) of the Act could not be invoked by a common carrier not subject to the Act. Luckenbach S. S. Co. v. Southern Ry. Co., 157 I. C. C. 752, and Ex-River Grain from St. Louis to South, 203 I. C. C. 385. In the Luckenbach case, the Commission carefully reviewed all precedents with reference to this subject and concluded that:

"It is difficult to see how the rates and charges of two competing carriers can be justly and fairly regulated unless the regulating tribunal has full and complete jurisdiction over both carriers."*

1289 The Commission also stated that it possessed the necessary jurisdiction to require that equality of treatment provided by Section 3 (3) between connecting carriers, whether rail or water, in the facilities for the interchange of traffic, including through routes and the interchange of cars (14).

Whether or not the provisions of Section 3 (3) have application to the matter of through routes is not here involved and was neither briefed nor argued. Defendant rail carriers contend that the Commission cannot be deprived of the discretion vested in it under Sections 6 (13) and 15 (3) by any supposed compulsory feature contained in Section 3 (3). However, as stated, the question of the application of the provisions of Section 3 (3) to the matter of through routes need not be determined in this proceeding. That question will be determined in docket 25727.

The statement that Section 3 (3) relates to the interchange of equipment is also erroneous. That portion of the language of Section 3 (3) which provides that carriers engaged in the trans-

*The view that the provisions of Section 3 (3) apply only to common carriers subject to the Interstate Commerce Act was stated by the Federal Court in Kentucky & Indiana Bridge Co. v. L. & N. R. R. Co., 37 Fed. 567, 620, and Little Rock & Memphis R. R. Co. v. East Tennessee, V. & G. R. R. Co., 47 Fed. 771, 779.

portation of passengers or property subject to the provisions of the Act shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines has no application to the matter of interchange of equipment between rail carriers and Seatrain.

In the first place, it appears to be restricted to the providing of facilities for the interchange of traffic between lines of railroad In the absence of express language to that effect, it cannot be inferred that Congress intended that the word "facilities" should be applied to interchange with a water carrier. Capehart & Smith v. L. & N. R. R., 3 I. C. C. 378, 4 I. C. C. 265.

1290 In the second place, it has been judicially determined that the word "facilities" as referred to in this paragraph of Section 3 does not embrace car equipment. Scofield v. Lake Shore & Michigan Southern R. R., 2 I. C. C. 67, 76 (referred to in United States v. D. L. & W. R. R., 40 Fed. 101, 103, and United States v. Pennsylvania R. R. Co., supra). The pertinent portion of the decision of the Commission in the Scofield case follows:

"A careful consideration of this provision of the statute has brought us to the conclusion that it refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers. The term 'facilities' as here used, does not embrace car equipment for the origination of and transporting of freight along the line of the carrier in the sense in which it is here contended for by the petitioners."

Thirdly, it has been held that the provisions of Section 3 (3) which require equal treatment of all connecting carriers in the matter of furnishing facilities for the interchange of traffic do not require carriers to treat all connecting carriers in precisely the same manner without reference to self-interest. Oregon Short Line & U. N. Ry. Co. v. N. P. R. R. Co., 61 Fed. 158, 162; L. R. & M. Ry. Co. v. St. Louis, S. W. Ry. Co., 63 Fed. 775, 779, and that the statutory right of equal facilities is reciprocal and one carrier must be able to furnish equal facilities with the other before it can complain of discrimination. Capehart & Smith v. L. & N. R. R. Co., 4 I. C. C. 265, 273; L. R. & M. Ry. Co. v. E. T. V. & G. Ry. Co., 47 Fed 771, 779.

1291 Moreover, there is no proof that defendant rail carriers have violated the provisions of Section 3 (3) and the Commission has not so found.

Reference is made by the Commission to the decision of the Supreme Court in C. R. I. & P. Ry. Co. v. United States, 274 U. S. 29, wherein the Supreme Court held that the Commission possessed the necessary power to require a rail carrier to embrace in a through rail water route less than the entire length of its railroad lying

between the termini of the through route proposed; and that by the provisions of the Transportation Act, 1920, it was the intention of Congress to broaden the control of the Interstate Commerce Commission over rail and water transportation (13–14).

This decision has no application to the instant situation. The provisions of Section 15 (4) by virtue of which rail carriers may be required to short-haul themselves "where one of the carriers is a water line" have no application under circumstances where the rates, fares, and practices of participating water carriers are subject to the same regulation as the rail carriers which possess an interest therein. In the report rendered February 5, 1935, the Commission held that the rates, fares, and practices of Seatrain were subject to the Panama Canal Act and should be posted with the Commission. Hence, the rates, fares, and practices of Seatrain must be treated the same as the rates, fares, and practices of the Missouri Pacific and the Texas & Pacific and defendant rail carriers cannot be obliged to short-haul themselves in connection with routes involving Seatrain. See in this connection Reduced Rates from New York Piers, 81 I. C. C. 312.

1282 In addition, as already explained, the finding of the Commission that it possesses the necessary authority to require the delivery of railroad-owned equipment to Seatrain in instances where through routes exist between the rail carriers and Seatrain is based upon the provisions of Section 1 (4) of the Act and not upon any of the provisions of the Transportation Act, 1920, referred to by the Supreme Court in its decision.

Even though the Commission had the power to compel delivery of railroad-owned equipment to water carriers in instances where through routes exist between rail carriers and water carriers (which is not conceded), it would not follow that the obligation to furnish such equipment could be placed wholly upon the participating rail carriers. In the case of through routes composed of two or more carriers, the obligation to furnish equipment for transportation over such through routes is joint upon the carriers participating therein. Pittsburgh Terminal Railroad Co. v. Director General, 63 I. C. C. 179, 182; United Colliers Co. v. Southern Ry. Co., 96 I. C. C. 338, 340–341; Wyoming Coal Co. v. Virginian Ry. Co., 98 I. C. C. 488, 494.

The evidence shows that Seatrain owns only six flat cars and one box car and is totally unprepared to make its proper contribution to the supply of equipment necessary for the operation of through routes between itself and defendant rail carriers. In other words, Seatrain has contributed no investment of its own in the acquisition of equipment necessary for the interchange of traffic with rail carriers. Its obligation to do so cannot be fulfilled

by appropriating the equipment of defendant rail carriers
1293 and offering to pay a rental therefor. Defendant rail carriers could with equal force argue that they were entitled to appropriate the Seatrain vessels for operation of through routes if they so desired merely by offering to pay necessary rental on the investment therein for the period of the voyages.

Defendant rail carriers do not disagree with the conclusion of the Commission that rail carriers may not be required to deliver equipment to water carriers in the absence of through routes between such rail and water carriers. However, they submit that this conclusion of law is not sufficiently broad and contend that rail carriers may not be required to deliver their equipment to water carriers under any circumstances, that is to say, whether or not through routes exist between such rail and water carriers.

Wherefore, defendant rail carriers respectfully request that the finding and conclusions of law above discussed be modified in line with the views set forth herein.

Respectfully submitted.

WILLIAM C. BURGER,
W. N. MCGEHEE,
G. H. MUCKLEY,
HENRY THURTELL,
ALFRED S. KNOWLTON,
ROLAND J. LEHMAN,
Attorneys for Defendants.

February 20, 1935, 143 Liberty Street, New York, N. Y.

1294 CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in the above proceeding by mailing a copy properly addressed to each party.

Dated, New York, N. Y., this 20th day of February 1935.

ROLAND J. LEHMAN,
For Defendants.

1296 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL.

Complainants' reply to defendants' petition for modification of findings and legal conclusions

Filed March 8, 1935

I

The defendants' petition for modification of the findings and of the legal conclusions set forth in the Commission's re-
1297 port of February 5, 1935, does not proceed on any theory that the Commission's conclusions are in error because contrary to the underlying purposes of the statute, or that the law as interpreted by the Commission will be contrary to any public interest intended to be served thereby. On the contrary, the defendants attack the Commission for failing to adopt the narrow interpretation of the statute argued for by them, which would plainly be contrary to the broad intent and underlying purposes of the Act. Not only does their brief in support of their petition disregard entirely the fundamental purposes of the legislation in question, but in reiterating their plea that the Commission should follow a narrow view of the law, their brief presents no new argument and raises no new issues which have not already been considered by the Commission. The points urged in the petition have all been argued in practically the same form in the original brief of the defendants, in their reply to the complainants' exceptions and in oral argument. Although the petition contains a table of citations two and one-half pages long, all of the principal decisions cited, if not indeed all of the cases listed, have been previously cited and discussed. It is not urged that any new facts have arisen to justify a reconsideration. Neither is it urged that there is any inconsistency between various past decisions of the Commission which would justify a reopening of the case for a review of the Commission's conclusions and a clarification of such inconsistency. For these reasons alone it is submitted that the petition presents no substantial ground justifying a reconsideration and modification of the Commission's conclusions in the respects sought.

II

Furthermore, it is believed that the petition is without
1298 merit and should be denied because it proceeds on an

incorrect assumption as to the basis of the Commission's decision, because it rests on arguments which are not supported by the cases cited and which have no relation to the situation involved and because the legal conclusion which the defendants in their petition urge the Commission to adopt is on its face fundamentally unsound.

(a) The petition assumes as the basis for the argument therein contained that the conclusions which the Commission has stated with respect to its legal authority to require the interchange of cars for the accomplishment of transportation over through routes are based entirely upon Section 1 (4) of the Act, and it is urged that this provision gives the Commission no authority in the premises. As we read the Commission's report, on the contrary, it appears to us that the Commission based its decision upon all of the provisions of the Act having to do with its authority to establish through routes and to require reasonable arrangements, facilities and equipment for the operation of such through routes.

(b) Proceeding from the assumption that the Commission's conclusion is based entirely upon the provisions of Section 1 (4), defendants argue that the language of that section requiring "every common carrier subject" to the Act to "provide reasonable facilities for operating through routes" relates only to the furnishing of railroad equipment for the operation of rail routes and does not apply to the interchange of rail equipment for the operation of rail and water routes. Apparently the theory of the argument is that the obligation upon a railroad to deliver equipment off its own rails not having existed at common law, must, if it now exists, be clearly expressed in the
1299 statute and that the language quoted cannot be said to impose any obligation to furnish facilities for operating through routes with a water carrier because the words "water carrier" are not expressly used. If this argument were sound here, it would be equally sound as applied to other situations where it would lead to conclusions so absurd and at odds with the Commission's decisions as utterly condemn it. Thus, on the same reasoning, it might equally have to be said that Section 1 (4) imposes no duty on railroads to establish through routes or just and reasonable rates with a water carrier, since the term "water carrier" is not expressly used in the first clause of the subdivision any more than it is in connection with the clause just quoted. The Commission has consistently held, however, that under this and other sections a railroad is under a duty to establish through routes and just and reasonable rates with a connecting water carrier. Colonial Navigation Co. v. N. Y., N. H. and H. R. R., 50 I. C. C. 625, 627; Flour City S. S. Co. v. L. V. R. R. Co., 24 I. C. C. 179, 184, 185. Likewise, if defendants' argument were sound, it would

have to be held that this provision imposes no duty to furnish equipment for the operation of through all-rail routes since the word "railroad" is not used therein any more than is the term "water carrier." And yet it was held, even prior to the adoption of the so-called car service provisions, that because interchange of cars was obviously the reasonable and economical method of accomplishing through transportation over routes involving two or more railroads, Section 1 (4), together with other provisions of the Act, imposed upon railroads the duty of such interchange which the Commission could enforce. Missouri & Illinois Coal Co. v. Illinois Central R. Co., 22 I. C. C. 39. It follows that the defendants' argument must be rejected and that the same conclu-
1300 sion would have had to be reached with regard to the duty to interchange cars with a water carrier as was reached in the last named case with regard to interchange between railroads, had it appeared in any case, as it does here, that the interchange of cars was the reasonable and economical method of accomplishing through transportation between a railroad and a connecting water line.

Defendants then advance the argument, previously urged by them, that the situation was altered by the change in the provisions of Section 1 (4) made by the Act of February 28, 1920. The substance of this argument is that although by the 1920 Act Congress clearly indicated an intention to increase the Commission's jurisdiction and the duty of the railroads with respect to through transportation by rail and water, it actually curtailed the Commission's authority and reduced the railroad's obligation wherever the interchange of cars affords the reasonable and economical method of accomplishing through transportation. Such an argument plainly cannot be accepted if full effect is to be given to the plain intent of Congress.

Defendants' next argument is that whatever duties may be imposed upon the railroads by Section 1 (4), these duties cannot be enforced by the Commission but are enforceable only in the courts. This argument rests upon a strained interpretation of a few sentences of the Supreme Court's opinion in the Pennsylvania Tank Car case. United States v. Pennsylvania R. R., 242 U. S. 208. The substance of this decision was that the Commission had not been clothed by the Act with authority to require a railroad to furnish to a shipper a particular and unusual type of car. Defendants rely on a sentence in the course of the opinion in which the Court expressed doubt whether the Commission had been given authority to require a railroad to provide itself with
1301 any equipment whatever. The decision, however, certainly does not hold that where a railroad already has equipment and furnishes it to shippers, it may not be required to interchange

that equipment with other carriers for the accomplishment of through transportation.

On pages 11 and 12 of their petition, defendants attempt to escape the force of the Commission's citation of numerous decisions under the Panama Canal Act, Section 5 (19–21), referred to by the Commission as indicating that when the various changes in the law were made, it had been well recognized that there were water carriers with which railroads interchanged cars in the operation of through routes. The defendants endeavor to dispose of the reference to these cases by stating that railroad equipment was delivered to the water carriers there involved because they were extensions of lines of railroad, and was not delivered to them as water carriers under the Panama Canal Act. The fact is, however, that they were treated by the Commission as water carriers and not as extensions of rail lines, a fact which is made clear because the Commission held the Panama Canal Act applicable to the railroad ownership in those water lines, whereas it has held that Act inapplicable and has dismissed an application thereunder where the car ferry in question has been found to be an extension of a rail line coming within the definition of a railroad contained in Section 1 of the statute. New York Harbor Facilities Applications, 101 I. C. C. 383, 386. Moreover, some of the water carriers involved in the cases cited were not only held by the Commission to be water carriers under the Panama Canal Act, but have been treated by the defendants themselves as water carriers for the purpose of the application of their own Car Service Rule 4. (Exhibit 8.)

On pages 13 to 15 of their petition, the defendants confuse
1302 the discussion by two arguments which have no bearing upon the present cases. They first argue that these cases present no issue under Section 3 of the Act and then contend that a water carrier which is not subject to the Act may not file a complaint alleging a violation of Section 3. In answer to the first of these arguments, it is enough to refer to the complaint itself in which the provisions of Section 3 of the Act are expressly invoked. The Commission, therefore, plainly made no error in discussing the effect of these provisions upon the issues in the case. The second argument, namely, that a water carrier not subject to the Act may not complain of a violation of Section 3, is both unsound, as we submit, and is entirely beside the point here, first, because the original complaints—the Hoboken Manufacturers Railroad and the New Orleans & Lower Coast Railroad—are common carriers by railroad and not by water; and second, because Seatrain, the intervening water carrier complainant, is, as the Commission has found, a common carrier subject to the Act.

(c) Finally, the sum total of the argument contained in the defendants' petition, which has been previously made by the defendants and rejected by the Commission, comes, in effect, to this: That in spite of the fact that Congress has consistently indicated an ever increasing intention that transportation of freight by water and rail should be encouraged and has from time to time given the Commission increased authority to require the establishment of through routes by rail and water, it has at the same time been curtailing the authority of the Commission to implement the operation of such through routes and has been reducing instead of increasing the obligations placed upon railroads with respect to the furnishing and interchange of equipment for the operation of such
1303 through routes where the interchange of railroad cars affords the most reasonable and economical method of such operation. This, we submit, as the Commission itself held, is an absolutely unthinkable condition of the law.

The defendants, recognizing the incongruity of the suggestion that Congress has curtailed the Commission's authority and reduced the railroads' obligations, attempt to avoid it first, by their erroneous assumption that the Commission's decision is based entirely upon Section 1 (4), and then by asserting that a decision that the Commission under that provision is without authority to require interchange of cars with a water carrier does not amount to a conclusion that the Commission's authority under that provision has been curtailed, since, as they urge, Section 1 (4) has never conferred authority on the Commission or imposed upon railroads duties with respect to the interchange of cars where a water carrier is concerned. They also urge that the word "facilities" as used in Section 1 (4) and Section 3 does not include "cars." However, both of these contentions are contrary to the law as it has been interpreted both by the Commission and the courts in the cases cited in our original brief and in the exceptions to the Examiner's proposed report in this proceeding. In effect, the defendants would have the Commission conclude that even if it may require them to establish through routes over their lines, the lines of the Hoboken, the New Orleans & Lower Coast and Seatrain, nevertheless the railroads have no more duty under the existing law and the Commission has no more authority with respect to the use of cars for the economical accomplishment of through transportation over such routes than existed prior to the enactment of the Interstate Commerce Act itself, when a railroad might refuse to allow
1304 its cars to go off its rails and might compel the transfer of lading to other cars, and thus, in spite of the theoretical existence of through routes, effectively interfere with the through transportation of freight. The Commission properly rejected such a concept of the law. We believe, indeed that the Commission did

not adopt a sufficiently broad view of the extent of its authority, but certainly it did not err in its decision that it had at least the authority which it concluded that it possessed.

The petition should be denied.

Respectfully submitted.

H. H. LARIMORE,
C. M. SPENCE,

Missouri Pacific Building, St. Louis, Mo., Attorneys for New Orleans & Lower Coast Railroad Company, Complainant in Docket No. 25878.

PARKER MCCOLLESTER,
FRANK J. CLARK,
LORD, DAY & LORD,

25 Broadway, New York, N. Y., Attorneys for Hoboken Manufacturers Railroad Company, Complainant in Docket No. 25728, and for Seatrain Lines, Inc., Intervener in both complaints.

Dated March 7, 1935.

1305 CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above reply upon Roland J. Lehman, attorney for the defendants, and upon all parties upon whom, as I am informed, copies of the defendants' petition were served by mailing a copy properly addressed to each of them.

Dated, New York, this 7th day of March 1935.

PARKER MCCOLLESTER,
Of Counsel for Complainants.

1306 [Order of April 1, 1935 omitted. Printed side page 74 ante.]

1308 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS' RAILROAD COMPANY, COMPLAINANT

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL., DEFENDANTS

Motion for entry of order

Filed July 21, 1938

Now come Hoboken Manufacturers' Railroad Company, complainant, and Seatrain Lines, Inc., intervener, in the above-entitled proceeding and move the Commission to reopen the

proceeding for the purpose of issuing an order therein and thereupon to issue an order in accordance with the findings of the Commission in this proceeding and in Docket No. 25727. And in support of their motion, petitioners respectfully show:

1. On or about December 29, 1932, complainant Hoboken Manufacturers' Railroad Company filed its complaint in the above-entitled proceeding. A similar complaint was filed at or about the same time by the New Orleans & Lower Coast
1309 Railroad Company in Docket No. 25878, and the two complaints were consolidated for hearing. Seatrain Lines, Inc., intervened in support of the complainants. The complaints arose out of the adoption by the defendant railroads, through the medium of the American Railway Association, of so-called Car Service Rule 4 prohibiting a railroad from delivering a car to a water carrier without the consent of the owning railroad and out of the recording by a substantial number of the defendant railroads of their refusal under this rule to permit their cars to be delivered to the vessels of Seatrain.

2. It was alleged by the complaints that Car Service Rule 4 and the defendants' refusal were unreasonable in violation of Section 1; and that so long as the defendants permitted their cars to go to Cuba via the vessels of the Florida East Coast Car Ferry Company in competition with Seatrain, or to be delivered to other water carriers, their refusal to permit their cars to be delivered to Seatrain was discriminatory in violation of Section 3 of the Act. It was also alleged and at the hearing evidence was produced to prove that the interchange of cars with Seatrain Lines was the efficient and economical method of performing through transportation via Seatrain; that the purpose of the defendants in refusing to permit their cars to be delivered to Seatrain was to impede and prevent the through movement of freight via Seatrain and discourage shippers from using the Seatrain route; and that there was no legitimate basis in any consideration reasonably affecting car service justifying the defendants' refusal.
1310 3. Practically the only defense offered by the defendant railroads was the assertion that the Commission lacked jurisdiction under the car service provisions of the Act to require them to interchange their cars or permit the interchange of their cars with a water carrier.

4. After hearing, the Commission on or about February 5, 1935 promulgated its decision as a part of its report in Investigation of Seatrain Lines, Inc., Docket No. 25565, 206 I. C. C. 328. The Commission held that it had jurisdiction to require the interchange of cars with Seatrain. In its report it said:

"Prior to the enactment of the Car Service Act we had held that the duty to establish through routes, which, by the terms of the

act, applied to all common carriers subject thereto, included through routes with water lines as well as with other rail lines, and in several cases had required the establishment of such through routes. Flour City S. S. Co. v. Lehigh Valley R. Co., 24 I. C. C. 179; Pacific Nav. Co. v. Southern Pac. Co., 31 I. C. C. 472; Chattanooga Packet Co. v. Illinois Central R. Co., 33 I. C. C. 384. The first of these cases was decided prior to the enactment on August 24, 1912, of section 6 (13) of the act, which specifically authorizes us to establish through routes and maximum joint rates over rail and water lines; the others subsequent thereto. We had also held that the duty to maintain through routes carried with it necessarily the power on our part to enforce rules which would permit
the free interchange of cars between carriers, the theory of
1311 this provision of the act being that carriers should freely interchange freight between their respective lines to the end that interstate commerce might move without interruption or delay. Missouri & Illinois Coal Co. v. Illinois Central R. Co., 22 I. C. C. 39, cited with approval in Chicago, R. I. & P. Ry. Co. v. United States, 284 U. S. 80. While the interchange of cars at that time, as now, was ordinarily between railroads, there was also some interchange of cars between railroads and various transportation and car-ferry companies which like Seatrain had been held to be water carriers within the meaning of section 5 (19–21) of the act. (Pages 340–341.)

* * * * *

"As our power to enforce rules relating to the interchange of cars necessarily flows from the carriers' duty to establish through routes, and as the duty to establish through routes relates to water-rail routes as well as to all-rail routes, it seems apparent that our power to enforce rules relating to the interchange of cars between rail and water carriers, where such interchange might reasonably and approximately be made, was, prior to the enactment of the Car Service Act, coextensive with our power to enforce rules relating to the interchange of cars between rail carriers. We do not believe that the latter act, as it stood originally or as amended in 1920, has lessened in any particular the jurisdiction we previously had with respect to interchange of cars but on the contrary has materially increased it. (Page 341.)

* * * * *

"It is our view that he have jurisdiction to require the establishment of through routes between rail and water carriers, and,
1312 where such routes are established pursuant to our order or voluntarily, to require the interchange of cars between the rail and water carriers, and to require that equality of treatment provided by section 3 (3) between connecting carriers, whether rail or water, in the facilities for the interchange of traffic, in-

cluding through routes and the interchange of cars. We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist." (Page 343.)

The Commission concluded as follows:

"This record shows that Seatrain participates in through routes and joint rates with the Missouri Pacific system lines and the Texas & Pacific and their short-line connections, which carriers permit their cars to be delivered to Seatrain. Whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record. Whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided." (Page 343.)

In its findings, the Commission found as follows:

"6. That we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such through routes are established pursuant to our order or voluntarily, to require the rail carriers parties thereto
1313 to interchange cars with the water carrier, if that is the reasonable and appropriate method of interchanging traffic moving over such routes.

* * * * *

"8. No. 25565 will be discontinued. An appropriate order will be entered in No. 25546. Nos. 25728 and 25878 will be dismissed without prejudice to the filing by complainants of petition for further consideration, or new complaints, after No. 25727 has been disposed of, if the conclusions reached in that case warrant such action." (Page 344.)

5. Docket No. 25727, referred to by the Commission, was a proceeding upon the complaint of Seatrain Lines, Inc., in which, among other things, it was alleged by the complainant that certain of the defendant railroads were parties to through routes for the through transportation of freight via their lines and Seatrain but were refusing to recognize such routes and to issue through bills of lading in connection therewith, that where such through routes did not exist they were required by the public interest and should be established and that the failure and refusal of the defendants to recognize or establish such through routes violated Sections 1 and 3 of the Act.

6. The Commission, after hearing, announced its decision in this proceeding on or about January 28, 1938, 266 I. C. C. 7. With respect to the existence of, or duty to establish through routes, the Commission found as follows:

"We find with respect to carload traffic:

1. That through routes in connection with Seatrain now
1314 exist between points in trunkline and New England territories, on the one hand, and southwestern territory, on the other hand.

"2. That the public interest requires the establishment and maintenance of through routes and joint rates in connection with Seatrain between that portion of official territory covered by the findings in the twenty-third and twenty-fifth supplemental reports in Consolidated Southwestern Cases, on the one hand, and southwestern territory and that portion of southern territory hereinbefore described, on the other hand."

On the question of cars, the Commission found as follows:

"As heretofore pointed out, after inauguration of coastwise service by Seatrain most of the railroads refused to permit delivery of their cars to Seatrain. This practice was assailed as unlawful by the Hoboken Manufacturers' and Lower Coast and in the report on further hearing in Investigation of Seatrain Lines, Inc., supra, we found that, where through routes between rail and water carriers are established pursuant to our order or voluntarily, we have jurisdiction to require the rail carriers parties thereto to interchange cars with the water carrier if that be the reasonable and appropriate method of interchanging traffic moving over such through routes.

"We have here found that in certain instances through routes between Seatrain and defendants now exist, and that, in those and other instances, the establishment and maintenance of through routes and joint rates are necessary in the public interest.
1315 The record here shows that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be by the interchange of the loaded cars. If defendants parties to the through routes and joint rates herein prescribed refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention either by a request for reopening Nos. 25728 and 25878, the complaints of the Hoboken Manufacturers' and Lower Coast referred to above, or by a new complaint."

7. Petitioners represent that pursuant to the above findings and order in Docket No. 25727 with respect to through routes, through routes for the through transportation of carload freight now exist between and over the lines of the defendant railroads and Seatrain Lines and that the defendant railroads accept freight for through transportation over such routes and issue through bills of lading thereon.

8. Nevertheless, Car Service Rule 4 has not been cancelled or withdrawn by the defendants and the defendant railroads which registered with the American Railway Association or its successor,

the Association of American Railroads, thereunder their refusals to permit the interchange of their cars with the vessels of Seatrain Lines for any purpose have not cancelled or withdrawn such refusals. Petitioners have contended and still contend that when the defendants, as they do, furnish their cars to shippers for the loading of through shipments to move via Seatrain knowing, as they do, that the important feature of Seatrain service
1316 is the through carriage of freight, at least carload freight, in the cars in which initially loaded, and when the defendants thereafter accept per diem charges on their cars while in the possession of Seatrain, they are estopped to deny that the interchange of their cars with the vessels of Seatrain in the accomplishment of such through transportation is without their consent. Nevertheless, we are informed that it is still the position of the defendants, or some of them, that because of their recorded refusals under Car Service Rule 4 to permit the interchange of their cars with the vessels of Seatrain Lines, defendants still do not consent and in fact refuse to permit their cars to be delivered to the vessels of Seatrain Lines in the operation of through routes.

9. If and to the extent that Car Service Rule 4 and the defendants' recorded refusals thereunder constitute refusal to permit the interchange of their cars with Seatrain Lines in the accomplishment of through transportation over through routes via their lines and the vessels of Seatrain, it is submitted that defendants' conduct is unlawful, as found by the Commission in the findings above referred to.

10. Consequently, pursuant to the permission granted by the Commission in Finding 8 of its order in the above-entitled proceeding and to the further permission and suggestion contained in the findings and report of the Commission in Docket No. 25727, petitioners bring this motion or petition in order that the above-entitled proceeding may be reopened for the purpose of the
1317 entry of an order to compel the defendants to conform their practices to the findings and conclusions of the Commission above quoted and to cease their refusal to permit the interchange of their cars with the vessels of Seatrain Lines in the performance of through transportation over through routes via their lines and Seatrain. It is submitted that no further hearing in the premises is necessary and that the order may properly be entered upon the findings previously made and the record upon which those findings were entered.

Wherefore, petitioners pray that the Commission may reopen the above-entitled proceeding for the purpose of the entry of an order therein and that thereafter it may issue an order requiring that the defendant railroads cease and desist from their refusal to permit the interchange of their cars with the vessels of Seatrain

Lines for the accomplishment of through transportation over through routes via the lines of defendant railroads and the lines of petitioner, and petitioners pray for such other and further relief in the premises as may be proper.

Respectfully submitted.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY,
Complainant,

SEATRAIN LINES, INC.,
Intervener.

By PARKER MCCOLLESTER,
LORD, DAY & LORD,
Their Attorneys, 25 Broadway, New York, N. Y.

Dated July 20, 1938.

1318 CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each party.

Dated July 20, 1938.

PARKER MCCOLLESTER,
Of Counsel for Hoboken Manufacturers' Railroad Company, Complainant, and for Seatrain Lines, Inc., Intervener.

1319 Before the Interstate Commerce Commission

No. 25728

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

Reply of eastern railroads to motions of complainants and Seatrain Lines, Inc., intervener, for entry of order requiring furnishing of cars.

Filed August 1, 1938

1320 Come now the eastern railroads parties defendant in the above-entitled proceedings, and make this their reply

to the motion of complainant and of intervener Seatrain Lines, Inc., in No. 25728, and to the motion of complainant in No. 25878, for the entry of an order requiring defendant railroads "* * * to permit the interchange of their cars with the vessels of Seatrain Lines for the accomplishment of through transportation over through routes via the lines of defendant railroads and the lines of petitioners * * *."

I. THE COMMISSION IS WITHOUT POWER TO ENTER THE ORDER REQUESTED

In Investigation of Seatrain Lines, Inc., 206 I. C. C. 328 (1935), the Commission, at page 343, concluded that where through routes between rail and water carriers are established pursuant to its order or voluntarily, it has jurisdiction to require the interchange of cars between the rail and water carriers. In Seatrain Lines, Inc., v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7 (1938), the Commission described its finding in the earlier case as follows:

"* * * where through routes between rail and water carriers are established pursuant to our order or voluntarily, we have jurisdiction to require the rail carriers parties thereto to interchange cars with the water carrier if that be the reasonable
1321 and appropriate method of interchanging traffic moving over such through routes."

In the later decision the Commission had further found that through routes between Seatrain and defendants existed in certain instances and that in those and other instances the establishment and maintenance of through routes and joint rates was necessary in the public interest.

In view of these several statements of the Commission the present occasion does not warrant extended argument on the point. Instead it will here suffice to record the objection of eastern railroads to the entry of the requested order on the ground that the Commission is without lawful power to enter such order.

These defendants respectfully submit that the Commission has no greater powers in respect of requiring interchange of equipment than those which are conferred by the car service provisions of Section 1 of the Act which relate wholly to carriers by railroad.

Apparently the Commission's assertion of power is based upon Section 6 (13) (b) of the Act. The tenuous character of the argument upon which such a conclusion is based is well indicated by the following portion of the separate opinion of Commissioner Caskie in Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, 40:

1322 "At the time section 3 (13) of the act was enacted, vessels similar to those operated by the Seatrain, which are specially

constructed for the carriage of loaded railroad cars on the high seas and in foreign commerce, were not in existence. Transshipment was the ordinary method of interchange between rail and water carriers. This was well known to the Congress. It is not probable that it foresaw that an effort would be made in the future to compel the rail carriers to permit their cars to be carried by a water carrier beyond the jurisdiction of the United States and subjected to that of a foreign country as a part of the equipment necessary for the operation of a competing transportation agency. The reasonable view is that Congress had in contemplation only such interchange as was then known and in general use.

"The provisions of the Car Service Act, approved May 20, 1917, and amended February 20, 1920, by its terms are specifically confined to carriers by railroad. It is this act which gives us authority to require the interchange of cars between railroads and to fix the compensation to be paid for their use. Although this act was passed about five years after the enactment of section 6 (13), no such authority was given us as to rail and water carriers. As I understand the majority's views, they are that the power to
1323 require the interchange of cars with the Seatrain is necessarily implied or necessarily flows from the authority conferred by section 6 (13) to prescribe through routes. We cannot compel the carriers to furnish cars to the Seatrain in the absence of an agreement without providing compensation for their use. The act does not specifically give us such authority. If we have it, it is because it necessarily flows from the power to require the interchange of cars, which in turn must necessarily flow from the jurisdiction to prescribe through routes, or expressed otherwise, it is a power implied from another implied power.

"In my opinion if the Congress had intended to confer such broad and important powers on us, it would not have clothed its intention in obscurity and left it to be evolved by doubtful implications and disclosed by construction, but would have explicity declared it."

In the car service provisions of the Act the Congress has made specific provisions for empowering the Commission to fix the compensation to be paid for the use of equipment not owned by the carrier using it, Section 1 (14). If similar power were intended to be conferred by Section 6 (13), similar provision would doubtless have been made therefor. Moreover, both the nature of the factors to be considered in fixing such compensation and the fact that the Congress put this duty upon
1324 the Commission in respect of the car service provisions effectually negative any suggestion that the furnishing of cars by railroads ot water lines under a requirement of the Commission should be subject to prior determination of that com-

pensation by some other tribunal. Yet without prior compensation or responsible assurance of such compensation and order of the Commission requiring such furnishing of equipment would contravene the requirements of due process under the fifth amendment to the Constitution. Louisville &c. R. R. Co. v. Stock Yards Co., 212 U. S. 118, 143, 144 (1909).

Without repetition of their contentions previously made in connection with the cases reported at Investigation of Seatrain Lines, Inc., 206 I. C. C. 328, and Seatrain Lines, Inc., v. Akron, C. & Y. Ry Co., 226 I. C. C. 7, eastern railroads reaffirm and rely upon all those contentions which challenge the Commission's power in the premises.

II. IF THE COMMISSION WERE EMPOWERED TO REQUIRE THE RELIEF SOUGHT NO SUMMARY ORDER COULD PROPERLY BE ENTERED, BUT FURTHER HEARING WOULD BE NECESSARY

Without in any way receding from their position as indicated in the preceding section of this reply, but assuming that
1325 the Commission will continue to assert jurisdiction, eastern railroads desire to direct attention to certain considerations which properly preclude the summary entry of an order as requested, and which dictate that if any such order is to be made it should be entered only after further hearing.

a. The Commission's Decisions Do Not Contemplate the Entry of The Order Requested Without Further Hearing

In concluding its report in Investigation of Seatrain Lines, Inc., 206 I. C. C. 328, the Commission in its finding No. 8 (p. 344) with reference to the complaints in these cases, stated:

"Nos. 25728 and 25878 will be dismissed without prejudice to the filing by complainants of *petition for further consideration*, or *new complaints*, after No. 25727 has been disposed of, if the conclusions reached in that case warrant such action." [Italics supplied.]

Again, in the decision covering No. 25727, Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, the Commission in dealing with the same subject, said at page 29 thereof:

"If defendants parties to the through routes and joint rates herein prescribed refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention *either by a request for reopening* Nos. 25728 and 25878,
1326 the complaints of the Hoboken Manufacturers' and Lower Coast referred to above, *or by a new complaint*." [Italics supplied.]

The very language employed by the Commission in both decisions plainly disallows any suggestion that the Commission upon the mere request of the moving parties, and without more, would

proceed to the entry of an order requiring the railroads to furnish their equipment for Seatrain service. The scope of any such order, the particular carriers to be made subject thereto, and other essential features could not well be determined upon a mere motion or petition and answers. The facts would have to be adduced upon which could be made the findings intended to support the order.

The Commission's language in the foregoing quotations is also significant in that in each case the alternative to further consideration for reopening is coupled with reference to a new complaint which of itself connotes the necessity of further hearing.

b. The Necessity For Fixing the Measure of Compensation For the Use of Defendants' Cars by Seatrain as Prerequisite to an Otherwise Valid Order Requires Further Hearing Before Its Entry

From the inception of the Seatrain service eastern rail-
1327 roads have refused to permit their cars to be delivered to or taken by Seatrain for use in its service, and they have no arrangement with it for compensation. Nevertheless in repeated instances Seatrain Lines, Inc., and its subsidiary, Hoboken Manufacturers' Railroad Company, have cooperated in using defendants' cars in such service in violation of the outstanding instructions of the eastern railroads.

If compensation for such unauthorized use of eastern lines' cars in Seatrain service were to be measured by the standards contemporaneously in effect with other railroads, hundreds of thousands of dollars would be owing eastern lines therefor. In the case of two of the eastern railroads, such amounts would aggregate roughly $100,000 apiece.

But for various reasons the measure of compensation for car detention employed among railroads would be inadequate as applied to equipment employed in Seatrain service. The Seatrain operation is so conducted that to a substantial extent cars which move over its route under load are returned empty to the owners not by Seatrain, but by all-rail routes. There is thus placed upon the railroads a greater burden in respect of cars used in Seatrain service than in respect of cars used in railroad service, since as to the latter the carriers participating in
1328 the loaded haul are obligated to bear the burden of any necessary empty return movement. Other items could be mentioned which demonstrate the propriety of a higher compensation for cars used in Seatrain service than in railroad service, but the item mentioned illustrates the point.

Wherefore, for the reasons indicated above, eastern railroads defendant submit that the motions should be denied, but that, if the Commission nevertheless entertains them, no order should be

entered except after hearing and the determination of what will be reasonable compensation to the railroads for the use of their cars when employed in Seatrain service.

H. WILSON,
Vice Chairman, Traffic Executives' Committee,
Eastern Territory, For Eastern Railroads defendant herein.
JOSEPH F. ESHELMAN,
Of Counsel.

JULY 29, 1938.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings, by mailing a copy thereof properly addressed to each party.

Dated at Philadelphia, Pa., this 29th day of July 1938.

JOSEPH F. ESHELMAN,
Of Counsel for Eastern Railroads Defendant.

1329 ST. LOUIS SOUTHWESTERN RAILWAY LINES

B. F. Batts, General Attorney and Commerce Counsel.

SAINT LOUIS, *August 3, 1938.*

In re I. C. C. Docket No. 25728, Hoboken Manufacturers' Railroad Co. v. A. & S. Ry. Co. et al.; I. C. C. Docket No. 25878, New Orleans & Lower Coast Railroad Co. v. A. C. & Y. Ry. Co. et al.

Mr. W. P. BARTEL,
Secretary, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR: I am in receipt of copy of reply of eastern railroads to motions of complainants and Seatrain Lines, Inc., intervener, for entry of order requiring furnishing of cars in the above case, dated July 29. On behalf of the St. Louis Southwestern Railway Lines, The Kansas City Southern Railway Company, Texas and New Orleans Railroad Company, The Santa Fe Lines and Fort Worth and Denver City Railway Company, I wish to adopt this reply as the reply of these railroads and request that it be given the same consideration as if filed by them.

I am enclosing 20 copies of this letter for the Commission's file and I certify that I have this day mailed copies to all parties of record in these proceedings.

Respectfully submitted.

B. F. BATTS,
B. F. Batts,
Attorney for above named Railways.

BFB:MBL.

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1330 [Order of Nov. 21, 1938, omitted. Printed side page 75 ante.]

1332 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD CO.

vs.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY

vs.

THE AKRON, CANTON & YOUNGSTOWN RY. CO. ET AL.

HOTEL NEW YORKER,
NEW YORK CITY, NEW YORK,
January 25, 1939.—at 10:00 o'clock A. M.

Before E. J. HOY, Examiner, Interstate Commerce Commission.
M. J. WALSH, Examiner, Interstate Commerce Commission.

Appearances: Parker McCollester, 25 Broadway, New York City, New York, and Graham M. Brush, 39 Broadway, New York City, New York, appearing for complainant, Hoboken Manufacturer Railroad, and Intervenor, Seatrain Lines, Inc.

1333 H. H. Larimore, 2008 Mo. Pacific Building, St. Louis, Missouri, and T. R. Ware, 2008 Mo. Pacific Building, St. Louis, Missouri, appearing for New Orleans & Lower Coast Railroad Company. Thomas P. Healy, 466 Lexington Avenue, New York City, New York, appearing for New York Central System, Francis R. Cross, Law Department, B. & O. Building, Baltimore, Maryland, appearing for Baltimore & Ohio Railroad. J. R. Bell, 205 Transportation Building, Washington, D. C., and G. H. Muckley, 205 Transportation Building, Washington, D. C., appearing for Southern Pacific Company and Texas & New Orleans Railway Company. Charles Clark C/o Southern Railway, 15th & K Streets, Washington, D. C., appearing for Southern Railway System Lines and Southern Carriers generally. Joseph F. Eshelman, 1740 Broad Street Station Building, Philadelphia, Pennsylvania, appearing for The Pennsylvania Railroad Company and its System Lines. Roland J. Lehman, Railway Exchange, Chicago, Illinois, appearing for A. T. & S. F. Railway Company. W. T. Pierson, Midland Building, Cleveland, Ohio, appearing for Trustees of Erie Railroad Company.

1334 PROCEEDINGS

Examiner HOY. The Interstate Commerce Commission has set dockets No. 35728, Hoboken Manufacturers Railroad Company versus the Abiline and Southern Railway Company, et al. and docket 25878, New Orleans and Lower Coast Railroad Company versus the Akron, Canton and Youngstown Railway Company, et al., for hearing at this time and place, to determine upon what terms and conditions, including compensation, defendants should be required to interchange their cars with intervenors, Seatrain, Incorporated. You have entered your appearances? Now, let's have the record show who is to receive the free copies of the transcript.

Mr. MCCOLLESTER. For the complainants, Parker McCollester.

Examiner HOY. And for the defendants, who is to receive the free transcript.

Mr. Pierson: Free copy for the defendant to go to W. G. Pierson.

Examiner HOY. Examiner Martin J. Walsh is sitting with me at the hearing. Complainants call their first witness.

Mr. PIERSON. Mr. Examiner, before the complainant pro-
1335 ceeds, I wish to make a motion which I think should be made at this time in fairness to complainants, as it may change the extent and character of their presentation.

Reserving all jurisdictional questions as to the Commission's power in the premises, the defendant rail lines in these proceedings respectfully request that the hearing be postponed until about the middle of February, for the following reasons:

On January 10th, representatives of certain defendants had a conference with Mr. Brush and Mr. McCollester with the view of determining whether a possible basis of compromise settlement existed. Therefore, the defendant rail lines, in view of the possibility of settlement, did not prepare data for presentation at this hearing. A few days ago, it developed that a compromise settlement could not be reached.

A further reason for postponement is the fact that the questions here presented will be the subject of consideration by the Board of Directors of the Association of American Railroads on January 27th. The car service matters under consideration are of broad, national interest to all of the car-owning lines, and the Commission should have before it the results of consideration by the Association of American Railroads, rather than the individual views of a limited number of lines. The action taken
1336 by the Association will probably be adopted and followed by all of the car-owning lines, and if so, the principal witnesses will be furnished by the Association. The Association witnesses are not in a position to express any views

with respect to the issues presented until such time as the Association has considered the matter and acted.

Postponement of the hearing will not be prejudicial to the complainants because it is now receiving an adequate car supply.

As I understand it, the Commission has indicated that a further hearing will be granted about the middle of February for the purpose of permitting the L. & N. Railroad to introduce evidence. Therefore, the record will be held open and no delay in rendering a decision will be occasioned by granting the postponement.

If the hearing is held about the middle of February, it will be convenient for all of the interested parties who will be in attendance at the Seatrain hearing commencing on February 8th.

Mr. CLARK. Mr. Examiner, in preserving the law questions to which Mr. Pierson referred at the outset, I think we should be sure that we include also the points that have been made with respect to the Commission's jurisdiction in the power to prescribe through routes involving rates, in docket 25727. I think it is, because if Your Honor will recall, the Commission re-
1337 ferred to the interchange of cars in connection with through routes that existed or that it might prescribe. I want to be sure the preservation went to that as well as to the specific interchange of car question.

Examiner HOY. Mr. McCollester?

Mr. MCCOLLESTER. Mr. Examiner, I think the record should show a few facts which are facts of record in the stenographic minutes. I call the Commission's attention to the fact that this further hearing is not upon the application of the complainants herein, but upon the application of the defendants. The complainants, believing that the record heretofore made before the Commission was a complete record, nothing to the contrary having been claimed by these defendants at the time the record was closed, the Commission having made its findings of facts, the complainant considered that the entry of an order on the record made was appropriate under the Commission's findings and conclusions in view of the fact that the defendants had not seen fit to conform their practices to the opinion expressed by the Commission as the Commission indicated or hoped it should be done.

Therefore, we made a motion for the entry of an order to require the practices of the defendants to conform to the findings and conclusions made by the Commission. That was in June or July. I think the first part of July. The request for the hearing was contained in the reply of the Eastern Railroads to
1338 our motion for the entry of an order. That reply being filed and served on us the 30th of July, six months ago. In that reply, as the basis for asking for a hearing, the Eastern

Railroads, through their counsel, made certain allegations, presumably allegations of fact. It was alleged that for various reasons, and I quote the reply, "But for various reasons the measure of compensation for car detention employed among railroads would be inadequate as applied to equipment employed in Seatrain service."

It was further alleged, "There is thus placed upon the railroads a greater burden in respect of cars used in Seatrain service than in respect to cars used in railroad service."

And it was further alleged that, "Other items could be mentioned which demonstrate the propriety of a higher compensation for cars used in Seatrain service than in railroad service."

And the prayer of the reply ended up with a request that no order be entered except after hearing and the determination of, "what will be reasonable compensation to the railroads for the use of their cars when employed in Seatrain service."

In other words, the only question upon which a further hearing was sought was as to the reasonable compensation to the railroads for the use of their cars.

The Commission by its order has re-opened the case for
1339 the taking of evidence as to terms and conditions, including compensation.

In view of the reply of the Eastern Railroads and the petition included in that reply for the further hearing, which is limited to the question of compensation, I think it may be fairly construed that the only issue raised as the issue of fact by the Eastern Railroads is as to compensation. The Southern and Southwestern railroads simply by letter adopted the petition of the Eastern railroads, so that we are before the Commission here on a hearing presumably to determine the compensation to be paid to the railroads for the use of their cars when employed by Seatrain and that hearing being pursuant to a petition made six months ago in which there were these allegations.

And now, we have considered that the railroads six months ago must have known whatever facts they relied upon as the basis of their allegations, if not the allegations were not made in good faith and should be disregarded by the Commission.

Now, it is true that on the 10th of January, I received a telephone call from counsel for one of the Eastern railroads saying that they would like to talk with us about possible settlement of the case. We have proceeded with our preparations, believing that the reply of the Eastern railroads had been filed in
1340 good faith, that they did have reason to believe these were facts which should be presented to the Commission and we proceeded with our preparation to meet these allegations and we think we can without any question meet the allegations.

We had a conference and—as requested by counsel for the Eastern railroads, and a tentative basis of settlement was worked out, it being understood, of course, that some of counsel present could not commit their railroads to that basis without referring its subject back to their executives. At that conference question was raised as to this hearing and we stated very definitely to the railroads present that if the Eastern railroads accepted the tentative basis of settlement, so far as they were concerned, and were prepared to take the necessary steps both to endeavor to bring the Southern and Southwestern Lines into the settlement and to have the necessary steps taken by the Association of American Railroads, which were contemplated by the basis of settlement, to make the settlement effective, we appreciated that these steps could not be taken before today and were content to a reasonable adjournment to enable the Eastern railroads to pursue the matter in accordance with the agreement. We definitely stated, however, that if the Eastern railroads should not agree to the tentative basis of settlement, we would not consent to an adjournment and would expect the case would proceed because time is of essence as
1341 far as we are concerned.

Now, I submit that under those circumstances, if the Eastern railroads had reason to make the allegations in their reply, they have no excuse for not being ready to go forward at this time. If the allegations in their reply were not made in good faith, if they did not have reason to believe the statements which I have quoted from their reply, then certainly the hearing should be discontinued and the case closed and order entered on the record already made.

Now, so far as Mr. Berger's request is concerned, I have replied by letter to that, but I want to add this further: I respectfully submit that before the Commission should adjourn a hearing which was set by agreement, at a date fixed by agreement of parties and the Examiner called at this date, was fixed by the agreement of parties, before the Commission should adjourn such a hearing, because of the inconvenience of counsel or of would-be witnesses, representation should be made to the Commission as to who those witnesses are who cannot attend and what they would testify to.

Now, we haven't had any indication as to what witnesses who are unable to be here, if there are any, that are unable to be here, would testify to if they were here.

Now, Mr. Examiner, such being the record so far in this proceeding, and this hearing being upon the application of the
1342 defendants and not of the complainants, our position as to going forward at this time is simply this: It is not the complainants in this proceeding who have alleged or suggested

that interchange of cars with Seatrain should be on any different basis as to compensation than is provided in the per diem rules agreement. We, therefore, feel that the burden of going forward is on those who asked for the hearing and who have alleged that some other basis of compensation should be determined here as the proper basis for the use of cars in Seatrain service.

Therefore, we will not produce any evidence in advance of evidence to be offered, if any, by the defendants in support of their allegations. But I think that we must go farther than making that mere statement at this time and I think this record should show what the position of the defendant railroads is as to the allegations which they have made on the basis of which they have asked, and secured, the further hearing.

I would like to ask counsel for the Eastern railroads, collectively or individually, whether after their further study of the matter, in spite of the filing of their reply, they now make any contention that the dollar per day provided in the per diem rules for the—as representing the cost of car ownership and as to the compensation to be paid for the use of cars, is inadequate with respect to be interchanged with Seatrain.

1343 Mr. PIERSON. So far as the question propounded by Mr. McCollister is concerned, with respect to the attitude of the Eastern lines, I can say only this, that we are in no position at the present time to state our position. We await action by the Board of Directors of the Association of American Railroads on the 27th before taking any position one way or the other.

Mr. MCCOLLISTER. Then, I think, Mr. Examiner, we are in the situation of a hearing on an application containing allegations which the defendants are not now prepared to support and are awaiting the action of the A. R. A. before they are willing to tell the Commission whether or not they support or withdraw the applications of the reply which was not filed by the A. R. A.—or the A. R.

Mr. CLARK. Mr. Examiner, Mr. McCollister's inquiry was directed to counsel to the Eastern lines?

Mr. MCCOLLISTER. Yes; in the first instance.

Mr. CLARK. I thought you were and I thought I would answer it now. As the Eastern lines' representatives have explained, I think it quite appropriate, in a matter of national scope of this kind that we should await action by the Board of Directors of the Association but so far as the Southern lines are concerned, I feel sure in saying that it is their view, certainly the view of the majority of them with whom I have been in contact,

1344 that we might well say that the per diem charge should be substantially more than obtained with respect to the interchanges and per diem arrangements between rail lines. I cannot

answer more specifically than that in the absence of our testimony which might go to that substance. In fact, it is a question of fact to be determined by facts shown of record.

Now, while I am on my feet, let me say that I deny any charge of lack of good faith or inference thereof on behalf of Southern lines. I want to remind the Commission that when this 25th engagement was made by agreement at New York, there was then a proceeding in which the Southern lines were not interested, it was the I. & S., involving the rates between the east and the southwest. I certainly was not there and as far as I know there were no representatives of the southern lines there and I think it is only fair that this be borne in mind from our standpoint. Also, in answer to Mr. McCollester's reference, I want to remind you that in this Seatrain matter, that we started out with L. & N., with Mr. J. K. Curr speaking for Southern carriers generally. Mr. Curr went from the L. & N. to the Southern Association of Railroads. You recall in October 1936 Mr. Dent testified and I was sorry at the time we didn't go as fully in that case as we expected. Mr. Dent then left the L. & N. Railroad, though he had very recently returned, and the matter was taken up by Mr.
1345 B. M. Northcut. We all know Mr. Northcut. I personally know that Mr. Northcut has been engaged for the last two weeks in the hearing on the grain case in Atlanta. We knew it was coming on, we knew it had to go, and as the attorneys for the L. & N., who were in that case, and had followed it through, they couldn't change horses in the middle of the stream in any such case and he had to go. It was with that authority in mind that Mr. Berger wrote you the letter he did.

On behalf of the other Southern lines, we have been very much embarrassed with the grain case and a very pressing North Carolina Section 13 case which I am trying next Monday. We have been somewhat in the fix of the L. & N.

Now, the transportation witnesses of L. & N. are obviously not testifying in the grain case; just who they will have, if they have any one, I frankly don't know.

Now, on the general question, I can say for Southern lines, my own, of course, that if this hearing goes over and the matter is considered by the A. A. R., it may then be possible that representatives of the A. A. R. can speak for all of the roads and save having to hear individual witnesses from first one and then another, and will greatly save the Commission's time, and expense, and so it will the parties.

I think it is only fair to my Southern lines to say that.
1346 I had a telegraph from Mr. Northcut the day before yesterday asking that if I was here that I call the L. & N. situation to the Commission's attention.

Mr. McCollester. Mr. Examiner, may I observe this, if Mr. Clark, for the Southern railroads contends to support the allegations of the reply, now is the time for them to do it and I respectfully submit that as a matter of procedure it is for the defendants who asked for the hearing, to put in—who made the allegations, and who asked for the hearing to go forth with their evidence. If there is to be no contention that the per diem rate for Seatrain should be different from the established per diem rate, then that matter is out of the window and we have nothing to defend.

Any evidence that we have would be by way of an effort to meet that allegation and we think, as I say, that we can very successfully meet it.

Now, so far as Mr. Berger and the inconvenience of Southern counsel and witnesses are concerned, I want to add just this: I have never known any tribunal, with the possible exception of this one, which would grant an adjournment of a hearing set long in advance upon a complaint or petition filed six months before unless counsel would state to the tribunal the witnesses who would testify and what it was desired to have them testify to, and I submit that unless counsel are prepared to make such a state-
1347 ment here, the record in this proceeding should be closed.

Mr. Eshelman. Mr. Examiner, before the record is closed, I should like to have one thing not stand of record as being the understanding of those of us on the other side in respect to the conference which was mentioned. I know that counsel is sincere, undoubtedly he thinks he must have said what he said to us a few minutes ago that he said, but when counsel says that they gave the Eastern lines notice that if there was no agreement among them that the hearing would go on, I say that he is saying something that I think he must think he said, but certainly never reached my recollection and it is not in accordance with my recollection and if he said it, he must have said it to someone else or not to me or if said, which I do not think, I can only say that certainly for myself, and I think it is true with the others, but certainly I can say, for myself, that never at any time did I understand that we were considering this question of whether or not we could dispose of any of our troubles with our backs to the wall, as against a watertight date, knowing that there was to be any possibility of postponement.

Therefore, I just want this record not to show any—by any silence on my part that what counsel has said in that respect was my understanding of the matter.

Mr. McCollester. Mr. Examiner, I, of course, cannot
1348 put my mind in Mr. Eshelman's head, and I don't challenge that he did not hear what I said or if he did hear it that he didn't understand it or what Mr. Brush said at the same meeting,

but there is no question but the statement I made here was made by me and was made by Mr. Brush and I think it was understood by others at the conference. However, whether or not that is the fact, I submit the situation speaks for itself.

The plea of counsel for the Eastern roads is that they are not ready because of that conference that we had looking toward our hopes for settlement. Mr. Commissioner, that conference was held after a request for this hearing had been filed with the Commission about five months. If they weren't ready then I don't think they ever would be ready. If they don't know now whether they are going to support the allegations, I don't think they ever knew whether they were going to support the allegations and I think to say that just because we got together ten days ago, or rather tried to get together ten days ago, and they haven't been able to accept the tentative agreement before, it is no excuse for their not being ready to go ahead with the hearing now if they ever had grounds for the hearing.

Mr. PIERSON. Mr. Examiner, may I just say one further statement briefly? I think, after all, we are confronted with a
1349 practical situation. It may very well be that the action of the Association on the 27th will make it unnecessary to present a large number of witnesses from individual lines and it is also possible that a further hearing with respect to certain matters might not be necessary and I think it is in the interest of the Commission as well as the parties to save time and expense and limit the record and not develop it unnecessarily, if there is any likelihood of an agreement on any of the issues in controversy here.

Examiner HOY. Mr. McCollester, as you have stated, you filed a motion for entry of an order on behalf of complainant and the defendants filed a reply with the Commission for consideration. They have reopened the case for further hearing to determine upon what terms and conditions, including compensation, defendants should be required to interchange their cars with intervenor, Seatrain. Now, it seems to me that it is incumbent if Seatrain wants an order, in view of this reopening, it seems to me that it is incumbent upon the complainant to show what they think the terms, conditions and compensation should be.

Mr. MCCOLLESTER. Mr. Examiner, I will state what we think and I don't think any further evidence is necessary. I will state that we think the terms and conditions should be as to compensation that Seatrain shall pay the same compensation that any other carriers pay for the use of cars, no more and no less
1350 provided we are permitted to use the cars.

Now, if any railroad is going to make a contention that we shouldn't have their cars or should pay a premium for them,

we will counter that by a contention which we will support when their claim is made that Seatrain should pay actually less compensation.

Now, Mr. Examiner, I want to direct your attention to the fact that we have here in this proceeding a record already of 448 pages and—well, I don't know how many exhibits, but a great many of them, 39 exhibits, that record shows that when cars are moving via Seatrain, they are not subject to damage or injury, such as are incurred by cars which are moved over railroads, shoved around in railroad freight yards. The record shows that 42 cents out of the 98 cents cost of car ownership on the basis of which the Commission fixed the per diem rate of $1.00, or approved the per diem rate of $1.00 in the car hire case, that 42 cents represents the expense of maintenance and repairs to cars due largely to the operation of those cars for mileage. The record contains the evidence of testimony of car service men to the effect that cars moved by Seatrain, since they don't turn a wheel, when they are on board Seatrain ships, are not subject to damage or injury which produces that character of expense.

1351 I think there is an ample record already on which the Commission can find and should find that certainly the compensation to be paid by Seatrain should be no greater than the dollar or whatever it is, the current per diem rate for the use of cars by others and the owners of those cars.

Examiner HOY. In other words, you are satisfied with the record as it stands now as to the terms and conditions and compensation under which defendants should be required and you wouldn't care to introduce anything else until defendants introduced something and then you would introduce evidence in reply?

Mr. MCCOLLESTER. My rebuttal, that's right, Mr. Examiner. May I just ask one further question of opposing counsel, whether opposing counsel may any contention with respect to the element of cost of car ownership conditions have changed since the conclusion of the testimony in this proceeding? I know such allegation is made in their petition for further hearing and therefore I think that it may properly be assumed that there is no contention that the record previously made in this proceeding does not fairly reflect the conditions as they are at the present time.

Mr. PIERSON. So far as the Eastern lines are concerned, I will say that we are not in a position to make any contentions or any statements with respect to what the facts may or may not be at this time, pending action by the Board of Directors of the Association of American Railroads.

1352 Now, I am not entriely clear as to what Mr. McCollester has in mind when he says that Seatrain is willing to pay

the same compensation for the use of railroad cars as the railroads pay among themselves. Do you have in mind, subject to the same terms and conditions, that is, that Seatrain would become a subscriber to the car service per diem and M. C. B. and other agreements?

Mr. McCollester. Well, we have talked that out among ourselves. The record in this proceeding already shows, if the Examiner please, that when Seatrain or its predecessor started operations, or before it started operation, application was made to the American Railway Association, the predecessor of the American Association of Railroads, to become a party to the per diem rules agreement. His application is exhibit No. 21 and was dated August 15, 1928. The record shows at pages 67 and 68, I believe it is, that the Association of American Railroads at that time advised that the Seatrain was a water carrier and not a railroad and since under the car service rules and the per diem rules agreement only railroads can strictly become parties thereto. That it was not appropriate for Seatrain to become a party, but that the requirements of the American Railway Association rules would be satisfied if Seatrain entered into a contract with the member railroads, that is the railroad mem-
1353 bers of the A. R. A. with whom it interchanged cars to handle those cars in accordance with the car service rules, the per diem rules, and the M. C. B. rules and that agreement was entered into at that time between Overseas Railway, the predecessor of intervenor, Seatrain, and the New Orleans and Lower Coast Railroad and a copy of that agreement is in the record in this proceeding. The record in this proceeding also shows that in September of 1932, when Seatrain contemplated the inauguration of a service to and from New York, the question of its relation to the car service per diem, M. C. B. rules, was discussed with Mr. Kendall of the Car Service Division of the American Railway Association, that the understanding arrived at was that Seatrain would enter into a contract with Hoboken similar to the contract that it had with the Lower Coast, agreeing to abide by the car service rules, the M. C. B. rules, the per diem rules, and that such a contract was entered into thereafter between Seatrain and Hoboken Manufacturers Railroad and a copy of that contract is in the record in this proceeding.

I cite these facts as indicating that we have already agreed so far as Seatrain is concerned, to abide by the terms of the per diem rules agreement as to compensation to handle cars in accordance with the car service rules and the M. C. B. rules of the American Railway Association or the Association of Ameri-
1354 can Railroads. Now, whether in the future, the position

of the Association of American Railroads is changed as to Seatrain becoming directly a party to the agreement—to the car service per diem in M. C. B. rules agreements, if that is what that is properly called, is relatively immaterial to us. We have contracted to be bound by them now and we are willing to contract directly with the Association of American Railroads if that is considered to be the practical method.

That is, of course, assuming that there is no peculiar conditions attached applicable to us and not to others.

Mr. PIERSON. In other words, the same terms and conditions that govern among the railroads themselves?

Mr. MCCOLLESTER. That's right. Of course, in that connection we may all understand we have attacked as unlawful car service rule 4, and that's the issue in this proceeding, and we don't agree to be bound by that.

Mr. CLARK. Mr. Examiner, in reply to Mr. McCollester's question I want to say on behalf of the Southern lines that I don't want to permit them or assent to the proposition that there has been no change in conditions since the date of the hearing. Would you mind giving the date, Mr. McCollester? You have a transcript.

Mr. McCollester. Yes.

Mr. Eshelman. There has been no assent on our part.

Mr. McCollester: November 4th, 1933, was the last
1355. date.

Mr. CLARK. There may have been some cases, until I have had opportunity to pause that out with the witnesses and reply. I wouldn't care to permit it.

Mr. MCCOLLESTER. On that point, Mr. Examiner, we are content to rest on this, as there has been no claim made in the request for a hearing that there have been such changes in conditions as to render the record obsolete and I understand no such claim is made here. The defendants don't agree one way or the other on that, therefore as the record stands there is no such contention made by the defendants.

Mr. ESHELMAN. You have to rest on Mr. Pierson's statement.

Examiner HOY. Did I understand that the defendants have no evidence that they want to present at this hearing? Is that the situation?

Mr. PIERSON. Yes.

Mr. ESHELMAN. Yes.

Mr. MCCOLLESTER. Mr. Examiner, in respect to Mr. Pierson's question about your becoming a party to the per diem rules agreement and the other agreements, we want it very definitely understood that when we have indicated willingness to become a party

to those agreements it would be on the understanding that there are no discriminatory provisions put in against Seatrain as a water carrier.

1356 Examiner HOY. And that in the absence of evidence from the defendants, Seatrain has no evidence?

Mr. MCCOLLESTER. That's right. We stand on the record already made, Mr. Examiner.

Examiner HOY. There is a request for an adjourned hearing February 13th or 14th.

Mr. MCCOLLESTER. We ask that the hearing be closed and the Commission enter an order on the record.

Mr. WARE. Mr. Examiner, before you close this hearing I should state a word on behalf of the New Orleans and Lower Coast, which are complainants in docket 25878.

You have heard Mr. McCollester, who has spoken in behalf of the Hoboken.

Examiner HOY. Yes.

Mr. WARE. What he has said in behalf of the Hoboken applies equally as well to the New Orleans and Lower Coast.

Examiner HOY. Then you adopt his statement?

Mr. WARE. Yes. The New Orleans and Lower Coast also filed a petition for entry of order. That motion was dated July 26th, 1938. The reply made by the Eastern line was a reply to the motion filed on behalf of Hoboken as well as the motion filed by the New Orleans and Lower Coast.

Mr. CLARK. The Examiner will appreciate a case of this kind involving two complaints, that Southern lines' primariy interest is in the complaint of the New Orleans and Lower

1357 Coast. I don't mean to say they are not interested in the other, but their primary interest, and we necessarily are in a position to be governed very largely, I should say in this case, by the action of the Eastern lines.

Examiner HOY. Well, of course——

Mr. CLARK. (Continuing). If I was here with all the Southern lines' witnesses, I would frankly hesitate to put them on in advance of our Eastern friends. I think you can appreciate that from our standpoint.

Examiner HOY. While the Examiner is trying to look at everything in a practical way and he is considering the advice that was given Mr. Berger on January 5th, he is considering the fact that there is going to be another hearing here on February 8th and he is considering the fact that what he is going to do will probably save more time to all parties, complainants and defendants, so he is going to adjourn the hearing to February 13th, Monday, February 13th. If the hearing from February 8th is not completed at that time, why the adjourned hearing in this proceeding will——

Mr. McCollester. That is a holiday.

Examiner Hoy. Then we will make it Tuesday, the 14th. It will be adjourned to the Hotel New Yorker unless you are advised to the contrary.

Off the record.

1358 (Discussion off the record.)

Mr. McCollester. May I ask that within reasonable time before the hearing counsel for the defendants advise me the names of the witnesses they intend to call and either the substance of their testimony or the points to which contentions of their testimony is to be directed.

Mr. Pierson. I don't know whether Eastern lines will have any testimony. It all depends upon the action by the Association.

Mr. McCollester. I think that is a fair request.

Examiner Hoy. Just add this on the record.

Now, when this hearing is adjourned to Tuesday, February 14th, the hearing will proceed irrespective of what action is taken by the American Association of Railways or irrespective of whether they have determined what their position is going to be, so far as the Examiner is concerned.

Mr. Clark. If the Association should say that we should admit them on the terms, we don't want to have a hearing.

Examiner Hoy. The hearing is adjourned.

(Whereupon the hearing was adjourned to February 14th, 1939, at 10:00 o'clock A. M., at the Hotel New Yorker, New York City, New York.)

1360 Before the Interstate Commerce Commission

Docket No. 25728

Hoboken Manufacturers Railroad Co.

vs.

Abilene & Southern Railway Company, et al.

Docket No. 25878

New Orleans; & Lower Coast Railroad Company

vs.

The Akron, Canton & Youngstown Ry. Co., et al.

Hotel New Yorker.
New York, N. Y.,
February 28, 1939, at 10:00 o'clock, A. M.

Before E. J. Hoy, Examiner, Interstate Commerce Commission; M. J. Walsh, Examiner, Interstate Commerce Commission.

Appearances

Parker McCollester, 25 Broadway, New York City, New York, and Graham M. Brush, 39 Broadway, New York City, New York, appearing for complainant Hoboken Manufacturer Railroad, and Intervenor, Seatrain Lines, Inc. H. H. Larimore, 2008 No. 1361 Pacific Building, St. Louis, Missouri, and T. R. Ware, 2068 Mo. Pacific Building, St. Louis, Missouri, appearing for New Orleans & Lower Coast Railroad Company. Thomas P. Healy, 466 Lexington Avenue, New York City, New York, appearing for New York Central System. Francis R. Cross, Law Department, B. & O. Building, Baltimore, Maryland, appearing for Baltimore & Ohio Railroad. J. R. Bell, 205 Transportation Building, Washington, D. C., and G. H. Muckley, 205 Transportation Building, Washington, D. C., appearing for Southern Pacific Company and Texas & New Orleans Railway Company. Charles Clark, care of Southern Railway, 15th & K Street, Washington, D. C., appearing for Southern Railway System Lines and Southern Carriers generally. Joseph F. Eshelman, 1740 Broad Street Station Building, Philadelphia, Pennsylvania, appearing for The Pennsylvania Railroad Company and its System Lines. Roland J. Lehman, Railway Exchange, Chicago, Illinois, appearing for A. T. & S. F. Railway Company. W. T. Pierson, Midland Building, Cleveland, Ohio, appearing for Trustees of Erie Railroad Company. Thos. P. Healy, W. T. Pierson, and Joseph F. Eshelman, appearing for eastern railroads defendants.

1363 PROCEEDINGS

Examiner HOY. The Interstate Commerce Commission has set for further hearing at this time and place Docket Nos. 25728, Hoboken Manufacturers' Railroad Company against Abilene & Southern Railway Company, and others; and 25878, New Orleans & Lower Coast Railroad Company, versus Akron, Canton & Youngstown Railway Company, and others, to determine upon what terms and conditions, including compensation, the defendants should be required to interchange their cars with the intervener, Seatrain Lines, Inc.

Mr. McCollester, you stated at the last hearing that the compainants in these cases had no further evidence to introduce on direct.

I presume that is still your position.

Mr. MCCOLLESTER. That is true, so far as the complainants I represent are concerned.

Examiner HOY. Is that true also as to the complainant in Docket No. 25878?

Mr. WARE. That is true, Mr. Examiner; yes, sir.

Examiner HOY. Then we will hear from the defendants.

Mr. FORT. Mr. Examiner, may I enter my appearance for the Association of American Railroads?

Examiner HOY. Give your name to the reporter.

Mr. FORT. J. C. Fort.

Examiner HOY. J. Carter Fort.

1364 Mr. FORT. In that connection, I would like to say that the appearance of the Association as such leaves free any individual railroad member of the Association to appear, if it wishes, take any position that it wishes, and offer any testimony that it wishes.

Mr. MCCOLLESTER. Mr. Examiner, I regret to oppose Mr. Fort's appearance, because I have great respect for Mr. Fort personally, and as a lawyer, but I do object on the ground, first, that the Association of American Railroads is not a party to this case.

Mr. FORT. I call Mr. McCollester's attention to the fact that the Association appeared at the first hearing.

Examiner HOY. The Association did appear at the first hearing, and was represented by counsel, Mr. Thom.

Mr. FORT. And that, without objection, as I recall it.

Mr. MCCOLLESTER. It has never intervened in this proceeding.

Examiner HOY. That is true. The American Railway Association is not a party to the proceeding. It is not a defendant, and it has never intervened.

Mr. FORT. In what capacity was its appearance accepted in the first place, if it was not an intervener?

Examiner HOY. I do not know. I did not conduct the first hearing, but I went over the record yesterday, and Mr. Thom entered an appearance for the Association.

1365 Mr. FORT. That constitutes, of course, an intervention, does it not?

Mr. MCCOLLESTER. I do not think it does.

Mr. FORT. You are without authority to ask for any additional reasons.

Examiner HOY. There is also a statement in the record by the Examiner presiding that there were certain interveners who had intervened, and I could only find one.

I think that was Galveston Association—I am not sure, but it was some southern association.

I could not find in the record where the Association had ever actually intervened, either prior to the first hearing, or at the first hearing. Seatrain intervened at the first hearing.

Mr. MCCOLLESTER. And may I point out, also, Mr. Examiner, that Mr. Thom's appearance was not for the Association of Ameri-

can Railroads, but for the American Railway Association. The Association of American Railroads was not then in existence.

Mr. Fort. It is a predecessor in interest, like the Sealines, or whatever it is.

Examiner Hoy. As a matter of general information, I knew that the name of the Association had changed since the first hearing.

Mr. McCollester. Not only the name of the Association,
1366 but the organization of the Association, and the instrument under which it functions, and the powers which it confers on, which that instrument confers upon, the directors and officers of the Association are different from those of the American Railway Association.

Mr. Eshelman. Mr. Examiner, I might add a word on this, if I may. In the first place, these complaints attack the reasonableness of car service Rule 4.

That rule is one of national scope in that it applies to all, so far as it has application. That is to say, the rules themselves have national application.

There is in this case the undoubted inability of any one line to present to the Commission properly the questions which have to be considered by the Commission in this, the first case involving questions of the Commission's power, the matter of compensation, the matter of terms and conditions in respect of interchanging with what the Commission calls a water line.

Now, the Commission is well advised of the fact that the car-service division has for years had control of this matter, and, therefore, we think it is obviously not a matter for an individual carrier.

Examiner Hoy. Well, of course, as I see it, the Association is not a party to the case. It is true, the rule of the Association
1367 is brought in issue, but it is brought in issue insofar as it is in force by the individual railroads, not because it is a rule of the Association.

Now, my inclination is to permit Mr. Fort to proceed on the theory that he is representing all the railroads who are members of the Association. He is appearing as counsel for the members of the Association, except insofar as they are otherwise represented at the hearing, or take a different position in the proceeding.

Mr. McCollester. I would like to ask whether it is the position of the defendants here, to which Mr. Eshelman has referred, or of the Association, that Car Service Rule 4, and the refusals of the railroads, which are the subject of the complaint, have been established, and exist by virtue of the agreement which has established the Association of American Railroads, and are maintained by virtue of that agreement, and are binding upon the railroads?

Mr. Fort. I am sorry, but I do not understand the question.

Examiner Hoy. The reporter will read it.

Mr. FORT. I heard it, but I do not understand it.

Examiner HOY. Can you make yourself a little more clear, Mr. McCollester, so that Mr. Fort can understand it?

Mr. MCCOLLESTER. Well, is it contended that, in the first place the Car Service Rule 4 was established, and is now maintained by agreement among the railroads, parties to the
1368 agreement establishing the Association of American Railroads, and pursuant to that agreement?

Mr. FORT. We have no announcement to make on that point, no contention to suggest at the moment.

There is no issue of the kind, and we have nothing to say about it.

Mr. MCCOLLESTER. Is it contended that——

Mr. FORT. In due course, if you will let us try a case, you will see what we are contending.

Mr. MCCOLLESTER. I think this goes to the question of the authority, if there is any, of the A. A. R. to be in this case, and of you to represent them.

Examiner HOY. Well, the Examiner will permit Mr. Fort to proceed, on the theory that he is representing all of the individual railroads that are members of the Association here in this proceeding, except insofar as they are otherwise represented.

Mr. MCCOLLESTER. Now, Mr. Examiner, I think you are, with all due respect, assuming a great deal as to Mr. Fort's authority. I ordinarily do not challenge the authority of an attorney to speak for a client, but you have here a corporate party, so to speak. It is not a corporation, as I understand it, but it is an unincorporated association, organized by contract.

1369 I challenge Mr. Fort's authority to speak for that Association, apart from the right of the Association to be a party to this proceeding, and I should like to have produced here any official action of the Association which empowers Mr. Fort to speak for the Association in this proceeding.

Examiner HOY. Well, it is not customary in these proceedings, Mr. McCollester, to question the authority under which counsel appears.

Mr. MCCOLLESTER. I know it is not customary, but that is why I am doing it here, Mr. Examiner: Because I think the authority can not be taken for granted in this instance.

Mr. FORT. Mr. Examiner, I ask leave to intervene in this case on behalf of the Association of American Railroads, if it be regarded that that Association has not already intervened.

I think they intervened by entering an appearance in the first place. We have no thought whatever of broadening the issues in this proceeding, and our desire to intervene arises from the duties and concern which the Association, as such, has with car service and per diem rules.

Mr. McCollester. Mr. Examiner, of course we will oppose that intervention, and ask to be heard before the Commission on it, but I want to say now that as I conceive it, the attorney or the officers of the Association can have no
1370 more authority than is provided for by the underlying instrument creating the Association, and by action pursuant thereto, and I challenge counsel to find in the plan of organization, or the contract of the Association of American Railroads any authority which would permit the Association of American Railroads to ask to become a party to a proceeding such as this.

Mr. Ware. Mr. Examiner, I would like to enter an objection here at this time to the intervention of the Association of American Railroads as such.

I wish to also enter an objection to the right of the Association to appear in this case and offer testimony in behalf of any of the members of the Association.

That latter objection is based upon this ground: That under the articles of association, the Association of American Railroads has the right to appear in concerted action in behalf of all the members of the Association.

This matter here involves a dispute between members of the Association, some on one side of the fence, some on the other, and as long as there is a dispute between the members of the Association, I challenge the right of the Association to appear in behalf of any members.

Those members should appear in their own individual right, and offer testimony through their own individual witnesses, and not through representatives of the Association of American Railroads.

1371 Mr. McCollester. Mr. Examiner, may I say further—I think that this may tend to clarify the discussion. It has been stated by Mr. Eshelman, I think, that the issue here is one of national concern, affecting a national policy on the part of the railroads as a whole.

Now, with all due respect, Mr. Examiner, that is not so.

This proceeding is a proceeding on two complaints. Those complaints, which are practically identical, attack certain specific acts and practices of certain defendant railroads. The things attached are the adoption of Car Service Rule 4, in the first instance, and, more particularly, the refusals, pursuant to Car Service Rule 4, of certain of the defendants to permit their cars to be interchanged with Seatrain Line.

Now, so far as the railroads have consented to the interchange of their cars with Seatrain, and are consenting and are permitting their cars to go by Seatrain, no order is necessary in this

proceeding requiring them to do so, and, therefore, that feature of the case is disposed of and is not here.

Now, I would direct your attention to the fact that Exhibit 9 in this proceeding, which is the special order of the A. A. R. of March 17, 1933, which I understand is the latest record on the point as to the railroads that have or have not consented, lists a very substantial number of railroads who have consented
1372 and are now consenting to the interchange of their cars with Seatrain for interstate operation.

As to those defendants no order requiring them to permit interchange is sought. Therefore, there is here no national issue as to those railroads. A considerable number of other railroads permit their cars to be interchanged with Seatrain for movement to Cuba.

One of the issues in the complaint is whether there is discrimination on the part of those railroads that permit their cars to go to Cuba via the Florida East Coast Railroad, and have refused to permit their cars to go to Cuba via Seatrain.

As to the railroads that have consented to the movement of their cars to Cuba—there is a large number of them—there is no issue here. Therefore, Mr. Examiner, we submit that this is not, as Mr. Eshelman has stated, a matter of national concern. It is a matter as between these complainants, and those individual railroads who have so far refused their permission for the interchange of their cars with Seatrain.

I submit that on such an issue, the organic acts of the Association of American Railroads does not permit that Association to take action.

I would direct your attention to the fact that the plan of organization, which is the agreement subscribed to by the member roads, provides that it is the purpose of the Association to
1373 accomplish ends "where concert of policy and action are required."

Now, if it is contended that concert of action and policy are required by the Association of all railroads, whether they have consented or not, then we have an issue which is—we have something bearing on an issue which is in this case.

If that is not so, then, plainly, the Association has no legal power to intervene in this proceeding.

I also direct your attention to the fact that the articles of the Association provide that on a controversial question, a three-fourths vote of the Board shall be necessary to a decision. It is for that reason that I have called upon counsel to produce the action of the Board, if any, purporting to authorize the appearance here, because we are entitled to know whether such three-fourths action has been taken.

I direct your attention also to the fact that the articles of the Association provide that no decision shall be reached, nor any order made, against any railroad company, with respect to any controversial question, without notice and opportunity to be heard.

Now, so far as the complainant, Hoboken Manufacturers' Railroad, is concerned, it is an associate member of Association of American Railroads. Under the articles, it was entitled to notice and an opportunity to be heard before any action was taken,
1374 to oppose it, because, certainly, any opposition to its complaint would be a controversial question, and I will state for the record that Hoboken Manufacturers' Railroad has received no notice from the Association of American Railroads, and it has had no opportunity to be heard before any action was taken by the Association in this connection.

I am informed that that is true of a large number of other railroads: That no notice of any proposed participation of the Association of American Railroads in this proceeding was given any notice of meeting of the Board of Directors.

I am authorized by Mr. Bell of the Rock Island Railroad, Rock Island Lines, to say that what I have stated now is the position of his company; that his company challenges the power of the Association to represent them in this proceeding.

Mr. THOMPSON. Mr. Examiner, on behalf of the Texas & Pacific Railway Company and the Abiline & Southern Railway Company, which are named among the defendants in No. 25728, I want to join in the objection made by Mr. Warg a few moments ago, and in that connection I want to point out along the lines Mr. McCollester has just spoken upon, that this complaint involves issues between the railroads. The railroads are complainants, and other railroads are defendants, and it is purely a controversy between the railroads that are members of the American Association of Railroads.

Mr. FORT. Mr. Examiner, it seems to me that what Mr. McCollester has said has been said under very obvious mis-
1375 apprehension of the issues here.

This is not a place to try out the authority as between members, the jurisdiction as between members of the Association of American Railroads. This is not the forum to decide questions of that kind at all.

I appear here at the direction, under the instructions of the Board of Directors of the Association of American Railroads. I appear here for the Association as such, not for the individual members. These individual members are free, as I have said, to appear and make any statement, any appearance they want.

It is difficult to quite appraise the motive that would lead to the interjection into this case at this stage of matter which so clearly is not matter over which the Commission has any jurisdiction at all. We will leave that to speculation.

The point is that under the Act to Regulate Commerce, a legal entity is not only a legal entity that may appear before the Commission, but by the very terms of the statute, any person, corporation, company, association, mercantile, agricultural, or manufacturing society, and any society of that kind has the right to appear, so far as the Act to Regulate Commerce is concerned.

The right to intervene extends to the same organizations and associations that the rights to complain extend to, under
1376 the rules of practice.

That is the only thing that is before the Commission. Certainly, the Commission will not undertake to decide anything about the authority of the American Association of Railroads. They have a right as an Association under the statute to intervene, and we ask to intervene under those provisions of the statute.

Mr. McCollester. Mr. Examiner, admittedly, an organization, corporation, or unincorporated association may appear in a proceeding before the Commission if it is a proper party to such proceeding, and can show that it has an interest in the proceeding. Before it does so——

Mr. Fort. That does not mean a legal interest, as you understand.

Mr. McCollester. Before it does so, however, it must allege the basis of its legal existence, and its authority appear.

Now, counsel for the Association has not alleged authority within the powers of the organization to appear here, but even if he had, I would say that the Association of American Railroads can have by itself no interest, no proper interest in this proceeding, and, therefore, is not a proper intervener in the proceedings, and should not be permitted by the Commission to intervene.

It can not have an interest apart from the interest of the
1377 defendant railroads, and the complainant railroads.

Now, you have both complainants and defendants who are parties to the Association in this proceeding, members of the Association, and the Association can not have an interest in the proceedings adverse to one group and in favor of another.

I do not know how otherwise we can challenge than at the threshold here the authority of the Association and of Mr. Fort as its attorney to become a party to this proceeding.

Mr. Fort. Without further argument, I am perfectly willing to leave it to the decision of the Examiner.

Examiner Hoy. Well, over the objection of the complainants in these proceedings, the Association will be permitted to intervene, and I will accept Mr. Fort's authority to speak for the Association, he having stated that he appears here by instructions of the Board of Directors of the Association.

Mr. McCollester. Will Mr. Fort produce the instructions of the Board of Directors?

Mr. FORT. I will not.

Examiner HOY. I will accept his authority to appear here on his own statement that he appears here under instructions of the Board of Directors, in the same way that I will accept your authority to appear for Seatrain, Mr. McCollester.

Mr. MCCOLLESTER. Well, Mr. Examiner, you will find quite a great difference, because you will find that my appearance here is on a verified complaint, verified by an officer of the
1378 corporation, which is complainant.

Examiner HOY. Well, I have stated that I will accept his appearance here on his own statement that he appears under instructions from the Board of Directors of the Association.

Mr. FORT. Mr. Examiner, before we take any testimony, I should like to make another statement, please.

In introducing evidence bearing upon what would be reasonable terms and conditions with respect to the interchange of these cars, as to compensation, reclaim per diem, and other matters, it should be understood that we do not mean to waive any question of the right of the Commission to require that interchange, either as the question might be raised by the Association, or by any member of it in a subsequent proceeding, or in this proceeding before the Commission, or before any other tribunal.

I do not mean to waive any of the underlying and preliminary questions which lie behind the one which I understand it is the purpose of the Commission to look into at this time: that is to say, the regulations, rules, and conditions of the interchange.

I should like to say only one other thing: I understand that Mr. McCollester and the other complainants in this case, upon whom a burden would rest as a primary matter to show that there should be interchange, and under what conditions, if they are to
1379 prevail in the action—I understand that they stand on the record as now made; that they have nothing more to offer in the case in chief. Is that true, Mr. McCollester?

Mr. MCCOLLESTER. That is correct. We may have rebuttal of your evidence.

Mr. FORT. That is a point that I mean to call attention to. If they rest at this time, I have no doubt that the Examiner will see that such testimony as they may later introduce is confined strictly to rebuttal, and does not take the form of making us go first, and then introducing a case in chief afterwards.

Mr. MCCOLLESTER. I will say this, which I stated at the previous hearing: That in resting, we do so on the state of the record, in which the defendants have neither by their petition or otherwise raised any issue that conditions have so changed since the close of the previous record that the facts as then shown are not the facts to the extent they were shown at the present time.

Mr. FORT. I could not——

Mr. MCCOLLESTER. It is our contention that if the defendants undertook, or should undertake to make a contention that conditions have so changed, they should have so alleged in their application for further hearing; that their application does not
1380 raise that issue. Their application for further hearing makes no allegation that the record previously made was not representative of conditions at the present time.

They asked for a further hearing for the purpose of taking further evidence on the question of compensation, and that is the only issue raised by their application for further hearing.

Mr. FORT. The petition will speak for itself. It goes beyond that.

Mr. MCCOLLESTER. On that state of the record, we have nothing further to offer.

Mr. FORT. If I should remain silent, I might mislead Mr. McCollester.

We do not stipulate that there has been no change in conditions, and we do not think that any presumption of that kind arises on the record.

If he thinks such a presumption arises on the record, that is a matter of argument.

Mr. MCCOLLESTER. Well, now, Mr. Examiner, you see the peculiar situation we are getting into here by permitting Mr. Fort to speak.

Mr. Fort is not a defendant. We do not care what the Association of American Railroads may or may not stipulate or agree to. It can not broaden the issues in this proceeding as an intervener.

The question is for the defendants, and the defendants
1381 have spoken by their petition.

Now, for that reason, Mr. Examiner, we most vigorously again urge that the Association of American Railroads is not a proper party here, and Mr. Fort is not authorized to appear in this proceeding.

I direct your attention, Mr. Examiner, to the fact that you have a great many railroads that have consented to the interchange of their cars. Now, if Mr. Fort speaks at all, he speaks for the Association, which includes the complainants and the railroads that have consented.

If he introduces any evidence here, he introduces it on behalf of all. Now, I cannot see how he can state an objection, urge any position here, or offer evidence on behalf of the railroads against whom there is no complaint in this proceeding.

Mr. FORT. I do not know whether you want to continue this argument, Mr. Examiner.

Examiner HOY. No, I do not.

Mr. FORT. That takes a great deal for granted, which I think is erroneous.

Mr. MCCOLLESTER. Mr. Examiner, I think it is a serious question whether this should not be threshed out before the Commission before we take evidence here offered by the Association as such.

Examiner HOY. Well, I have permitted the Association
1382 to intervene, and permitted Mr. Fort to appear, and accepted his authority to appear.

Now, proceed with the evidence, Mr. Fort.

Mr. MCCOLLESTER. May we have an exception to your ruling?

Examiner HOY. Yes, have the record note an exception.

Mr. WARE. I take an exception.

Examiner HOY. I stated at the beginning that it was over the objection of the complainants that I ruled.

Mr. FORT. Doctor McDonnell.

Dr. MILTON E. MCDONNELL was sworn and testified as follows:

Direct examination by Mr. FORT:

Q. What is you name, Doctor?

A. Milton E. McDonnell.

Q. What is your occupation?

A. I am chief chemist for the Pennsylvania Railroad.

Q. Chief chemist?

A. Chief chemist.

Q. What are your duties, generally speaking? First, let me ask you this: How long have you had that position?

A. Since January 1921.

Q. Were you connected with the Pennsylvania Railroad prior to that time?

A. I have been connected with the chemical department of the Pennsylvania Railroad since November 1899.

1383 Q. Yes. In your present position, generally, and briefly, what are your duties?

A. My duties are to assist in the specifications covering the materials used by the railroad company, and in getting the best materials, and in determining that when materials are purchased, they shall comply with the requirements of the specifications under which they were purchased.

Q. In your position, are you called upon to do research work of a scientific nature?

A. I am.

Q. Now, where were you educated, Doctor?

A. I was graduated from the Pennsylvania State College, and took graduate work there; also graduate work at Wesleyan Uni-

versity, the University of Berlin, and the German University of Kiel.

Q. What was the nature of the graduate work that you took at these universities?

A. My major subject in these universities was chemistry.

Q. Are you a member of any scientific society?

A. I am a member of a number of scientific societies, including the American Society of Testing Materials.

Q. American Society for Testing Materials?

A. Yes, the American Chemical Society, and, until recently, I was a member of the American Society of Mechanical Engineers.

Q. Now, have you conducted any tests with respect to
1384 corrosion on steel, or other metals?

A. One of our major problems has been to conduct experiments which would lead to the improvement for the protection of metals, in other words, coatings for metals, and methods to show the relative rate of corrosion of different metals, with the object of selecting those which would give the best durability.

Q. Now, has there been a particular test in which you have been associated, or in which you have participated, carried on by the American Society for Testing Materials, or a committee of that Society dealing with corrosion of metal due to climatic conditions?

A. I have been a member of a committee of the American Society of Testing Materials, which started tests on steel of different compositions, at different locations, for the purpose of determining the influence of different constituents in the atmosphere on the corrosion of the metal.

Q. Yes, sir. Now, was that test carried on through a committee organized for the purpose?

A. That was started by a committee organized for the purpose.

Q. Were you on that committee?

A. I was on the committee for the selection of the materials to be applied to the test, and I have been from the start chairman of the Sheet Inspection Committee.

Q. Of the Sheet Inspection Committee?

1385 A. Sheet Inspection Committee.

Q. Now, will you tell who the other members, or some of the other members of that testing committee were and are, Doctor McDonnell?

A. The members of the Inspection Committee are Doctor Raddon, Chief Metallurgist for the United States Bureau of Standards; Doctor Hocker, Research Engineer for Bell Laboratories; Mr. Smith, H. E. Smith, formerly Chief Chemist and Engineer of Tests for the New York Central Railroad, who is now retired; Mr. Denoon, representing the General Motors Corporation; Mr. Tayierson, representing the United States Steel Corporation; Mr.

Passano, representing the American Rolling Mill Company; and several other members.

Q. Now, when was this committee formed to begin the testing, approximately?

A. Well, the test was considered by the corrosion committee of the American Society of Testing Materials for a number of years, before it was actually started, and it was carefully planned by that Committee, as there were at the time a number of controversial questions, so that the planning covered a period of, I should say, three years, more or less.

Q. Beginning when?

A. Beginning about 1923, but the test was actually started—the test panels selected for the tests were placed on the exposure test racks in 1926.

1386 Q. Yes, sir. Now, Doctor, please explain the nature of the tests that were made, in a narrative manner, telling your own story. What is this test you refer to, and how is it undertaken by the Committee? What did it cover?

A. Well, part of the test over which—which comes under the jurisdiction of my Inspection Committee covers the exposure of the ten sheets of steel of different compositions, each of which is from the same ingot, for the purpose of obtaining uniformity, and testing these sheets without any protection; also an endeavor to protect the sheets by an application of various amounts of zinc coating; in other words, galvanizing different weights of thickness.

Q. Yes. Now, you——

A. And we——

Q. Let me interrupt there. You took ten different kinds of steel sheets; is that true?

A. That is true.

Q. And you exposed those ten different kinds of steel sheets at several different locations, in order to determine the effect of the atmosphere at those various locations upon the ten different kinds of steel.

A. That is true.

Q. And in order to have the same kind of corresponding steel at each of the locations, you took a lot out of the same ingot; is that true?

1387 A. I took each lot out of the same ingot.

Q. Now, was there in this material of the ten different kinds, a material which corresponds to the steel used in railroad freight cars?

A. Two of the sheets were in accordance with the present specifications of the American Association of Railroads, and of the Pennsylvania Railroad Company, for the copper-bearing steel now generally used in car construction.

Q. Now, what were those two sheets called, or how were they designated?

A. They were given—they were assigned code numbers, and the sheets that contained copper were designated "C" and "K."

Q. "C" and "K"?

A. Yes, sir.

Q. Why did you use a code, Doctor? Was there some secret about this?

A. Why the reason a code was used was that—on account of the different manufacturers who produced these ingots. It was a desire not to make it a test which might be used for sales propaganda, but it was an attempt to get a truly scientific test, and the principal object was to establish the effect of different constituents in the atmosphere on rate of corrosion.

Q. Yes, sir.

A. For example, what is the effect of sulphur, and other
1388 impurities in industrial atmospheres, and what——

Q. Well, now, what localities did you select in which to expose these sheets, and why were the localities which were selected, selected?

A. The selection of the localities was given very careful consideration, and Pittsburgh was selected as one of the locations on account of the known high content of sulphur in that industrial atmosphere.

Q. Yes, sir.

A. Then the tests at that location were located on the property of a public utility, the Duquesne Light & Power Company, on Bruno Island.

Q. Now, what was another location, sir?

A. Now, at Altoona, the test at Altoona—Altoona was selected for the same relative kind of impurities, although it was thought that Altoona was probably not quite as bad as Pittsburgh, but they were paired groups, and, then, coming further east, a third point of selection was State College, for an atmosphere which is relatively pure, as there are no industrial plants at State College, and the Pennsylvania State College contributed a proving ground about two miles from the town on their property, to represent a pure atmosphere.

Q. Now, what other locations?

A. Uncontaminated.

Q. What other locations?

1389 A. The two other locations were determined with reference to determining the effect of salt air on corrosion, with salt air condition, full salt air exposure—they were conducted at Key West, on the property of the United States Navy;

while the second location for salt air, which is not so full of salt, but is more in the nature of semisalt air, due to the fact that the land breezes do not carry the same humidity and salt as on a location out in the open water—the location for that was Sandy Hook, on the property of the United States Army.

Q. Yes. Now, let me see if I understand it. Of the five selections we have taken, Key West was taken to develop the effect of the so-called full-salt air atmosphere?

A. Correct.

Q. Sandy Hook was selected to develop the effect of the so-called semisalt atmosphere; is that correct?

A. I would call it semisalt atmosphere.

Q. Yes. State College, Pennsylvania, might be regarded as relatively pure?

A. It was meant to be pure.

Q. Yes. Pittsburgh and Altoona were representative of the atmosphere in industrial centers?

A. State industrial centers.

Q. State College?

1390 A. Correct. That is correct.

Q. Now, what would you say with respect to the atmosphere, or atmospheric conditions on Long Island, having to do with salt and humidity, as compared with those at Sandy Hook and Key West?

A. Well, I would say that Long Island would be a semi-salt air condition, or, rather, less than semi, if anything.

Q. Now, you exhibited or exposed these ten sheets of metal at each of these five locations, did you?

A. We did.

Q. When was that done?

A. In 1926.

Q. 1926?

A. Yes; 1926.

Q. I have understood you to say in the earlier part of your testimony that the test began in 1929. Was I wrong in that?

A. That was in error.

Examiner HOY. I have 1926.

The WITNESS. I meant to say 1926.

By Mr. FORT:

Q. Well, will you explain how these ten sheets were exposed at each of the five locations?

A. I can show some—perhaps I can show that better illustrated on a photograph. This happens to be a photograph.

Q. Have you got copies of that?

Examiner HOY. It does not mean anything on the record.

1391 By Mr. FORT:

Q. Have you got copies of it? Are all these the same?

A. Those are all the same.

Q. Have you three copies?

A. I have three copies of that.

Mr. FORT. Three copies would not serve the purpose of the record, would they?

Examiner HOY. They would temporarily, if you supply other copies to the parties of record, later on, if you want to introduce it as an exhibit.

By Mr. FORT:

Q. Doctor, suppose you state, and if it does not seem to be susceptible of being put in words fairly, we will later put in a picture, how you exposed these sheets?

A. I would like to refer to my records, because I want to have sizes right, and I do not [witness referring to paper].

The sheets exposed to test were 28 inches wide before corrugation, and 46 inches long, and ten of the sheets, one of each kind, were exposed at each location, without any protective coating.

Now, the test rack is—provides for half of the sheets on one side of what would correspond to a roof, and half on the other, half on the east side, and half on the west side, and the ten sheets which do not have any protective coating are accompanied

1392 by ten sheets of twenty-eight gauge metal also tested with three-quarters of an ounce of zinc per square foot, followed by ten sheets of 22-gauge metal, and three-quarter ounce of zinc per square foot; then, by 22-gauge sheets, protected with an ounce and a quarter of zinc; then with ten sheets with two ounces of zinc.

Examiner HOY. Same gauge?

The WITNESS. Same gauge; and ten with two and a half ounces, same gauge; and ten with 18-gauge, and two and a half ounces of zinc.

By Mr. FORT:

Q. Yes. Now, the test racks, I take it, were designed to expose the sheets on both sides; is that true?

A. Yes.

Examiner HOY. On both sides of the sheets?

By Mr. FORT:

Q. On both sides of the sheet?

A. Both sides of the rack.

Examiner HOY. Both sides of the rack, but not both sides of the sheet?

By Mr. FORT:

Q. Both sides of the sheet. The under side of the sheet was exposed to atmospheric conditions as well as the top side, was it not?

A. Well, that is true. The sheets were supported by pilasters, and——

Examiner HOY. With open sides and ends?

The WITNESS. With open sides and ends, so that both the
1393 upper and the lower sides of the sheets were subject to corrosion, and were open for inspection.

Q. Yes.

Mr. THOMPSON. May I ask a question for information?

Mr. FORT. Yes, sir.

By Mr. THOMPSON:

Q. Doctor McDonnell, you speak of these different gauges, 18, 22, and 28. Am I correct in understanding that that means the number of sheets to the inch—18-gauge would be eighteen thicknesses of sheets to the inch?

A. No; that is an arbitrary, or, rather, I would say an arbitrary scale that is used in the trade, but a 22-gauge sheet is one-thirty-second of an inch. A twenty-eight gauge is one-sixty-fourth, and an 18-gauge is one-twentieth. It is a trade method of designating the thickness of the sheets.

Examiner HOY. The smaller the gauge, the thicker the sheet. That is true, is it not? The smaller the number of the gauge, the thicker the sheet?

The WITNESS. That is right.

By Mr. FORT:

Q. Doctor McDonnell, is that one of the test racks shown on this photograph?

A. That is one of the test racks.

Q. Test racks at what location is this particular one?

A. That is State College location.

1394 Q. All the test racks at the various locations were the same?

A. They were all the same. I have, maybe, not enough for distribution, but I have——

Q. Wait a minute, just answer my questions now.

A. Yes. They were all the same.

Q. In which direction does the test rack run?

A. North and south. The black sheets are on the north end of the racks, in every instance, and the heavy two-and-a-half-inch galvanized sheets are on the south end of the test racks.

Q. Now, you show here one side—the test rack here looks like one side of a pitched roof. Is there anything on the other side?

A. There is a corresponding—this side just shows one-half of the test, and there is——

Q. And the other side looks just the same?

A. The other side looks just the same.

Mr. FORT. Mr. Examiner, I ask that that be marked as an Exhibit. I do not know what would be an appropriate number.

Examiner HOY. Exhibit No. 49.

Mr. FORT. Exhibit No. 49—I ask that it be accepted.

Examiner HOY. Without objection, the photograph——

Mr. MCCOLLESTER. I object on the ground of immateriality. If it will be connected up, that is another thing. So far it has not been.

Examiner HOY. The exhibit will be accepted as 49.

1395 (Exhibit 49, Witness McDonnell, was received in evidence.)

Examiner HOY. You will supply copies of this to the parties interested?

Mr. FORT. Anyone who wants them.

Examiner HOY. If anybody wants a copy of it, ask Mr. Fort.

By Mr. FORT:

Q. After these sheets were expose in 1926, did the Testing Committee, of which I understand you were the Chairman, make periodic tests of the materials to see the condition, so far as corrosion was concerned?

A. The Inspection Committee examined all of the test locations in the north, including Pittsburgh, Altoona, State College, and Sandy Hook, twice a year. The Key West sheets were inspected once a year.

Q. Now, you said that there were two of these sheets, "C" and "K," which corresponded to the specifications for steel used in railroad freight cars, as I understand it?

A. I did.

Q. What is the difference between "C" and "K"?

A. They are very similar, and the "K" sheet is slightly higher in phosphorus than the "C" sheet, and a trifle higher in copper.

Q. "K" was?

A. "K" was.

Q. Now, take your reference to sheets "C" and "K." Will you explain to the Examiner what the tests have shown—what

1396 the examinations have shown, these periodic examinations, as to corrosion of this material at the different locations?

A. The tests have shown that the most rapid rate of failure was at the salt-air exposure rack in Key West. The actual results at Pittsburgh, Altoona, and Sandy Hook were rather similar, and the

tests at State College show very little corrosion up to the present time, after almost thirteen years' exposure.

Q. Well, now, Doctor, taking it step by step—may I intervene here? Perhaps you will not object as much as Mr. McCollester did—take the State College test on the "C" sheets and the "K" sheets. How many "C" sheets did you have there?

A. Of the uncoated sheets, we had one "C" sheet at each location.

Q. You did not have one on either side of the rack; you just had one; is that true?

A. Just had one.

Q. One "C" sheet that was uncoated?

A. Yes.

Q. And one "K" sheet?

A. One "K" sheet.

Q. At State College?

A. Yes.

Q. Now, they have been examined, you say, semiannually,
1397 since they have been placed there in 1926?

A. The State College ones have been examined semi-annually.

Q. What is the condition of those two sheets today, so far as corrosion is concerned?

Examiner HOY. Those are both uncoated sheets?

By Mr. FORT:

Q. Both uncoated sheets?

A. They show very little corrosion.

Q. Would it be possible for you to tell, or hazard a guess, as to the life that remains in those sheets before they are destroyed by corrosion?

A. My estimate on that must presumptive, except to the extent that some other factors indicate that they will be serviceable for a least forty or fifty years.

Q. Before failure?

A. Before failure.

Q. And they are now, after 13 years, as I understand it, in excellent condition, so far as corrosion is concerned?

A. That is true. They are in excellent condition, and possibly I can explain why I make the minimum life forty years. None of the ten sheets exposed at State College have failed at the present time; even the poorest sheet of the ten.

Q. What was your code for the poorest sheet of the ten? What would you call that?

A. I would call it open hearth iron.

1398 Q. No; did you have a name for it to correspond to your "C" and "K"?

A. Yes; I have all the results tabulated, and I would like to refer to this tabulation for a moment. Well, take the open hearth iron, designated "E" on the code.

Q. "B"?

Examiner HOY. Did you say "B" or "E"?

The WITNESS. "E." Now I beg your pardon. It is "R," designated "R" on the code. The "R" sheet has not failed at State College, and it still looks good, and at the other locations, it failed very much quicker than——

By Mr. FORT:

Q. "C" or "K"?

A. "C" or "K."

Q. Yes. Now, you have talked about the sheets at State College that were unprotected. Did you have "C" sheets and "K" sheets there that were protected at State College by this Zinc that you talked about?

A. Yes; we have.

Q. Now, what is the condition of those sheets at State College?

A. Well, those sheets are in very good condition.

Q. Yes.

1399 A. Now——

Q. Now, let us get Key West, from the best to the worst.

Examiner HOY. What do you mean? Which very good conditions—better conditions than the uncoated sheets, I presume?

The WITNESS. They are better than the uncoated, yes, because while some of the ones with the lighter coating, like three-quarters of an ounce per square foot show local rust spots on the top side of the sheet, the under side of the sheet at State College—all the sheets that are galvanized are bright.

By Mr. FORT.:

Q. Yes. Going now to Key West, and taking your uncoated "C" and "K" sheets at Key West, what is the condition of those sheet snow?

A. The uncoated sheets, "C" and "K" at Key West failed after an average exposure of 5.155 years.

Q. What are you talking about now, "C" or "K"?

A. I am talking about the average of the two.

Q. Average of the two?

A. I am taking the average of the two.

Mr. MCCOLLESTER. Those are the uncoated sheets?

The WITNESS. Those are uncoated sheets.

By Mr. FORT:

Q. Now, what do you mean by "failed," when you say they failed in an average of 5.15 years?

A. I mean that after 5.15 years exposure, or, to be exact,
1400 5.155 that they had holes in them.

Q. Had holes in them?

A. Had holes in them.

Q. Did you remove them when the holes developed at the end of these five years?

A. No; they were not removed.

Q. They were left there?

A. They were left there.

Q. What is the condition of them now?

A. At the end—when a sheet develops a hole, the Inspection Committee ruled that it would not receive any further consideration. The test is closed as far as that sheet is concerned. I might, however, say that when I saw the Key West test rack in December 1938, the uncoated sheets, unprotected sheets, had all vanished, and reverted to oxide.

Q. Now, when did the "R" sheets fail at Key West, the ones that you say have not yet failed at State College?

A. The "R" sheets—Key West?

Q. Yes, sir.

A. Well, the average life of all ten sheets at Key West was 3.827 years.

Q. What sheets?

A. All ten of the uncoated sheets.

Q. I was talking about the "R" sheets?

1401 A. Oh, you are talking about the "R" sheets?

Q. Yes.

Mr. McCollester. Mr. Examiner, I do not want to interrupt this very interesting examination, but I do submit that we are encumbering the record, if we are talking about sheets that have nothing to do with cars. I understand that there are just two sheets here, "C" and "K," which are used in cars.

Mr. Fort. Mr. Examiner, if we want to argue the case as we go along, it suits me all right. The point is perfectly obvious, I think: That when you get to State College not only have these "C" and "K" sheets not failed, but even the "R" sheets, which have a much less resistant quality, have not failed at State College, indicating the life that is left in those sheets there, getting finally down to your "C" and "K" sheets, of course.

Now, we are showing the relative failure at Key West, where not only "R" has filed, but "C" and "K" have failed, to show how much more quickly "R" fails then "C" and "K."

Examiner Hoy. All right. Continue, Mr. Fort.

The Witness. "R" sheets at Key West failed in 3.62 years, and might I add that the "T" sheet failed in 2.62 years.

Examiner Hoy. What sheet?

The Witness. The "Y" sheet.

1402 Examiner HOY. You have not described what they are.

The WITNESS. The "Y" sheet—When I was asked the quickest failure, I said the "R" sheet, but "R" and "Y" are very similiar. Actually, "Y" failed before "R."

By Mr. FORT:

Q. When did it fail—in two and what number years? Two——

A. The "Y" sheet failed in 2.62.

Q. Now, has the "Y" sheet failed at State College yet?

A. No.

Q. What kind of shape is it in at State College?

A. It looks good.

Q. Yes, sir.

A. It looks good.

Q. Now, what about your "C" and "K" sheets at Key West that had the zinc protection? Have they failed yet?

A. Generally, only a few of them. Some five or six of the galvanized sheets at Key West that were galvanized have failed.

Q. Well, the "C" and "K" galvanized sheets at Key West—have they failed?

A. I do not have that data.

Q. Yes, sir. Now, coming to Sandy Hook, as contrasted with State College and Key West, take your "C" and "K," un-

1403 protected sheets. Have they failed at Sandy Hook yet, and, if so, when did they fail?

A. Those two sheets failed at Sandy Hook after 11.4 years exposure.

Q. Almost twice the time that they existed at Key West, was it not?

A. Yes; a little more than twice.

Q. And, according to your calculations, about a quarter of the time they will exist at State College; is that right? You said forty years for State College?

A. Well, that would be a minimum.

Q. A minimum; yes. That suits me; all right. Doctor, what about the "C" and "K" sheets at your other two points, Altoona and Pittsburgh, where you had the industrial atmosphere?

A. At Altoona, the average life was 11.5 years, and at Bruno Island, seven.

Q. When you speak of Bruno Island, you mean Sandy Hook?

A. I mean Pittsburgh; Bruno Island, Pittsburgh—7.865.

Q. 7.865?

A. Yes, seven and a little over eight-tenths years.

Q. The "C" and "K" material now you are speaking of?

A. I am speaking of the "C" and "K" sheets.

Examiner HOY. Uncoated?

1404 The WITNESS. Uncoated.

By Mr. FORT:

Q. Was Pittsburgh selected as the most extreme test of industrial sulphuric atmosphere that you could readily find?

A. It was. It was anticipated that the first failures from industrial contamination would be at Pittsburgh.

Q. Yes. Doctor McDonnell, I call your attention to a pamphlet entitled "Out to Sea on Rails," which I understand is Exhibit 20 in this case. It shows pictures and diagrams and other things of the Seatrain, indicating how a car could load into a train. Have you examined that pamphlet?

A. Yes; I have examined it.

Q. You see, do you not, that a certain number of cars are parked, if that is what you call it, or held, at any rate, on exposed deck, and that other cars are held on three or four decks below that, that are not completely exposed as the outer deck is; is that true?

A. That appears to be true.

Q. Yes.

A. From the diagram in the exhibit.

Q. Yes. Taking cars that are so-called unexposed cars, in that they are not on the outer decks, would they be subject, or the steel parts of those cars—would they be subject to
1405 corrosion by reason of the salt air and the humidity, or would the fact that they were not on the outer deck protect them from that influence?

Mr. MCCOLLESTER. I object, Mr. Examiner. It has not been shown that the witness has seen any Seatrain ships, has been on them, knows what protection is afforded to cars loaded on the ships, has made no tests of the atmospheric conditions on the ships. It is pure speculation, not proper opinion testimony, a foundation has not been laid for it.

Mr. FORT. Maybe I can ask a question like this, that will avoid any controversy:

By Mr. FORT:

Q. Under the exposed decks, in a ship such as this train appears to be from Exhibit 20, would the same salt air condition exist that would exist on the outer decks, approximately?

Mr. MCCOLLESTER. Objection, Mr. Examiner. It has not been shown that the witness knows what protection there is from atmosphere. The witness has not been shown to have had any experience in examining the inside atmosphere of ships as compared with the outside conditions. I could testify to that just as well as the witness, and I am not——

Mr. FORT. I really think anybody could testify to it. I
1406 think it is almost an obvious fact.

Examiner HOY. Well, from the diagram, he can, I think, express an opinion—from the diagram alone. Now, he has not inspected the boat, but it seems to me we are going to go pretty far afield if we are going to get that kind of opinion testimony. People look at a picture of a boat. They have never inspected the boat. They do not know how the cars are protected when they are put on there, and the vessel sails. It seems to me we are going pretty far afield with that kind of testimony.

Mr. FORT. Will there be a boat here today, Mr. McCollester?

Mr. MCCOLLESTER. Yes; there will be one here today.

Mr. FORT. Can Doctor McDonnell go out on your boat and look at it?

Mr. MCCOLLESTER. I am sorry. Off the record——

Mr. FORT. No; on the record.

(Discussion off the record.)

Mr. FORT. I ask, on the record, that Doctor McDonnell be permitted to inspect the Seatrain boat that is in New York today.

Mr. MCCOLLESTER. Mr. Examiner, for reasons that I have stated off the record, I must regretfully refuse today. At
1407 some other time, the Doctor may inspect the Boat, but not today.

Mr. FORT. I would like to have him inspect it while the hearing is going on, if we can.

Examiner HOY. Well, of course, the Examiner has no authority to direct Seatrain to let anybody inspect their boats.

Mr. FORT. No; but when they complain that he has not seen it, and then do not let him see it, it leaves us in the air.

Examiner HOY. Well, that may be. That is too bad. Perhaps you should have made your request to inspect the boat previously.

Mr. FORT. Perhaps we did, when we get into "perhaps."

Examiner HOY. Perhaps you did.

Mr. MCCOLLESTER. He did not.

By Mr. FORT:

Q. Doctor McDonnel, take a house on a sea coast. Is there a salt air condition inside the walls of the house, just as there is outside?

Mr. MCCOLLESTER. I object, Mr. Examiner. Maybe the Doctor is qualified as whatever you call it, on air conditions, and so forth, but it has not been shown as yet.

Mr. FORT. It is a scientific question, and it has been shown that the Doctor is a scientist.

Mr. MCCOLLESTER. Yes; but not that kind of a scientist.

Mr. FORT. I ask for an answer.

1408 Examiner HOY. Well, I think we are going a little far afield here, too.

Mr. FORT. I suppose that it is really a self-proving fact, as far as that is concerned. Maybe we can do that in argument.

You may cross-examine the witness.

Examiner HOY. We will have a five-minute recess before cross-examination.

(Whereupon a short recess was taken.)

AFTER RECESS

Mr. FORT. Mr. Examiner, during the recess, I have spoken with Mr. McCollester, and he has kindly consented that I might withdraw this witness before cross-examination, to put another on who must catch a train, and then recall Doctor McDonnell for cross-examination.

Examiner HOY. All right.

Mr. FORT. But on direct, I should like to ask Doctor McDonnell one, or maybe two more questions.

Examiner HOY. All right, you may do so.

By Mr. FORT:

Q. Doctor McDonnell, if you know, will you explain whether there is a difference in the corrosive influence in the hold of a ship as contrasted with upon an exposed deck of a ship?

Mr. MCCOLLESTER. I object, unless he shows that he has made some study of the subject.

1499 Examiner HOY. The question is—does he know whether there is any?

Mr. MCCOLLESTER. I know, Mr. Examiner, but I——

Examiner HOY. I presume when he answers the question, he will state why he knows.

Mr. MCCOLLESTER. I think he should state why and how he knows. After all, it can only be a matter of opinion.

Mr. FORT. Let me ask one or two preliminary questions, then.

By Mr. FORT:

Q. Doctor, have you spent a large part of your life in studying corrosion and corrosive influences of climate and other factors on metal and steel?

A. I have.

Q. Have you an opinion as to whether or not there is a distinction in the corrosive influence of salt air and humidity, in the hold of a ship, and on an exposed deck of a ship?

A. There is a difference.

Mr. MCCOLLESTER. Well, now, just a minute. I move to strike that.

Examiner HOY. How do you know that there is a difference, Doctor? What do you base that on?

The WITNESS. I base—In the first place, I have seen holds in ships and—other than Seatrain ships, and the
1410 hull of a vessel is——

Mr. MCCOLLESTER. Well, now, just a minute. May I ask the witness some questions on his qualifications?

Examiner HOY. Yes.

By Mr. MCCOLLESTER:

Q. How often have you been in the hold of a ship, Doctor?

A. Oh, I should say half a dozen times, or more.

Q. What kind of ships?

A. Ships that carry passengers and miscellaneous freight.

Q. For what purpose did you go into the hold of the ship?

A. Well, for various purposes. I have been in the engine room of a ship when I went—I have been in the engine room of a ship to observe the performance of the engine, and the lubrication of the engine, and have had an academic interest in the holds of ships, of the preparing of commodities for shipment in the holds of ships, and the relative methods, to some extent—the relative method of packing, metal commodities, for shipment by freight in cars, or by shipment by water.

Q. Well, have you made any metallurgical examination of the holds of ships themselves, that is, the side plating of ships?

A. No, I have not made any metallurgical——

Q. Have you made any meteorological—any examination by instruments or otherwise as to the atmospheric conditions, moisture, and so forth, in the holds of ships?

1411 A. Not by actual measurements.

Mr. MCCOLLESTER. I object, Mr. Examiner.

Mr. FORT. I ask that the witness be permitted to answer my question.

Examiner HOY (addressing Reporter). What is the question? (Question read as follows:)

"Q. Have you an opinion as to whether or not there is a distinction in the corrosive influence of salt air and humidity, in the hold of a ship, and on an exposed deck of a ship?")

Examiner HOY. He may answer the question.

Mr. MCCOLLESTER. Exception.

The WITNESS. There is a difference; yes.

By Mr. FORT:

Q. What is the difference?

A. In the hold of a ship, it is cooler, and the cooling of air that goes into the hold of a ship through the ventilators precipitates moisture, as soon as the dew point is reached, and there is a deposition—an increase in humidity, and a deposition in moisture by

virtue of the cooling effects of the water in which the ship's hull is immersed.

Q. Well, what is the result of that, from a corrosive standpoint?

A. It accelerates corrosion.

Q. You would expect to find more corrosion in the hold than on the exposed deck.?

A. You would, just as you would expect to find, and do
1412 find more corrosion in a damp cellar than you do in the third floor of your cellar. You put your automobile chains in a damp cellar, and they rust badly during the season. You put them in a dry place on the third floor, and they do not rust.

Q. When metal sheets, steel sheets, or tin sheets, are shipped by ocean, is it common practice to have special protective measures taken to avoid corrosion; or do you know?

A. I know that such commodities do get special packing precautions to prevent corrosion.

Q. Now, what is the nature of that special packing protection?

A. Well, in the case of tin plate, tin plate for loading in a freight car, is not enclosed in an airtight sealed tin vessel the way it is enclose in a tin container for export.

Q. For export?

A. For export.

Q. I see. Now, is that tin plate you referred to any more subject to corrosion than the "C" and "K" material you speak of?

A. At the trimmed edges, tin plate would be the same as these 10 black plate sheets. It is the same "C" and "K," some kinds of tin plate, and on tin plate there is always a difficulty of preventing pin holes in the tin coating, and if that tin plate rusts and tarnishes, in transit, it is no longer acceptable in the trade at current market prices, so it requires greater protection to prevent that.

1413 Mr. FORT. Mr. Examiner, that concludes the direct testimony of Doctor McDonnell. He will be available, for cross-examination.

(Witness excused temporarily.)

Mr. FORT. I will call Mr. Tassin.

J. S. TASSIN was sworn and testified as follows:

Direct examination by Mr. FORT:

Q. Mr. Tassin, have you appeared as a witness in this case before?

A. Not in this case.

Q. What is your occupation?

A. General statistician, Southern Railway System Lines.

Q. Generally, what are your duties in that position?

A. To make cost studies, statistical surveys, as required by the company, generally for use in commerce cases.

Q. How long have you been dealing with railroad figures?
A. Over 35 years.
Q. How long have you had your present position?
A. Since 1932.
Q. Mr. Tassin, have you made a study, and statistical study, designed to show or indicate the ownership costs of railroad cars for the period of time that those cars are rolling on a railroad?
A. I have.
1414 Q. Will you please explain your study and the exhibits or statements which you have prepared in that connection?
A. I have one exhibit to offer, which will be No.——
Examiner HOY. Fifty.
The WITNESS. No; 50.
(Exhibit 50, Witness Tassin, marked for identification.)
The WITNESS. On page 1 of this Exhibit, in Table 1, I show the car supply in the United States from 1901 through 1937. The units are in millions of cars, so that that first figure; or 2.7, is 2,700,000 cars available in the six years shown.
In order to determine a general average, typical or normal supply for the United States, I have, of course, considered all of these seventeen years, good and bad alike, and on that basis, a normal supply for the United States may be said to be between 2,500,000, and 2,600,000 cars. Those cars, of course, dealt with in this table, are all cars, whether owned by Class 1, Class 2 or Class 3 railroads, switching and terminal companies, and even private car owners.
In the next table, just by way of comparison, I show the average number of those cars that were on the line of first-class railroads daily which show, for example, that the highest number in eight years is two and a half million cars, and in comparison with a total of 2,700,000 cars, which shows that approximately only
1415 200,000 cars a day are on the short lines and terminal companies.

By Mr. FORT:

Q. Does your table indicate the source of those figures?
A. Appendix A, in the back of the book, gives the details by years, and shows the source, that is, the statistics of railways in the United States, as issued by the Interstate Commerce Commission in what is commonly known as the "Blue Book."
Q. Continue, sir.
A. Over on Sheet 2, I show the car demand in the United States. Over that same period, 17 years, good and bad alike, this car demand has been determined by me by taking the tonnage originated on all classes of railroads in the United States, and turning those into cars, by dividing the number of tons originated by

the average loading of the cars, that is, ton miles per car mile. It was necessary for me to estimate it in this way so as to reflect in these figures l. c. l. loadings on short lines, as well as on the Class I lines.

On Sheet 3, I show the average loads per car per year, obtained by dividing the cars available, the car supply, on page 1, into the car demand on page 2. It shows on the average how many loads a car receives a year, the typical figure being between 18 and 19 loads a year.

The lower section of that table divides those average loads into the number of days in a year, in order to gauge the complete
1416 cycle of service of a car, that is, the lapse of days from one load to another. Here, the typical situation in the United States is between 19 and 20 days, on the average, from one load to another. On page 4 of the exhibit, I show the average haul in the United States during these years expressed in terms of 100 miles. The typical representative haul is 320 miles, for the United States as a whole. In the next table I show the average speed of freight trains in the United States, the typical being between 17 and 19 miles an hour.

Q. Now, I notice that you show for 1937, 22 miles. What speed is that, and where do you get it?

A. That is obtained by dividing freight train hours, excluding hours spent in train switching, into freight train miles.

Q. In other words, that is not the figure often referred to as the terminal-to-terminal figure?

A. No; because it eliminates the delay due to train switching.

Q. All right, go ahead.

A. On page 5, by applying the speed to the average haul, I determine the number of road hours per car, which is, of course, the number of road hours per train, the car and the train having the same number of hours, naturally, and an average haul in the United States consumes from 18 to 19 hours, less than the 24 hours in the calendar day.

1417 Q. How long would that average haul be?

A. 320 miles.

Q. Now, that time you gave for that average haul, you say, excludes switching. What does it exclude?

A. It excludes all switching.

Q. Excludes all switching?

A. It is running time, between terminals. Of course, it reflects division stops other than for train switching purposes.

Q. Yes. Now, as to the time spent for a car in switching, that is, in rolling and switching movement, have you any judgment about that?

A. Yes; having made numerous switching studies, while the actual moving time of a car at a terminal will naturally be contingent upon the nature of the terminal service it receives, whether being picked up from an industry or at the freight house or on a team track, hauled in from an interchange point, or merely classified from one train to another, in passing through a yard, naturally, there is a great variety of yard services that are being rendered, but on a basis of my general observation and experience, I would say that the average number of hours available on the basis of these figures, which would be from five to six hours, is ample time for the active movement of a car through the yards or in the yards.

Q. So that this average movement of the car at some 300 or more miles, so far as the rolling time of the car is con-
1418 cerned, would take place without switching in the number of hours you show here on your statement?

A. Yes.

Q. And, in your judgment, would the switching, that is, would the rolling time in switching—it would be completed within the 24 hours; is that true?

A. That is true.

Q. Now, look at your Appendix A. What is that?

A. My Appendix A are the actual figures taken from the Commission's report of statistics of railways in the United States, which I have condensed and rearranged in the tables for convenience of consideration.

Q. Merely supporting your tables?

A. They are supporting the tables.

Q. And "B" is also supporting data?

A. Yes; "B" is also supporting data. You will notice here I show on this table the average loads per car per year, the average days elapsed between loads, the average haul, the total freight train hours, excluding train switching, the total freight train miles, the average freight train speed, obtained by dividing one figure into the other.

This is the supporting detail.

Q. Now, your "C"—that is the same thing?

A. The Appendix "C" supports the table, too, on page 1.

1419 Mr. FORT. That concludes the examination.

Cross-examination by Mr. MCCOLLESTER:

Q. Mr. Tassin, you testified, did you not, in Docket No. 25727?

A. I did.

Q. And is it not correct that the statistics, or, at least, most of them shown in your Exhibit No. 50, were included in the exhibit marked 153, which you identified in that proceeding?

A. All of them.

Q. Now——

A. Or in some one of the exhibits.

Q. Yes; either 153 or 154?

A. Yes.

Q. Have you before you your Exhibit No. 153 in Docket 25727?

A. I have.

Q. Will you turn to page 27 of that exhibit?

A. Yes.

Q. By means of that exhibit, did you not testify in that proceeding: "All conditions receiving counter balancing consideration, 70 cents per car per day, 23 cents capital carrying, and 47 cents depreciation and maintenance, seems presently and for some time to come a reasonable allowance for Southern Railway Company, exclusive of cost of storage."

A. That appears in that exhibit.

Q. Yes.

1420 A. And as Exhibit No.—well, is this——

Q. Just confine yourself to answering my questions, first, please.

A. I will.

Mr. Fort. If the witness wishes to make any explanation, I think he has a right to do so.

The Witness. I merely wish to say that this figure also excluded the cost of distribution of empties.

By Mr. McCollester:

Q. Yes. Will you turn to page 26 of that exhibit. Looking at the last paragraph on that page, did you not, through that exhibit, testify: "We have conservatively placed the cost of car ownership to the Southern Railway Company at 70 cents per day and of car storage at 7 cents per day." That was your statement, was it not?

A. That statement, as far as it goes—it goes further than that, of course.

Q. Yes.

Examiner Hoy. Make any explanation you want to, of your answer, Mr. Tassin.

The Witness. Well, the explanation of the experience with respect to the Southern Railway Company is this: We have a shorter haul than that of the United States, as a whole. Our average haul is under 200 miles.

1421 We also have a quicker turn-over than indicated for the railroads generally in the United States, our turn-over being 11, but when we take into consideration on the Southern Railway Company our shorter haul, our quicker turn-over, and adding together the burden to us of owning the car, of storing the car, and of distributing the empties over the system for the reception

of loads, I come out with $19.00 a day for the Southern Railway just as I arrived at $19.00 per day for the railroads of the country as a whole, excepting the $1.00 per day—$1.00 per diem as possibly reflective in a general way of the burden of car ownership.

Mr. FORT. $19.00 a day for what?

The WITNESS. $19.00 a day for the completed cycle of service of a car, between loads, one load to another.

By Mr. McCOLLESTER:

Q. Now, did you quite correctly state yourself? Wasn't your conclusion that the cost of car ownership was $19.00 for, say, per active day, per day under load?

A. For active movement under load, that is the basis of the measurement.

Q. Well, now——

A. It being shown that it consumes less than 24 hours; active movement consumes less than—actual running time takes up less than 24 hours on the average.

Q. Will you turn to page 41 of that exhibit.

1422 A. You appreciate, of course, that you are examining me on Southern Railway Company, on which I had not testified on direct in this case.

Q. I appreciate that. On page 41 of that exhibit, in the second paragraph, is it correct that you testified that by adding in taxes and other items, you reached the following result:

"The typical outcome on this basis would be 70 cents per car per day, for car-carrying costs; 7 cents for storage, and 5 cents for taxes; 82 cents in all, which is 95 percent of what is required if we include traffic and general expenses."

Mr. FORT. Just a minute. Are you referring to the Southern Railway figures?

Mr. McCOLLESTER. Yes; I am asking what the witness testified to in that proceeding.

The WITNESS. These are all Southern Railway figures.

Mr. FORT. I just wanted the record to be clear, that you are not talking about figures he has testified to here, but you are asking him whether he said something in some other case.

Examiner HOY. Yes; that is what he is asking.

Mr. McCOLLESTER. That is correct.

The WITNESS. Yes.

By Mr. McCOLLESTER (continuing):

Q. "Or 86 cents, in comparison with the 90 cents produced
1423 under Title 46, which 90 cents allows for excess paid on the dollar per day basis for adverse balance of freight cars on line; also car rental on a mileage basis." Now, that was your statement, was it not?

A. That statement, as far as it goes, but the statement was carried farther, of course.

Q. Then, after that——

Mr. FORT. Well, wait a minute.

Examiner HOY. Do you care to carry it further right now?

The WITNESS. Yes.

Examiner HOY. Well, go ahead and do it.

Mr. MCCOLLESTER. Mr. Examiner, I submit that I am entitled to cross-examine the witness, and then counsel can either bring out anything that he thinks that the witness—

Examiner HOY. I just want the witness to know that when you ask him a question as to whether he testified to a certain effect in that case, he can say, yes, and then say, "But I also testified further," and qualify his anwser in anyway he wants to, and make it full.

Mr. MCCOLLESTER. If, when I get through, I have not been fair in my cross-examination then, of course, the witness can amplify it.

Mr. FORT. I do not want to wait until he gets through.

Examiner HOY. I want the witness to understand that he
1424 can give a full and complete answer to your question.

Mr. FORT. That is right.

Examiner HOY. If he just wants to answer your question yes or no, he can do that, or he can qualify his answer. Just answer it in your own way, Mr. Tassin.

The WITNESS. I will. Thank you, sir.

Mr. FORT. Applying the doctrine to the facts on this last question, I ask that it be read again, and see whether Mr. Tassin desires to——

Examiner HOY. I think that Mr. Tassin understood it.

The WITNESS. I understood it. I said it was true as far as it went, but it did not go far enough, because it does not reflect the cost of distributing empties. That is a part of our cost of car service.

By Mr. MCCOLLESTER:

Q. And that is a cost that you said you could not ascertain?

A. At that—when this exhibit was prepared, but my Exhibit No. 54, as a supplement, carries the question——

Examiner HOY. 154?

The WITNESS. 154—carries the question on into the cost of distribution of empty cars, completes it, in other words.

By Mr. MCCOLLESTER:

Q. Now, coming to the $19.00 per car—you understand I want to be fair to you and put your theory fairly before the Commission.

1425 A. I will be frank with you; I have nothing to fear.

Q. Your theory of the $19.00 per car is that for each car day under load, there are 18 idle days, on an average, and that therefore each day under load must pay for a total of 19 days, is that right, of car ownership?

Mr. FORT. Each moving day under load, he said.

The WITNESS. That measure which gives me the 19 days was arrived at by me, in order to get at as close a comparison as possible on a basis of like with like, whether a car was rolling on the rails or riding on the waves.

By Mr. MCCOLLESTER:

Q. But is not my statement correct, that your figure of $19.00 was $19.00 per—we will call it per day per car, per day that a car is earning revenue?

A. Not exactly. That figure represents this: If a dollar a day is fairly compensatory for the use of a car, and there are 365 days in a year, that a car costs $365.00 a year, and if a car is employed only 19 times in that year, the real cost of car service is nineteen into $365.00.

Q. Well, in other words, somebody has got to pay; either the car owner or the car renter has got to pay $365.00 a year for that car?

A. Somebody pays, as I testified in the other case.

Q. $365.00 per year?

A. That is, assuming that the——

1426 Q. Assuming $1.00; yes.

A. Assuming $1.00.

Q. But your figures for the Southern Railroad are those that you have testified to here?

A. The figures for the Southern Railway show that the cost of carrying the car by itself, and of storing it is under $1.00, by reason of the quicker turn-over, and the shorter haul, but it is more than $1.00 by reason of the distribution of the empties, so that the Southern Railway actually works out $19.00 per day of actual movement, just the same as the general average for the United States works out.

Q. Now, the Southern Railway, as I understand it, has an adverse car balance. Is that correct?

A. Yes.

Q. Have you proposed that the Southern should pay to the owners $19.00, because you use more cars of other railroads than you have your own cars on your rails?

A. No; for this reason: The Southern is a partner to the general arrangement on the part of all of the railroads, whereby we receive from other railroads loads to be delivered on our line.

They receive similar loads to be delivered on their lines. There is a general arrangement, a reciprocal arrangement entered into, to which we are parties, so that this $19.00 a day could not apply to other railroads, where we have another arrangement.

1427 Q. Well, now——

A. But we spend that money for their behalf by storing their cars on our line, and paying them $1.00 a day while we are holding them for loads. It comes to the same thing. We pay out the money, whether it is our car or theirs.

Q. If you pay the car owners a dollar a day while you are holding the cars, then the ultimate result is that, on the average, you pay $19 for each loaded day?

A. It is as long as it is short.

Q. So that $1.00 a day loaded or empty works out to $19 per loaded day?

A. $19.00 per——

Q. Is that right?

Mr. FORT. I must keep the record straight

A. Per moving——

Q. Per moving day?

A. Yes.

Mr. FORT. Just a minute. The witness has not called it a loaded day, and when Mr. McCollester uses that term, I suppose he is just using that for convenience to describe——

Mr. MCCOLLESTER. He has called it a loaded car day in the exhibit. I think you termed it in the exhibit as loaded car.

The WITNESS. Yes, I know, but I qualified it throughout

1428 by showing that it was a day under movement, load under movement.

By Mr. MCCOLLESTER:

Q. Well, a day earning freight revenue.

A. I called it a loaded day, because I have shown that the actual movement is accomplished within 24 hours, actual running time.

Q. Well, my point, and I want to be sure that I understand you and that you understand me—my point is that if the Southern Railroad pays $1.00 a day to a car owner for the entire time that a foreign car is on its rails, loaded and empty, it has in effect paid what you say it should pay as the $19 for a loaded day of movement, or per profitable day, if you want to put it that way?

A. It costs more.

Q. Isn't that correct?

A. Not exactly. It costs us more to use a foreign car than one of our own cars.

Q. Well, that wasn't my question. My question was whether you had not in effect paid to the owner of the foreign car, by paying that owner a dollar a day while a car is on your rails, either loaded or empty—haven't you, on your theory, paid to the car owner, in effect, $19.00 per loaded day of movement, if that is the correct description?

A. No, your question does not fit the case at all. We actually pay to the owner $1.00 for every day we hold his car.

1429 Q. Yes.

A. And I have nowhere stated that we hold foreign cars an average of 19 days on our road. You see, your question doesn't fit the case at all.

Q. Well, somebody has paid the owner for 19 days, if the car is away from home 19 days, isn't that right?

A. The general experience of all of the railroads is that the 19 days reflect the cycle of service of a car, and that one dollar per day—that means $19.00, but that naturally varies with respect to individual railroads. Some will be above the average; some will be below the average. That happens with respect to all averages, individual instances above or below.

Q. Well, let us put it this way, Mr. Tassin: On the average, for the railroads as a whole, now, the payment to a car owner of $1.00 a day per car, whether the car is—both while the car is empty and while the car is under load, is the equivalent of $19.00 per day of loaded profitable movement, is that right?

A. Of movement under load.

Q. Under load; yes.

A. It is the equivalent of the United States as a whole.

Q. Yes, that is right.

Examiner HOY. On the average.

1430 The WITNESS. On the average, over good years and bad years, alike, 17 years being considered.

By Mr. MCCOLLISTER:

Q. Now, will you turn to page 42 of your Exhibit No. 153, in Docket No. 25727. Now, if I correctly understand your point there——

Mr. FORT. What exhibit are you talking about, Mr. McCollester?

Mr. MCCOLLESTER. I have identified it on the record.

The WITNESS. 153 in the other case.

Examiner HOY. Page 42.

Mr. FORT. What is the purpose of the cross-examination on that exhibit in this case?

Mr. MCCOLLESTER. Because the witness has used the same figures on which he based his conclusions in the other exhibit.

Mr. FORT. You are cross-examining as to conclusions?

Mr. McCollester. I am cross-examining on the conclusions which he derived from these figures.

By Mr. McCollester:

Q. Now, as I understand your point, on that page, Mr. Tassin, it is that on Seatrain's coastwise operations, Seatrain does not pay the full cost, providing all kinds of equipment, in your opinion, because, as you state, "It does not produce traffic for the railroads," but—isn't that your point as to coastwise?

1431 A. My point as to coastwise is this: That when Seatrain combined in the same service marine and railway equipment, there and then there was an equity created for the car as well as for the boat. I am trying to measure the equity for the car.

Q. Now, then, do you not state on this same page, or did you not state as follows:

"The same is not true with respect to Cuban business, for the reason that there Seatrain supplements and does not supplant rail traffic. It ferries loaded cars to and from Cuba, and thus provides the railroads with originated and terminated tonnage, for the sake of which they can well afford to carry the necessary empty car days, as this is part of the reciprocal arrangement which they have with one another, and is, in fact, the raison d'etre of the symbolic dollar a day per diem charge.

A. I draw a distinction between Cuban business and coastwise business, where you contribute and where you don't.

Q. And that statement that I have read fairly reflects your opinion as to Seatrain's Cuban business?

A. There is a distinction between coastwise and Cuban business.

Q. And you think that on Cuban business, the dollar a day works out to be fair?

A. Well I say there is more justification for it. I do not

1432 say it is fair, but there is more justification for it.

Mr. McCollester. More justification; all right. That is all.

Mr. McCollester. More justification; all right. That is all.

By Mr. Thompson:

Q. Mr. Tassin, on page 4 of your Exhibit 50, you show figures here that purport to represent the average haul in the United States, running from 300 to 350 miles; is that correct.

A. From 300 to 350 miles.

Q. Now, that would represent joint line service, where shipments move over more than one railroad, would it not?

A. Yes; this is a statistic provided by the Interstate Commerce Commission as the best gauge we have of the average movement, independent of the roads that handle it.

Q. And that does not reflect the average haul of individual railroads?

A. It does not.

Q. Then, that being true, the average haul of individual railroads would invariably be less than the average haul of all traffic, would it not?

A. I wouldn't say invariably; probably generally speaking. I know for the Southern Railway it is less.

Q. This 350-mile haul would not be typical of a haul from New York, say, to Texas, would it?

A. The haul from New York to Texas is reflected in this
1433 general figure.

Q. That is true, but, then, that would not—that would be a much longer haul than 350 miles, would it not?

A. Oh, certainly.

Q. And there is no reason to assume that the detention of cars in loading and idleness on a long haul would be any greater than on a short haul, would it?

A. Assuming that they would be less. There is no ground for any assumption whatever as to car detention.

Q. It would not take longer to load or unload a car that moves 2,000 miles than it would a car that moves 200 miles, would it?

A. No.

Q. But a car that moves 2,000 miles would take much longer to haul—I mean, it would run over a period of several days, would it not, as compared with your average movement of 350 miles here?

A. Oh, yes; the running time would be longer than the running time for 320 miles.

Q. Then, assuming a car moves over three or more lines, this $19 figure that you have computed here would be shared between the originating line and any one or more intermediate lines, and the terminal line, would it not?

A. The running time——

1434 Is that the question you asked——

Q. No; you computed $19.00 as being the average cost in a cycle, as you called it, a movement?

A. Yes; cycle of service per day of loaded movement.

Q. Per day of loaded movement?

A. On the average.

Q. But on each one of those cycles of service, that $19.00 would be participated in, where it is joint line movement, between the originating line and any one or more intermediate lines and the terminal line, would it not?

A. The burden of it should be participated in.

Q. In other words, it would not be borne by the line that actually has the running movement of the car?

A. In fact, it is borne by all of the lines by reason of their reciprocal arrangement of handling one another's cars. It is participated in by all of them.

Q. Yes.

A. And that is the average experience of them all.

Q. Under this $1.00 per day per diem rule?

A. That is right.

Mr. THOMPSON. That is all. Thank you.

Examiner HOY. Is there any redirect, Mr. Fort?

Mr. FORT. Yes, a little; and a little bit more direct on one question that I overlooked on the first direct.

1435 Redirect examination by Mr. FORT:

Q. As to redirect, Mr. Tassin, as I understand your statement, you said $1.00 per day for 365 days a year was fair car ownership expense, is that true, generally speaking, for the 365 days a year?

A. 365 days a year at $1.00 a day is $365.00 a car.

Q. Well, answer my question——

Mr. FORT (addressing the reporter). Will you read the question, please?

(Question repeated.)

A. My assumption there is that the $1.00 per day is fairly representative.

By Mr. FORT:

Q. That is on the present per diem?

A. On the present per diem.

Q. Yes. Now, as a matter of fact, a car is not in any kind of a service, on an average, 365 days a year, is it, either empty or loaded?

A. No.

Q. There is a certain storage time, in order to take care of the peak requirements, and things of that kind; is there not?

A. That is true, and then repair time, also, of course.

Q. And then there is a certain repair time?

A. That is right.

Q. Now, in addition to that, there is a certain time spent in empty movement back to the ownership road, or to the place
1436 where you are anticipating a load; isn't that true?

A. Yes.

Q. Then, in addition to that, in connection with the origination of business, you may accumulate and hold the cars in the territory where your freight business originates; isn't that so?

A. That is true.

Q. And, furthermore, in connection with the origination of business, a certain amount of time is consumed by the originating road, placing the car for the shipper to load?

A. That is true.

Q. And a certain amount of time is consumed by the shipper in loading?

A. That is true.

Q. And a certain amount of time is consumed in terminal service of getting the car back to the classification yard, and making the classification, and things of that kind?

A. That is true.

Q. And you have a like loss of time at destination, do you?

A. Yes.

Q. So all of that time is incidental to what might be regarded in one sense as a productive time of the car?

A. Yes.

1437 Q. Now, Mr. Tassin, I overlooked asking you on direct—and this does not purport to be redirect—whether you have any information indicating the relative cost with respect to revenue car hire or car ownership on Seatrain, as contrasted with railroads?

A. Yes, I have. At page 231 of the record in I. & S. Docket 4542, Mr. Brush testified to the effect that the total per diem freight car expense on all domestic or total coastwise trade would be $10 per car as the very maximum.

At page 286 of the record, he said that that $10.00 per car referred to the loaded car.

At page 269 of that record, Mr. Brush stated that Seatrain handled 5,111 loaded, coastwise, in 1937.

Sheet 2 of Exhibit No. 25, filed by Mr. Brush, in Docket No. 4542, shows that Seatrain's gross freight revenue from coastwise traffic amounted to $818,803 in 1937.

Utilizing $10 as the maximum per diem freight car charge on the 5,111 loaded cars handled, it is determined that the relationship of Seatrain's car hire costs on coastwise traffic to gross freight revenue on coastwise traffic is 6.2 percent, or 6.2 cents per dollar of revenue.

Much of the average $10 cost is no doubt due to absorption on port to port traffic, so that on the through traffic, the relation would be less than 6.2 cents.

1438 How does this compare with ownership costs for all Class 1 railways in the United States? In 1937, Class 1 railways reported a total of 1,929,761 freight carrying cars

on line. The figure included a probable excess number of cars in storage, and an excess number in bad order.

Reducing the storage and unserviceable cars to a normal number, 80,000 surplus, and six percent in bad order, the required normal car supply for 1937 is calculated at 1,750,247 cars.

Gross line haul freight revenue received by railways, or Class 1, per day, in 1937, averaged $9,235,505.

If the railways rendered their needed car supply at one dollar per day, it would have cost them 19 cents per dollar of revenue, more than three times the cost which is the car hire expense of Seatrain.

Now, before I get away from this statement, I would like to refer to a somewhat similar statement made by me on page 42 of my Exhibit No. 153.

I do not wish any confusion between the two statements in the record. Here I am dealing with coastwise only, and Class 1 railroads only. In the table at the bottom of page 42, I deal with Seatrain's total business, Cuban as well as coast-wise, and in that table I show for 1937 that car hire expense, as it is reported in the Seatrain's reports to the Interstate Commerce Commission, consumed nine cents of Seatrain out of every dollar of Seatrain's
1439 revenue, the railways, of course, being 19 cents in either case.

Q. Now, you are referring to exhibit number what?

A. 153 in I. C. C. Docket No. 25727.

Q. In other words, that is an exhibit not in this record?

A. Not in this record.

Q. But it is one Mr. McCollester was questioning you about?

A. Asked me about, and I did not want any confusion of the figures.

Mr. Fort. Thank you very much, Mr. Tassin.

Examiner Hoy. Is there any recross, Mr. McCollester?

Mr. McCollester. No recross.

Mr. Fort. I offer Exhibit 50 in evidence.

Examiner Hoy. Exhibit 50 for indentification will be received in evidence.

(Exhibit 50, Witness Tassin, was received in evidence.)

Examiner Hoy. You are excused, Mr. Tassin.

(Witness excused.)

Examiner Hoy. We will adjourn until two o'clock.

(Whereupon, at 12:35 o'clock, a recess was taken until two o'clock p. m., same day.)

Examiner Hoy. We will proceed with the cross-examination of Doctor McDonnell.

Dr. Milton E. McDonnell, was recalled, and being previously duly sworn, testified further as follows:

Mr. Fort. I find, in talking with the Doctor at lunch, that he made one error in his replies on direct examination. I asked him to tell me about the failure at Pittsburgh on these sheets "C" and "K"—were they not?

The Witness. That is right.

Mr. Fort. "C" and "K" and he said something about seven years. He now tells me that that was an error.

By Mr. Fort:

Q. What were the seven years you were referring to, Doctor?

A. That was the average of—one of the sheet's average was not—from this tabulation, was not the "C," and the answer should have been over 12.48 years, where I gave you the figure of 7.86 years. I would like that changed to 12.48 plus.

Q. When did the "C" sheet fail; after how many years did the "C" sheet fail at Pittsburgh?

A. The "C" sheet failed at—was reported at the last inspection, which was 12.48 years.

Examiner Hoy. Well, that is higher than Altoona, is it not? You had Altoona as eleven and a half years.

1441 Mr. Fort. Mr. Examiner, I do not think that we quite got the facts on this Pittsburgh situation yet.

By Mr. Fort:

Q. When did the "C" sheets fail at Pittsburgh, Doctor?

A. 12.48 years.

Q. When did the "K" sheets fail at Pittsburgh?

A. The "K" sheets had not failed at the last inspection.

Q. And how many years had passed at the time of the last inspection?

A. 12.48.

Q. 12.48. So the fact is that the "C" sheets failed at 12.48; and the "K" sheet has not yet failed; is that true?

A. That is true.

Q. Is there any way to tell how much more life there is in the "K" sheet?

A. No, that will have to be determined by the official inspections of the Committee, and I would not like to predicate a date.

Q. Would you say what condition the "K" sheet is in? Did you see it at this last inspection?

A. Yes.

Q. What shape was the "K" sheet in, so far as corrosion is concerned?

A. It is corroded, and getting thin.

Mr. Fort. That is the only correction I want to make.

1442 Examiner Hoy. Well, now, that 12.48 at Pittsburgh is longer life than the average "C" and "K" at Altoona, which you say was eleven and a half years; is that correct?

The Witness. Well, at Altoona, on my tabluation, I have some explanations which I did not get in the direct testimony.

The "K" sheet at Altoona had not failed on the last inspection.

Mr. Fort. That is after 12.48 years.

The Witness. After 12.48 years.

Mr. Fort. What about the "C" sheet?

The Witness. The "C" sheet at Altoona was lost after ten years; at the tenth annual inspection the "C" sheet had been blown away by a severe storm we had there, and there were several sheets lost from that test, including several light weight zinc coated sheets, and this one "C" sheet.

By Mr. Fort:

Q. Then you did not have a record of failure on the "C" sheet at Altoona; is that so?

A. The record on it is lost by wind, after ten years' exposure.

Q. Well, now, answering my questions directly, as to the "C" sheet at Altoona, did it ever show failure upon any inspection?

A. It never showed failure on any inspection.

Q. The "K" sheet showed failure at the end of 12.48?

A. The "K" sheet——

Q. Just answer directly.

1443 A. No.

Q. When did the "K" sheet show failure?

A. Well, 12.48 years was the last inspection.

Q. And there was no failure?

A. There was no failure.

Q. Now, you got your eleven years that you first testified to, at Altoona, as the average of the two, by taking the ten years when the "C" sheet blew away without failure, and averaging that with the 12.48 years, which was the total time elapsed now, but as to which there has been no failure of the "K" sheet; is that right?

A. There has been no failure of the "K" sheet.

Mr. Fort. All right. That is all.

Examiner Hoy. Well, that is where you got your average. That is the question.

Mr. Fort. Yes. How did you get that average?

Examiner Hoy. How did you get that eleven and a half average—average of ten and 12.48?

The Witness. No, that applies to the "K" sheet only, because the "K" sheet had not failed, and the "C" sheet was lost, and it is 11.48, plus.

Examiner Hoy. Well, this morning you testified that the average of the "C" and "K" at Altoona was eleven and a half years, according to my recollection and note.

Mr. Fort. The question is, Doctor, where did you get that
1444 eleven and a half years that you testified to this morning?

The Witness. Why, that was the "K" sheet that had not been blown away.

Mr. Fort. I think we have gotten a little bit mixed up.

By Mr. Fort:

Q. Is your "K" sheet still at Altoona?

A. Since the last official——

Q. Wait a minute. Is your "K" sheet still at Altoona?

A. The "K" sheet is gone.

Q. The "K" sheet is gone?

A. Is gone.

Q. And that was lost after 10 years?

A. The——

Q. Wait a minute. Was that lost after ten years?

A. Yes, after ten years.

Q. Without failure?

A. Without failure.

Q. Now, your "C" sheet is still at Altoona?

A. No, the "C" sheet was lost at the tenth year inspection. At the last official inspection, which was 12.48 years, the "K" sheet was still—had not failed.

Q. Yes. Now, answer my direct question, and see if we can get this straight on the record. At the end of the tenth year at Altoona, the "C" sheet was blown away in a storm, and it had not failed up until that time; is that true?

A. That is right.

1445 Q. Now, the "K" sheet at Altoona is still there; is that true?

A. The "K" sheet—it is not there now. It was there at the last official inspection.

Q. It was there at the last official inspection?

A. At the last official inspection.

Q. Now, wait a minute. Answer my questions. That was 12 how many years?

A. That was 11.48.

Q. 11.48?

A. Yes.

Examiner HOY. Or 12?

By Mr. FORT:

Q. Or 12?

A. No, 11.48, at the last inspection.

Q. At the last inspection, how old was the "K" sheet?

A. 11.48 years.

Q. Had it failed at that time?

A. It had not failed at that time.

Q. Now, what has happened since the last official inspection, if you know, with respect to that "K" sheet?

A. I know that the "K" sheet is gone now, but it has not been inspected, and officially reported as gone by the Committee.

Q. When you say "gone," you mean it has failed?

A. The wind has blown it away, and it is not on the rack any more.

Q. No, so both the "C" sheet and "K" sheet have been 1446 blown away by the wind at Altoona?

A. In Altoona.

Q. The "C" sheet blown away at the end of ten years, the "K" sheet had blown away at the end of what number of years?

A. Well, since the last—it was not present. It had not failed there at the last official inspection, in October, after 10.48 years.

Examiner HOY. Wait a minute. It was 12.48, then 11.48, and how he has it down to 10.48.

Now, your last inspection, a few minutes ago—you said the "K" sheet there was 11.48 years?

The WITNESS. Yes.

By Mr. FORT:

Q. Which is right, Doctor?

A. Right is 12.48.

Q. 12.48?

A. Right is 12.48.

Q. Now, let me see if I can state it correctly, and if I am wrong, you say what is correct.

The "C" sheet blew away at about the end of the tenth year at Altoona. It had not then failed; is that true?

A. That is true.

Q. The "K" sheet was present at the end of 11.48.

Examiner HOY. 12.

By Mr. FORT:

Q. Wait a minute. It was present at the end of 11.48 years, or was it 12.48?

1447 A. I should have said 12.48.

Q. Was present at the end of 12.48 years, and had not yet failed, but has blown away since that time?

A. Since the official—since the last official inspection.

Q. So the situation is that one of the sheets had not failed at the end of 10 years, and the other had not failed at the end of 12.48 years, is that right, at Altoona?

A. Well, the "C" sheet had not failed at the inspection of nine and a half years, approximately, but at the tenth year—those were semiannual inspections, approximately, half year periods, and at the tenth year inspection, the "C" sheet was gone on account of a wind.

Q. Now, the "K" sheet had not failed at the 12.48 inspection?

A. Had not failed.

Q. But has now been blown away; is that so?

A. Has now been blown away.

Q. As to Altoona, you can not give an average time of failure because neither sheet failed, but you can show how many years they lasted without failure; is that correct?

A. That is true. In other words, unless you make assumptions, you can not give a correct average.

Examiner HOY. Does that finish your direct?

Mr. FORT. Yes.

Examiner HOY. Cross-examination.

1448 Cross-examination by Mr. MCCOLLESTER:

Q. Doctor, did I correctly understand you to testify that tin plate is packed in some special kind of containers for shipment by water?

A. Yes.

Q. Well, now, what tin plate—tin plate originating at what point?

A. American Sheet & Tinplate Company.

Q. Where are they?

A. Vandergrift, Pennsylvania.

Q. Is that in the Pittsburgh district?

A. Pittsburgh district.

Q. When did you last see tin plate so packed?

A. This information was given to me—I did not personally see it—it was given to me by representatives of the American Sheet & Tin Plate Company, and by our company inspectors.

Q. Now, where was that to be shipped; do you know?

A. No; I do not know.

Q. Did you in your investigations discover that tin plate has been shipped over your railroad in large quantities, for movement via Seatrain?

A. No; I did not have that information.

Q. Then I suppose that you do not know that that tin plate is moved in large quantities over your railroad in open top cars, without any—in cars, without any special packing?

1449 A. Well, I know the tin plate is shipped in our cars without any special packing.

Q. Yes. For movement via Seatrain?

A. I do not know about the Seatrain.

Q. Do you know whether it is shipped without special packing for movement via the Morgan Line, and other coastwise steamship lines?

A. No, I do not know that.

Q. Now, is my impression correct that the purpose of this committee of yours, whose activities you testified about, is to improve the character of steel and the protective coatings applied to steel?

A. That is the purpose.

Q. And there has been considerable improvement, has there not, both in the protective coatings, and in the character of steel itself, from the standpoint of durability.

A. Yes; there has.

Q. And all of these samples that you have testified to were steel acquired on or before 1926; is that correct?

A. That is right.

Q. Now, is it your testimony that salt moist atmosphere—moisture in the atmosphere with salt water has a corrosive effect upon steel protected in the manner that steel is protected in box cars?

A. Yes.

1450 Mr. Fort. What was the question? I did not hear it.

(Question and answer repeated by the reporter.)

By Mr. McCollester:

Q. Well, now, I had reference to the steel used in the box cars when protected by paint and other protective methods employed in the construction of box cars?

A. You mean a painted box car?

Q. That is right.

A. Well, salt water is very detrimental to paint coatings, in the first place. In the second place, the protective coatings on box cars are not impervious. The coatings are damaged locally by a car in service, by ballast, and by mechanical injury, and when salt spray comes in contact with a steel where the paint coating is not

impervious, or where the paint coating is damaged, it starts to rust at the point of contact, and, furthermore, it progresses and produces rust under the coatings, and starts aggravated damage to the steel structure.

Q. That result is produced by the contacts of salt spray with the sides of cars, you would say?

A. Yes.

Q. Now, have you observed freight cars on car floats in New York Harbor?

A. I have observed them; yes.

Q. Car floats are quite low, are they not—very low freeboard?

1451 A. Yes; they are.

Q. And have you not observed that very generally, around the New York Harbor, especially when there is any wind, there is considerable spray which goes over the cars on car floats, moving around New York Harbor? Have you observed that?

A. That some times occurs.

Q. Now, you testified that one of your testing points was Key West. You visited Key West in connection with the examinations of the plates there, did you not?

A. Yes, I made the official inspections at Key West with the Committee.

Q. And did you observe that the line of the Florida East Coast Railroad at that time went across the Keys to Key West?

A. I did.

Q. And the cars on that would be exposed to salt spray, would they not?

A. They would; that is, to salt air.

Q. Yes.

A. The viaduct was so high, they would not—in exceptional cases, they may have gotten spray.

Q. Yes. There is considerable wind at times along the Keys, is there not, which results in spray going all the way across the Keys; isn't that right?

A. That is right.

1452 Q. And that would bring salt spray in contact with the cars on the Florida East Coast Railroad; is that right?

A. That is right.

Q. Now, are you familiar with the line of the Union Pacific that crosses the Great Salt Lake—Southern Pacific, it is?

A. No; I have never been over there.

Q. Have you seen any cars—When you were down in Key West, did you see any cars on the Florida East Coast car ferries?

A. No; I did not.

Q. You did not observe how they were loaded on to or taken off the car ferries?

A. No.

Q. Is it not a fact, Doctor, that coal cinders generally contain a considerable amount of sulphur?

A. Yes.

Q. And haven't one of the serious problems that the use of the steel car has presented been the corrosion of the car due to the deposit of the cinders from locomotive smoke, which makes it necessary to wash the cars at frequent intervals?

A. No; I would not say that is true.

Q. Hasn't that been one of the problems that the railroads have been studying?

A. The railroads have been studying methods of getting steel that is less corrosive, and getting coating, protective coat-
1453 ings that are more protective.

Q. And one of the needs for that is the inevitable accumulation of cinder dust on cars in transit; isn't that so?

A. I have not considered that that was a factor on a car. The car does not have—the roof of the car does not retain cinders; the side of the car would not retain cinders, and if it did, the rain would wash it off, and I have attributed the corrosion action more to the sulphur in the air, just as it was in this Pittsburgh Test, and in the Altoona Test. Those panels were exposed to smoke and cinders.

Q. Now, have you in your tests, ever made any examination of steel freight cars themselves, to determine in what localities they deteriorate most rapidly?

A. I have not done that personally; no.

Q. And you have not applied the results of this examination, these steel plates, at five particular points, to the actual use of steel in steel box cars, then, to the extent of making studies of the box cars themselves?

A. No; I have not.

Mr. McCollester. That is all. Thank you.

Examiner Hoy. Is there any redirect?

Mr. Thompson. I have a question or two.

By Mr. Thompson:

Q. Doctor McDonnell, what is it that causes this corrosion or rust of metal—iron, for instance?

1454 A. It is moisture and air.

Q. Coming in contact with the metal?

A. Because slow corrosion—if that moisture carries an electrolite, as, for example, salt, or sulphuric acid, sulphur dioxide, that aggravates the corrosion, and makes it rapidly destructive.

Q. Well, another term for rust is oxidation; is it not?

A. Yes.

Q. Now, if the air and moisture do not come in contact with the iron, this rust or oxidation does not set in, does it?

A. If the steel could be kept perfectly dry, with low humidity air, the steel would not rust.

Q. Well, now, if the steel is covered with some protective elements, such as paint, or, I believe, you said, zinc coating, doesn't it protect it from the rust, or from the effect of the air and moisture?

A. That protects it as long as the moisture and especially the electrolite do not penetrate the coating.

Q. Well, did any of these plates that you used in this test have paint coating or any other coating, besides zinc? I believe you called it some zinc coating.

A. Well, this particular test to which I referred, of the American Society of Testing Materials, was a metallic protection, and not paint protection.

Now, we have tests on paint coatings, and the effect of
1455 salt spray on paint coating, but that was not in connection with the steel corrosion tests to which I referred. These tests were primarily to show the rate of corrosion of unprotected sheets in different kinds of atmosphere.

Q. I see. Well, now, will you tell me this: Assuming that a piece of metal, iron, or steel, has been exposed to these influences, and has started to become corroded with rust or something like that, and then you have this protective coating put on it, of paint or some other metal, would that stop the further action of the rust?

A. Not unless the corrosion which had previously taken place is removed.

Q. Removed before the coating is put on?

A. That should be removed before the coating is put on.

Mr. THOMPSON. That is all I have.

Mr. MCCOLLESTER. May I ask just one more question?

By Mr. MCCOLLESTER:

Q. I understood you to testify, Doctor, that your theory that there might be more corrosion in the hold of a ship than on deck was predicated upon your impression that the temperature is lower in the hold of a ship than on deck, and, therefore, produces condensation of moisture in the atmosphere, which may go into the hold; is that correct?

A. That is correct, and you get a deposition of salt air, of moisture, from salt air, in the hold of a ship, which is surrounded

by water which is colder than the air. You must
1456 get a deposition of moisture, and, furthermore, in the hold of that ship, there is no rain or anything to wash the salt deposit off, like on the sheets we have at Key West—on the ones that are galvanized, the rain has washed the salt deposit off of the top of the sheet frequently enough so that the predominating corrosion is from the underside of those galvanized sheets, and those sheets are badly rusted on the under side.

Now, take State College—and there was a picture of this on——

Q. I think we are getting a little bit beyond my question, Doctor, on that point, but I would like to ask you whether your theory about the greater possibility of corrosion in the hold of a ship is based upon your speculation or is based upon actual observation of any particular ships?

A. Well, it is based on the observation of ships which have enclosed holds, and which are wholly are partially, or in part immersed in water, and the plans of the ships show that those holds are ventilated, and I have the plans of ships which are—which enable you to make definite conclusions.

Q. Well, now, Doctor, don't you know, or do you know that there is a great deal more chipping and painting because of corrosion necessary on the upper work of a ship than in the hold of a ship?

A. No; I do not know that to be the case.

Q. You do not know that it is not the case, though, do you,
1457 from your experience?

A. Well, from our experience, corrosion——

Q. No; from your experience.

A. Places corresponding to holds in ships are seriously corroded and they are a problem, but they are not given the attention that that part of a ship is given which is open to more ready inspection, and inspection and observation.

Q. Well, now, do you mean to state that the hold of a freighter is actually lower in temperature than the superstructure?

A. In many cases, it must be.

Q. Well, will you state that it is. Have you had any experience to know? I do not want your deduction.

A. I know from the fact that the water is cooler than the air through which that hull is moved, under many conditions.

Q. That is the basis of your assumption?

A. That is the basis.

Q. Yes. Well, have you considered the effect of the sun on the side of the ship and on the decks of the ship?

A. Yes, I have considered that.

Q. And the heat from the engine room?

A. Yes.

Q. And you still think that the hold of a ship is cooler than the superstructure?

A. In many cases, it is, in my opinion.

Q. Well, now, is that a just matter of opinion, then,
1458 Doctor, based upon——

A. It is based on the fact that the water in which the ship is immersed is colder than the air.

Mr. McCollester. That is all.

Mr. Fort. I have one or two questions, Doctor.

Redirect examination by Mr. Fort:

Q. As to this material used in sheets "C" and "K," does that meet the present specification for steel used in freight cars?

A. They both do.

Q. Yes, and are there a large number of the cars now on the railroads, or the great majority of them that have steel of that character, or less resistant steel than "C" and "K" that you spoke about?

A. Well——

Examiner Hoy. By "less resistant," you mean less resistant to rust, I presume.

Mr. Fort. Less resistant to rust; yes.

A. That is almost a universal standard for car construction today.

By Mr. Fort:

Q. Yes. Now, with respect to paint, is there corrosion on steel freight cars or on steel used in freight cars, in spite of the fact that they are painted. In other words, does the average paint condition permit of corrosion, and do you find it an actual practice on freight cars?

1459 A. You find corrosion on actual practice on freight cars, regardless of your effort to keep it painted.

1460 Q. Now, would a freight car in average paint condition be subject to more severe corrosion in a salt air atmosphere than in one lacking in salt air?

A. Salt air is much more detrimental to paint coatings than fresh air, and salt spray tests are extremely destructive to paint films.

Q. Then the salt air is more destructive to the paint than the other air, and also more destructive in its corrosive influences to the metal under the paint, or the metal that is in part exposed in an average paint condition; is that true?

A. That is true. It is more destructive to both. You use salt spray for making accelerated tests on paints.

Q. Yes. Now, you have been talking about salt spray. Where was this testing ground at Key West, as compared with the Ocean or the Gulf? Was it right on the edge of the shore, or where was it?

A. Key West is a small key, or a small island, I should say, in the Gulf of Mexico, and it is about, I should say, five miles long and one to possibly two miles wide in its widest part.

Q. And where is the testing ground there?

A. This testing ground is near the end of the key——

Q. How far from the water?

A. Approximately—I am speaking not from actual measurement, but I would say——

1461 Q. An approximation is enough.

A. I would say 100 yards—75 or 100 yards.

Now, one thing that made me study this question—at Key West there is a very peculiar form of corrosion taking place on the underside of galvanized sheets that had the Committee baffled as as to why that occurred on the underside, and on the last——

Examiner HOY. Is it necessary to go into that here?

Mr. FORT. I think, perhaps, you had better restrict yourself to answering my questions.

The WITNESS. All right; I beg your pardon.

By Mr. FORT:

Q. This testing ground there, as you say, is about a hundred yards from the ocean?

A. 75 to 100.

Q. Or the Gulf, or whatever you call it?

A. 75 to 100 yards from the ocean.

Q. You have been speaking of corrosion and salt spray. There is the accelerated corrosion by a salt air atmosphere, that is, a salt—I don't know how exactly to express it technically, but which does not come up to what people know generally as salt spray; am I right or wrong there?

A. That is correct.

Q. Salt air laden atmosphere has this corrosive effect that you are talking about; is that true?

A. That is correct.

1462 Mr. FORT. That is all, Doctor.

Re-cross-examination by Mr. MCCOLLESTER:

Q. Doctor, that atmospheric condition prevails pretty generally along the coast of Florida, does it not?

A. Well, I—if you say the southern coast of Florida.

Q. Yes, southern coast.

A. I would think that is probably true.

Q. And is it not also prevalant, that same atmospheric condition, along the coast of the Gulf itself?

A. That is presumably true. I have not personally had a chance to observe the actual conditions about other places on the Gulf.

Mr. McCollester. That is all. Thank you.

Examiner Hoy. You are excused, Doctor.

(Witness excused.)

Examiner Hoy. Call your next witness.

Mr. Fort. Mr. Kleine.

R. L. Kleine was sworn and testified as follows:

Direct examination by Mr. Fort:

Q. Your name is R. L. Kleine?

A. Correct.

Q. What is your occupation, Mr. Kleine?

A. Assistant chief of motor power, Pennsylvania Railroad.

1463 Q. How long have you held that position?

A. Since March 1920.

Q. What were you doing before that?

A. Before that I was chief car inspector, located at Altoona.

Q. How long was that?

A. That was from 1907 to 1920.

Q. I guess we have gone back far enough. What are your duties, chiefly, and briefly, in your present position?

A. Supervision of design, maintenance, and inspection of car equipment on the Pennsylvania system, under the direction of the assistant vice president and chief of motor power.

Q. Now, what were your duties in your position that you had before 1920?

A. Chief car inspector.

Q. Yes, sir?

A. In connection with recommending changes in design, supervising of the shop work, maintenance, and inspection.

Q. For more than 30 years, at any rate, you have been dealing primarily with the construction and maintenance, supervision of freight cars on the Pennsylvania Railroad; is that true?

A. I have.

Q. Mr. Kleine, have you made some investigations and calculations designed to show the cost of maintenance of freight box cars, due to corrosion?

1464 A. I have.

Q. I show you a statement which is headed, "Estimate of Repairs to Freight Cars," and ask if you prepared it?

A. I had it prepared under my jurisdiction.

Mr. FORT. I ask that it be marked Exhibit No. 51 for identification.

(Exhibit 51, Witness Kleine, marked for identification.)

By Mr. FORT:

Q. Mr. Kleine, please explain to the Examiner what that exhibit shows?

A. That exhibit shows the following——

Mr. McCOLLESTER. May I ask if this study is confined to the Pennsylvania Railroad?

The WITNESS. It is confined to particular types of all-steel and composite box cars of the Pennsylvania Railroad.

By Mr. FORT:

Q. All right, continue.

A. Which, however, are similar to cars of other railroads in construction. Now, over in the left-hand column——

Q. Let me ask you a few questions before you get to the general statement. I see that you have a heading, "X25 (All-Steel). What does that mean?

A. That means our X25 box cars—our X25 All-Steel box car, steel underframe, steel superstructure.

1465 Q. Steel underframe, steel superstructure?

A. Yes.

Q. Approximately how many cars have you of that character, or of that general character on the Pennsylvania Railroad?

A. We have a total of 11,399.

Q. Now, your X26, marked "Composite"—what type of car is that? That is a box car, too, is it not?

A. That is a box car with a steel underframe, metal superstructure and wooden side framing; that is, wooden lining. It has metal posts and braces, steel roof and wooden lining.

It is the car that was designed during Federal control and allocated to the Pennsylvania Railroad and some of those same cars were allocated to other railroads.

Q. Now you show "Class Repairs." Is that distinguished from running repairs?

A. That is the distinction between running repairs and heavy repairs.

Q. Now you show "First 8 Years," Second 8 Years," as to each class of cars. You did not carry this study beyond the first 16 years cycle in the life of the car, as I understand it?

A. No, sir.

Q. Now you divide as shown on the left, these repairs into general headings such as "Body, underframes, woodwork, truck repairs, air brakes" and so on; is that true?

1466 A. Yes.

Q. And you show as to each of those general headings a further division into material, labor, overhead and store expense; is that so?

A. Correct.

Q. Now, is it my understanding that these class repairs, shown on this exhibit which has been marked 51 for identification, include the entire cost of the class repairs of not only those due to corrosion; am I correct in that?

A. That is correct, that is the complete cost of the repairs.

Q. Yes. Now, why did you take an 8 year period? In other words, is it your judgment that on an average, at the end of the first 8 years, certain class repairs would be due on cars of the type covered here, both all-steel and composite?

A. That is the usual cycle.

Q. Usual cycle?

A. And that was the case here.

Q. Yes; and at that time, on an average, certain work must be done to those cars?

A. Yes.

Q. And that is the work which is shown in this exhibit; is that true?

A. Correct.

Q. Now, how did you arrive at the work which would have to be done, and at the 8 year cycle—I mean to say by that—is
1467 that representative of your judgment from your work over a great number of years dealing with the maintenance of these cars?

A. Yes, sir.

Q. There are no records from which that could be developed mathematically and statistically, as I understand it; is that true?

A. No, that is an average for those particular cars.

Q. Yes?

A. In other words, the average cost of repairs on the X25 All-Steel car, for the first 8 years, on check tests that were made, studies made—it amounted to $354.28.

Examiner HOY. What do you mean by check tests?

The WITNESS. By check tests, I mean an actual record kept of a certain number of cars that go through the shop, because it is impossible, Mr. Examiner, to keep a record of each individual car for repairs, so the practice is to take a certain class of car at certain periods, and make a check test by keeping a shop order of the work that is done on those particular cars.

Examiner HOY. Then you use that cost as developed on that check test for each and every car of that class?

The WITNESS. That is right, and we further——

Examiner HOY. And that is what these figures are?

The WITNESS. That is what these figures are. In alloting
1468 the money to the shops for making the repairs to cars, they are based on these figures.

By Mr. FORT:

Q. So that on an average, taking first your X25 cars, at the end of the first 8 years, there would be an expenditure for class repairs running to $354.00, divided as you have shown there; is that not true?

A. Correct.

Q. Then, at the end of the second 8 years of the life of that car, there would be another series of class repairs on an average of $818.00; is that correct?

A. That is correct.

Q. Now, after that work has been done, at the end of the second 8 years, have you completely restored that car to new car condition with respect to corrosion, or are there still in that car certain pieces such as center sills, carrying the effect of corrosion, which has not been removed or replaced, or done away with by either your repairs at the end of the first years or those at the end of the second 8 years?

A. That is correct. You only renew at that time the portions of the cars that have fully deteriorated, or that wouldn't give you an expected life until the next class repair.

Q. Yes. Then I am right in my understanding that after you have spent all this money at the end of the 16 years, all those expenditures have not completely done away with the corrosion that has taken place on the car during that time?

1469 A. You haven't replaced all the corrosion; no, sir.

Q. That is right. Now, Mr. Kleine, have you attempted to draw from this material shown on the exhibit marked for identification 51, that proportion of the expenses which, in your estimation, are due to corrosion?

A. I have.

Q. Will you indicate as to those items which part you think is due to corrosion? Take, for example, your body repairs. I am limiting all my questions now to your all-steel cars.

A. All-steel cars?

Q. Yes.

A. The money shown there for the repairs to the body of the steel parts are due mainly to corrosion. The renewals are made on account of corrosion.

Q. Then, would you put your $179.00, for example, for the first 8 years—have you figured that all due to corrosion in your estimates?

A. I have.

Q. You have?
A. Yes.
Q. All right, sir.
Examiner HOY. The same for the second 8 years?
The WITNESS. Correct.
Examiner HOY. Now, take the——

The WITNESS. In other words, Mr. Examiner, in the first
1470 8 years you had lesser parts to renew due to corrosion than you did during the second 8 years.

By Mr. FORT:

Q. But it was all corrosion?
A. It was all corrosion.
Q. Now, take your next big heading, "Underframes," in the first 8 years. What percentage of that would you say was due to corrosion?
A. 25 percent.
Q. 25 percent?
A. Yes.
Q. The second 8 years; what percent?
A. 25 percent.
Q. Now, the wood work—what part of that wood work was made necessary by reason of repairs required by corrosion, and therefore properly assignable as a cost of corrosion?
A. On the all-steel car, two-thirds.
Q. Two-thirds?
A. Yes.
Q. That is for both periods?
A. For both periods.
Q. Now, under "Truck repairs," how did you divide that?
A. On the truck repairs, while there is considerable corrosion, I took no account of expenses on account of corrosion. In other words, I took none of that.

Q. In other words, your costs of truck repairs you as-
1471 signed to corrosion in no part at all; is that right?

A. In no part at all.
Q. How about air brakes?
A. On the air brakes an explanation there is necessary. You will note that on the first 8 years, there is $6.97; on the second 8 years $173.43. That is due to equipping the cars with the "A. B." brake, or, in other words, a new type of brake which replaced the "K" brake.

In other words, on the first 8 years, it was only repairs to existing brakes; on the second 8 years, we included the total cost of changing the "K" brake to the "A. B." brake.

Q. After the first 8 years, did you assign any of that $6.97 to corrosion?

A. None.

Q. In the second 8 years?

A. None.

Q. Take your next big item: Couplers, coupler yokes, and so on. What did you do there?

A. I assigned none of that to corrosion, while, of course, there is some corrosion.

Q. Now, go to your composite cars, first and second 8 years on your body. Was that all corrosion?

A. In the first 8 years, the $78.97 was due to corrosion; in the second 8 years, I reduced the $190.00 to $160.00, on account of putting on a heavier type of roof, and only took $110.00 of
1472 that for the roof, and $50.00 for the posts and braces.

Q. You have $160.00 for corrosion?

A. For corrosion.

Q. All right. In your next big item, underframes, the first 8 years, $56.00?

A. 25 percent in each case.

Q. 25 for the first 8 and 25 for the second?

A. Correct.

Q. Now, on your wood work, $164.00 the first 8, and $163.00 the second?

A. One third of the wood work due to replacing parts that had to be renewed on account of corrosion.

Q. Of the metal parts?

A. Of the metal parts.

Q. Now, as to truck repairs?

A. Truck repairs, air brakes, and couplers—I have taken none of that.

Q. None in each case?

A. For corrosion, although there is corrosion there.

Mr. FORT. I now offer in evidence this exhibit which has been marked 51 for identification.

Examiner HOY. The exhibit will be received.

(Exhibit 51, Witness Kleine, received in evidence.)

By Mr. FORT:

Q. Mr. Kleine, I show you another statement, headed,
1473 "Expenditures Due to Corrosion", and ask you if that was prepared by you or under your direction?

A. It was.

Mr. FORT. I ask that that be accepted as Exhibit 52, subject to a motion to strike, if there is any such motion after there has been examination.

(Exhibit 52, Witness Kleine, was received in evidence.)

By Mr. FORT:

Q. Mr. Kleine, explain this Exhibit 52, please.

A. Exhibit 52 was made up on the underlying data shown in Exhibit 51. You will notice for the X25 (All-Steel Cars) as I have stated, under the first 8 years, $179.97 for the body, steel parts and roof have been included under corrosion.

For the underframe, 25 percent has been taken; and the woodwork, two-thirds of the cost of the renewal of the woodwork due to corrosion has been included, which gives you a total of $233.00—rather, $233.93, or a cost per day of .0801.

Now, in the case of the second 8 years, the tabulation is on the basis that I have testified to in the make-up of No. 51 Exhibit, which gets you to $435.28, .149 per day, due to corrosion.

The X26 was handled on the proportions that I testified to on 51, which gave you a cost per day of 0.0506 for the first 8 years, and a cost per day for the second 8 years of .0813.

Then, I averaged the all-steel cars, that is, for the
1474 first 8 and second 8 years, which gives us a figure of .115; and similarly, averaging the X26 composite car, gives you a figure of .066.

Q. Mr. Kleine, may I ask you a question there: that 11.5 cents for the all-steel car and your 6.6 cents as to your composite car, is the average cost per day by reason of corrosion for the first 16 years, of the life of the cars of those respective classes; is that true?

A. That is correct.

Q. Yes, sir. Well, now, continue with your explanation.

A. Below those figures, you will find the number of all-steel cars, class 1 railroads, December 31, 1937, 207,678 for all class 1 cars, the number of composite, steel and wood, at 487,937, which gives you a weighted average cost of repairs due to corrosion for your all-steel car of 8.06 cents.

Examiner HOY. Of your all-steel car, you mean, or all the cars?

The WITNESS. Of all the cars.

A. (Continuing.) Now, on the P. R. R. division, you will note that we have more steel cars than composite cars and the weighted average cost of repairs for the P. R. R. cars, due to corrosion——

Examiner HOY. Call that Pennsylvania.

A. (Continuing.) For the Pennsylvania—is 10.37 cents.

By Mr. FORT:

Q. Mr. Kleine, are these cars that you are speaking of
1475 the X25's and X26's in general service on the Pennsylvania Railroad?

A. They are, and they are interchanged with foreign cars, with foreign roads.

Q. Yes. Now, are they representative of all-steel and composite box cars owned generally and in railroad service generally in the United States?

A. They are.

Q. Mr. Kleine, have you made recent calculation and study to determine——

Examiner HOY. Are you finished with this exhibit?

Mr. FORT. Yes.

Examiner HOY. Are you offering it?

Mr. MCCOLLESTER. You offered it before.

Examiner HOY. For identification.

Mr. MCCOLLESTER. No, he offered it, subject to——

Mr. FORT. I offered it subject to a motion.

Examiner HOY. It will be received, then.

Mr. FORT. May I proceed, Mr. Examiner?

Examiner HOY. Yes.

Mr. FORT. Will you read the question I started?

(Record read as requested.)

By Mr. FORT (continuing):

Q. To determine the amount of running repairs on railroad box cars that might be avoided by reason of the fact that those cars were not turning their wheels as they would if they were
1476 running in a train on a railroad track?

A. I have.

Q. Have you listed on this statement such running repairs that you think might be avoided by reason of a car not running in a train and turning its wheels?

A. I have.

Mr. FORT. I ask that this exhibit be received subject to a motion to strike, as Exhibit 53.

(Exhibit 53, Witness Kleine, received in evidence.)

By Mr. FORT:

Q. And have you made a similar statement or list covering running repairs which would not be avoided in that way?

A. I have.

Q. Is that the statement?

A. It is.

Mr. FORT. I ask that it be marked Exhibit 54, subject to the same motion.

(Exhibit 54, Witness Kleine, received in evidence.)

Examiner HOY. We will take a five minute recess.

(Whereupon, a short recess was taken.)

AFTER RECESS

Examiner HOY. Continue, Mr. Fort.

By Mr. FORT:

Q. Mr. Kleine, have you, or did you have a gondola car on the Long Island Railroad, known as the G. R. D. car?

1477 A. Yes, sir.

Q. Have you prepared a statement which indicates when those cars were built, and when they were retired?

A. I have.

Q. Is this the statement?

A. Yes, sir.

Q. Very well.

Mr. FORT. I offer this statement and ask that it be marked Exhibit 55.

(Exhibit 55, Witness Kleine, received in evidence.)

By Mr. FORT:

Q. Now, Mr. Kleine, have you on the Pennsylvania Railroad, or did you have a gondola car known as Class G. R.?

A. Yes, sir.

Q. Have you a statement—prepared a statement, and is this the statement which indicates when those cars were built or acquired, and when they were retired?

A. Yes, sir.

Mr. FORT. I ask that this statement be marked Exhibit No. 56.

(Exhibit 56, Witness Kleine, received in evidence.)

By Mr. FORT:

Q. Now, Mr. Kleine, with respect to the cars covered by those exhibits 55 and 56, in other words, the Long Island car G. R. D., and the Pennsylvania car G. R., was it—were they alike or similar, or identical cars, or how do they compare in type?

1478 A. They are alike, with the exception of the sides. The sides are constructed of steel posts, and wooden longitudinal timbers. In the case of the P. R. R. cars the sides were solid; in the case of the Long Island G. R. D. sides, the sides permitted the unloading of the lading through side drop-doors.

Q. Through side drop-doors?

A. Yes, sir.

Q. They are otherwise the same?

A. Otherwise identical.

Q. Use the same type of steel in the two types of cars?

A. Correct.

Q. Now, looking at your Exhibit 55, how many of those G. R. D. cars on the Long Island were acquired altogether?

A. 184.

Mr. McCollester. The exhibit shows them.

Mr. Fort. But may I ask the witness a question, please?

By Mr. Fort:

Q. Will you answer that question?

A. 184.

Q. And this exhibit shows 184 were acquired in 1907, 20 in 1909——

Examiner Hoy. 64 in 1907, the exhibit shows.

The Witness: 64.

By Mr. Fort:

Q. And 100 in 1910?

A. Correct.

Q. Of all cars—have all those cars now been retired?

1479 A. All but four.

Q. What has happened to the four?

A. The four are still in service.

Q. Four are still in service?

A. Right.

Q. Now, does the exhibit show when those cars were retired, and in what numbers?

A. Yes.

Q. And does it show the average age at the time of retirement of the cars which have been retired?

A. Twenty and four-tenths years.

Q. What was the reason that those cars were retired?

A. Corrosion of the underframe and corrosion of the side stakes.

Q. Looking at Exhibit—before I get to 56, were these G. R. D. cars, cars which were kept in service on the Long Island Railroad, practically all the time?

A. They were.

Q. Was there anything connected with the use to which these cars were put that would result in unusual corrosion in the service—I mean the lading in the cars?

A. No; they were built for the ballast and stone trade.

Q. And there is nothing about that trade that produces unusual corrosion?

A. There is not.

Q. Now, looking at your exhibit 56, covering the G. R.

1480 cars, the first ones were acquired in 1902 by the Pennsylvania; is that correct?

A. Correct.

Q. And practically all of them were acquired by 1905, as the exhibit shows, and some few after that?

A. Yes, sir.

Q. Now, the total was 16,275?

A. That is right.

Q. How many of those have been retired?

A. 6,858.

Q. What was the average life of those cars at the time they were retired?

A. The average life of the 6,858 cars is 33 years.

Q. And you still have approximately 10,000 some less than 10,000 still in service?

A. Correct.

Q. That have not reached a point where they must be retired?

A. Correct, although some of those cars are now awaiting heavy repairs.

Q. Would you know how many are now awaiting heavy repairs?

A. I can furnish the figure. I don't have it offhand.

Q. You do not even know approximately offhand?

A. No; I wouldn't want to estimate it.

Q. Were these cars, the G. R. cars, in general service on the Pennsylvania and the connections of the Pennsylvania?

1481 A. Yes, sir.

Q. Generally, what would be your conclusion as to the very striking difference in the life span of the Long Island cars, the G. R. D's and the Pennsylvania cars, the G. R.'s?

A. More rapid corrosion on cars used on the Long Island Railroad, on account of the salt atmosphere.

Mr. Fort. Cross-examine.

Examiner Hoy. Exhibits 53, 54, 55, and 56 have been received in evidence.

Cross-examination by Mr. McCollester:

Q. Mr. Kleine, it is a fact, is it not, that for a considerable number of years, the Long Island Railroad has been in a bad way financially?

A. I have no figures on the Long Island's financial condition. That is not part of my——

Q. Is it not a fact that the Long Island Railroad has very drastically curtailed maintenance of equipment over the past 10 years?

A. Well, I should say over the past 5 or 6 years; yes, sir.

Q. Well, wouldn't you put it farther back than that?

A. No; I would not, for the reason that we have been handling the budget on the Long Island in that time.

Q. Well, the Long Island eliminated its own shops when?

A. They haven't eliminated their shops. You mean the shops for heavy repairs?

1482 Q. That is right.

A. Well, the heavy repairs to the Long Island cars are made on the Pennsylvania.

Q. That is right.

A. So as not to maintain——

Q. They were——

A. (Continuing.) Two shops.

Q. They were formerly made on the Long Island, were they not?

A. They were formerly made on the Long Island.

Q. When was that change made?

A. We repaired some Long Island cars on the Pennsylvania in the years 1929 to 1931.

Q. Well, is it not correct that beginning about that time, the Long Island very drastically curtailed its maintenance of equipment to the point that it attracted attention in the New York press?

A. You are talking about passenger cars?

Q. And freight also.

A. No, I didn't know that freight was included in that, because in those years of 1929 to '31 we repaired these Long Island cars on the Pennsylvania Railroad, so there was no curtailment—no curtailment at that time.

Q. Well, you do not know that they were sent for repairs as frequently as they were when the shops were maintained by the Long Island Railroad, do you?

1483 A. Well, when the shops were maintained by the Long Island Railroad, naturally, the cars were repaired on the Long Island.

Q. Well, the extent to which equipment is maintained necessarily affects its life, does it not?

A. Absolutely.

Q. And is it not a fact that the Pennsylvania equipment is better maintained, and has for years been better maintained than the Long Island equipment?

A. I wouldn't say that, because, since 1929, the Pennsylvania Railroad has very seriously curtailed—I mean, very largely curtailed the repairs to freight cars.

In other words, in 1929 we had about 5.5 bad order cars, and today we have 22 percent.

Q. Well, is it not a fact, Mr. Kleine, that the Long Island equipment for a period of at least 10 years has been less well-maintained than the Pennsylvania?

A. I can't subscribe to that, because I am acquainted with the maintenance of the passenger and freight equipment on the Long Island.

Q. I thought I was once, too.

A. I am serious about it.

Q. So am I.

Now, the Long Island cars have been used, you say, for ballast, largely?

A. Largely.

1484 Q. That is, work in connection with repairs—with construction of grade-crossing eliminations; isn't that largely it?

A. Yes; in that, and also for commercial ballast movements.

Q. There has been very extensive grade-crossing elimination work on the Long Island Railroad in the past 10 years, has there not?

A. Yes, sir.

Q. And that kind of work involving hauling cars over temporary construction track is very hard on equipment, is it not?

A. On freight equipment?

Q. Yes.

A. Not at the speed at which you would haul them over construction track. You would have reduced speed.

Q. Don't you have cars off the tracks, and damage to running gear due to the temporary character of the tracks, and the handling of ballast?

A. Occasionally, but that is only very occasional. I wouldn't say that that enters into it, seriously, the cost of repairs.

Q. Would you put your best cars into ballast work on the theory that that was the best kind of traffic for cars to handle?

A. I would put the cars in the ballast trade that were designed to go in the ballast trade.

Q. Well, generally, the railroads try to use their second-grade equipment in ballast trade, do they not?

1485 A. Are you talking of M W work?

Q. Yes.

A. Well, for M W work you have special——

Examiner HOY. What is M W work?

The WITNESS. Maintenance of way work.

Examiner HOY. Have you finished your answer?

A. (Continuing.) In other words, the Long Island had some dump cars which were largely used in that ballast business for the change in the tracks, and they were side dump cars, which were first leased and later purchased.

As I recall it, there were about 20 of those cars.

By Mr. MCCOLLESTER:

Q. Well, now, what were these 184 gondolas used for?

A. They were used for hauling stone and ballast, sand.

Q. In connection with construction work?

A. Well, they were in that general trade. I can't give you the details of the business.

Q. Were the Pennsylvania cars largely in the coal business?

A. No; the Pennsylvania cars—they are mill-type cars. You see, they are 30-inch sides, with a drop end, and they are mostly used in the mill type, hauling ballast, hauling sand, hauling gravel.

Q. Do they haul pipe?

A. Haul pipe?

Q. Yes.

1486 A. Yes.

Q. Anything requiring closed-side gondolas?

A. Yes; what you term a mill-type car.

Q. Where did you say these Pennsylvania cars listed on Exhibit 56 were operated?

A. In general trade and interchange service.

Q. Are they still being operated in that?

A. They are so being operated today.

Q. And interchanged generally with other railroads?

A. Correct.

Q. Now, do you know that since 1929 Pennsylvania cars have been moving via Seatrain?

A. I do not.

Q. You do not know.

Mr. FORT. Are you suggesting that these gondolas moved by Seatrain?

Mr. MCCOLLESTER. They may have, for all I know. We handled gondolas, Pennsylvania Railroad gondolas.

Mr. FORT. How many do you handle?

By Mr. MCCOLLESTER:

Q. Well, do you know, Mr. Kleine?

A. I do not. In other words, that is not in my——

Q. Not in your field; all right, sir.

A. No, sir.

Mr. FORT. In view of your question, Mr. McCollester, will you furnish for the record the number of Pennsylvania

1487 gondolas that Seatrain handled last year?

Mr. MCCOLLESTER. No; I will not, unless we want it for our part of the case. We may.

Mr. FORT. Then I suggest that the inference that the question was apparently intended to carry clearly is not justified.

Examiner HOY. Proceed with the cross-examination.

By Mr. MCCOLLESTER:

Q. Now, Mr. Kleine, in connection with the subject of corrosion, there has been considerable difficulty, has there not, encoun-

tered by the railroads in connection with steel boxcars, due to the sweating of the insides of the cars?

A. That is correct.

Q. And that—has that been a cause of corrosion?

A. That would cause corrosion. Any damp atmosphere will cause corrosion, and that is caused in the loading of boxcars and by loading lading hot, such as flour, which is still warm, and if you load that at certain seasons of the year, I don't care whether you load it in a steel boxcar or if you load it in a wooden boxcar—and your outside temperature changes—you get precipitation, and that precipitation, of course, is more on steel than it is on wood, because wood has a certain absorptive quality.

Q. And there is——

A. The answer, of course, to it is—don't load the lading hot.

Q. And there has been a considerable amount of trouble
1488 of that sort, has there not, in the flour trade out of Buffalo?

A. There has been some, at certain seasons of the year.

Q. Yes. Now, it is also a fact, is it not, that certain ladings due to their chemical characteristics tend to corrode the insides of cars?

A. That is correct.

Q. Salt in bulk, for example?

A. That is correct.

Q. And this corrosion that you speak of, is corrosion that may be due to those causes as well as to the outside elements?

A. Partly both.

Q. Now, in connection with the subject of repairs, don't you have occasion to renew steel and sheets due to bending of the sheets in collison?

A. There is some of that; yes.

Q. And also——

A. In that case, however, why, you straighten the sheet out.

Q. But the expense of doing it would be involved in your repairs?

A. Correct.

Q. Repair expense?

A. But there is very little of that.

Q. Handles are torn off, I suppose, by cars having too little clearance between each other?

A. That is in cornering.

1489 Q. Yes.

A. Hand holds also deteriorate due to rusting out, and get below the five-eighth inch diameter required by the I. C. C., when you have to renew them.

Q. Yes; but they are also torn off, in, as you call it, cornering?

A. Well, of course, that wouldn't be in this statement. That would be a running repair.

Q. But if the car came in for——

A. Class repairs, absolutely, it would be renewed at that time.

Q. And bolts and rivets may be torn out due to the shocks of the cars in yards, I suppose, and would have to be renewed when the car came in for class repairs?

A. Just what do you mean?

Q. I do not know. I am asking you. You can tell me what I ought to mean.

A. I don't understand your question. Bolts and rivets are not torn out by shocks in the yard. Bolts and rivets that you use in your repairs are caused by cutting off the old bolts and the old rivets and renewing the bolts and rivets for that purpose generally.

Q. All right. Now, do you know Mr. T. W. Demarest?

A. Yes, sir.

Q. Is he connected with the Pennsylvania Railroad, or was he?

A. He was. He is retired now.

1490 Q. Well, was he the general superintendent of motor power of the Pennsylvania, Western region?

A. He was.

Q. If you will accept my word for it, if opposing counsel will, he was the witness for the railroads as a whole, in Docket 17801, Rules for Car Hire Settlement, in which the dollar per diem was approved by the Interstate Commerce Commission, and the Commission's report and an examination of the record will show that the statement of car ownership costs, set forth in the Commission's report, is copied from Exhibit 18, identified by Witness Demarest.

Now, I read from page 578——

Mr. FORT. Well, wait a minute, Mr. McCollester. What are you reading to this witness—from some other case?

Mr. MCCOLLESTER. That is right.

Mr. FORT. It may be all right with you but it is not with me.

Mr. MCCOLLESTER. I am going to ask him a question about it.

By Mr. MCCOLLESTER:

Q. I read from——

Mr. FORT. Wait a minute. I do not know why he is entitled to read from some other record, and then want to ask this witness about something that happened in some other record.

If you can ask a direct question of fact or of opinion, whatever is involved, with this witness——

Mr. MCCOLLESTER. All right, I will. I am going to read

1491 from Demarest's testimony, and ask the witness if he agrees with it.

Mr. FORT. All right. Ask him the question. It makes no difference whether it is Mr. Demarest's testimony or not. Ask him whether he agrees with whatever conclusion you want.

Examiner HOY. Yes. He is going to read it and then ask the question as to whether he agrees.

Mr. FORT. It makes no difference whether he agrees with Mr. Demarest or not. The question is what does he think, and I object to reading from some other record with which I am not familiar, reading little sentences out of it here and there, and asking questions based on it.

Mr. MCCOLLESTER. May I proceed, Mr. Examiner?

Examiner HOY. Ask him his views, Mr. McCollester.

Mr. MCCOLLESTER. I am entitled to ask him if he agrees with another man who has testified in another case for the Pennsylvania Railroad. I certainly am.

Do you challenge the correctness of that testimony, Mr. Fort?

Mr. FORT. I do not know anything about it.

Mr. MCCOLLESTER. Will you look at it, please?

Mr. FORT. I would not know anything about it if I looked at it.

Mr. MCCOLLESTER. Then I am going to ask him.

1492 Mr. FORT. I object to it.

By Mr. MCCOLLESTER:

Q. I read from page 578.

Examiner HOY. Read the testimony and ask your question. Ask your question based on the testimony.

Mr. MCCOLLESTER. That is right.

By Mr. MCCOLLESTER (continuing):

Q. Of the record, in Docket No. 17801. Mr. Demarest is reported as saying:

"The wearing out of a car is brought about by the use of a car. We could stand that car on a siding and not use it at all, and barring the affect of time on it, just as on a house, it might last forever." Do you agree with that?

A. I do not, and I will tell you why.

Examiner HOY. Tell him why if you want to.

The WITNESS. In other words, you can take a car out of service and put it on the side tracks, and it may be perfectly serviceable at that time, and if you let it stand there 8 or 10 years, why, you will probably have no car left.

Mr. FORT. Mr. Examiner, this is an effort to get into this record by indirection certain excerpts taken from the testimony of another man in another case, which may be representative of his opinion or may not be representative of this opinion.

If you want to get another record in this case, I think
1493 you should get it in the customary way, by stipulation, or by proof that it is in the record, and put all of it in.

Examiner HOY. He is not getting the record of that case in here. He is simply asking the man if he believes a certain statement, just the same as a hyp'thetical question.

Mr. FORT. The only purpose of asking questions this way is to get in this record that Mr. Demarest said something in another case. That is the purpose of it.

Examiner HOY. That is not in the record. What Mr. Demarest testified to in that case is not a part of the record here, except in the form of a question to which the witness has replied that he does not agree.

Mr. FORT. If that is true, then why hasn't counsel asked the question in this way: "Do you think that a car standing on a sidetrack will last forever?" Why does he bring Mr. Demarest in?

Examiner HOY. It probably would be a better way.

Mr. MCCOLLESTER. I am not putting in my evidence at the present time. I may do it when I get to rebuttal.

Mr. FORT. You are.

Mr. MCCOLLESTER. I am not. I am testing your witness, and I am entitled to do it.

By Mr. MCCOLLESTER:

Q. I quote from the same page, where the witness, Demarest, is reported to have said:

"While the cost of replacement is not carried on a
1494 mileage basis, it is on an anual basis, on an estimated life to the car. It is certain, however, if we get down to final analysis that wear and tear is brought about by miles." Do you agree with that?

Examiner HOY. Read it, if you want to, before you answer it. Understand the question thoroughly.

Mr. FORT. If this question were correctly framed, it would read something like this:

"If Mr. Demarest said this", or someone else, would you agree with him?

Mr. MCCOLLESTER. All right, I will adopt that, if you want that.

Examiner HOY. That is all it is, the effect of it, the way the question is asked.

Mr. FORT. No; the real effect of it is to try to put in this record that somebody said something in another case.

Examiner HOY. Well, it will not be considered, so far as the Examiner is concerned. Mr. Demarest's testimony in this case is not yet in the record here, and will not be considered as in the record.

That question is to this witness, and his answer is——

Mr. FORT. With that reassurance, I am perfectly happy.

The WITNESS. I partially agree with that.

By Mr. McCOLLESTER:

1495 Q. To what extent do you not agree with it, Mr. Kleine?

A. Because it says that all the wear and tear—now, depending upon what Mr. Demarest meant at that time—wear and tear, of course, has to repaired and replaced. There is a certain element of corrosion that goes on when a car is standing for a period of time, and that is not in that answer.

Q. As I understand you, Mr. Kleine, with respect to Exhibit 51 and 52 you included the entire $179.97 for the first 8 years, and the corresponding figures for the second 8 years, of body repairs to X25 cars, upon your—as repairs due entirely to corrosion, upon your testimony that they were largely due to corrosion. Was that correct?

A. That was correct.

Q. But you would agree, would you not, that within that figure there would be repairs made necessary by other factors other than corrosion?

A. Very little.

Q. Do class repairs include cars that have been in wrecks and have to be rebuilt, although they do not go in the end of the 8-year period?

A. They do.

Q. And all costs due to wrecks, then, would be included in these figures here; in body repairs?

A. No; not in these figures here, because, as I stated

1496 before, this was taken on a study of a certain number of cars repaired over a period at a given shop, and the total cost was $354.28, and these figures did not include wrecked cars.

Q. I see.

A. Although, in your class repairs, normally, you would include the figures on wrecked cars.

Mr. McCOLLESTER. I think I have nothing further.

By Mr. WARE:

Q. Mr. Kleine, on your Exhibit 55 you refer to the gondola cars of the Long Island Railroad. Are those cars used almost strictly in operation over the Long Island Railroad?

A. Yes, sir.

Q. And will you tell me just the location of the Long Island Railroad?

A. I can't tell you between what points.

Q. Well, just where is it? Is it located near the coast?

A. The Long Island Railroad, of course, runs from New York City to Montauk Point.

Q. And that is—it borders along the Atlantic Coast here?

A. It borders along the Atlantic Coast; yes, sir.

Q. What are those gondola cars used for hauling in particular, Mr. Kleine?

A. I already stated.

Examiner HOY. He stated rock and for road building.

The WITNESS. Sand, gravel.

1497 By Mr. WARE:

Q. Now, because of the use which is made of them in hauling this stone, sand, and gravel, and the location of the Long Island Railroad, aren't those cars more subject to corrosion probably than cars which are operated over the Pennsylvania Railroad?

A. Correct.

Mr. FORT. Conceded.

By Mr. WARE:

Q. The car which is handled over the Seatrain—it might make one trip over the Seatrain and not see the Seatrain again for another year; isn't that possible?

Mr. FORT. He has not said anything——

A. I am acquainted with——

Mr. FORT. Just a minute. He did not testify at all with respect to Seatrain, or any knowledge of when it ran or did not run, or how it ran.

Examiner HOY. Or anything about cars on the Seatrain, for that matter.

Mr. FORT. That is right.

By Mr. WARE:

Q. On your Exhibit 56, what percent of those 16,275 cars, Mr. Kleine, are in bad order at the present time, if you know?

A. I will furnish the figure. I don't have it with me.

Mr. WARE. All right. That is all.

The WITNESS. If it is desired.

Mr. FORT. In order to have the record clear, does anyone—do you want that figure furnished or not? I want to furnish
1498 it if anybody wants it.

Examiner HOY. Do you want it, Mr. Ware?

Mr. WARE. If it is convenient for him. If it is not, why——

Examiner HOY. Can he do it at this hearing or later?

Mr. FORT. Can you 'phone that up tomorrow?

The WITNESS. Yes.

Mr. FORT. From Philadelphia?

The WITNESS. Absolutely, because I have it right in my office.

Examiner HOY. All right.

Mr. FORT. We will undertake to get it, and if you will remind us, we will have it.

Mr. WARE. All right. Thank you.

Examiner HOY. Have you finished, Mr. Ware?

Mr. WARE. Yes, sir.

Examiner HOY. Have you any questions, Mr. Thompson?

Mr. THOMPSON. Yes.

By Mr. THOMPSON:

Q. Still on your Exhibits 55 and 56, Mr. Kleine, can you tell me what kind of ballast, I guess you call it, for stone and stand and gravel, is put in cars, as to whether it is dry or wet or not? For instance, the gravel—is that loaded wet?

A. Gravel is loaded damp, yes, sir; in some cases; in some cases, dry.

1499 Q. The same is true of sand, is it not?

A. The same is true of sand.

Q. Picked up and dumped in the car?

A. Yes.

Q. And, I believe you testified that on the Pennsylvania Railroad they are used for pipe loading and such as that?

A. Also sand and gravel.

Q. Yes; but where wet ballast is put in a car, that does have a more corrosive effect than where it is used for dry loading; does it not?

A. Surely.

Q. Now, on these mill type gondola cars, that you spoke of, do they have metal sides or the wooden side cars?

A. They may have what they term fish belly. Both the G. R. cars and the G. R. D. Cars have fish belly side sills and center sills. That is for carrying concentrated loads in the center. They are all metal.

Q. All metal—no wooden construction?

A. The floor is of wood, and the stringers supporting the floor are of wood, but they rest on cross bearers, which are metal.

Q. Now, I believe you stated that you considered the longer life of the Pennsylvania cars shown on Exhibit 56 than the Long Island cars shown on Exhibit 55 was due to the greater effects of corrosion on the Long Island cars; is that correct?

A. Or the atmospheric conditions prevailing on the

1500 Long Island Railroad. The salt water; the salt air condition.

Q. Well, I notice that the shortest age of the Long Island cars that you had retired was 4 years and the shortest age of the Penn-

sylvania cars that you indicated on Exhibit 56 was 2 years. How do you account for that—or 1 year; one car there shows that it was retired in one year on the Pennsylvania?

A. Well, where do you find——

Q. It is the sixth item, I believe, in Exhibit 56; it is the sixth or seventh item.

A. You say in one year. The cars were built in 1902, and the first car that was retired was in 1904.

Q. But you show in your last column there, in the seventh line I believe it is, that one car was retired at the age of one year.

A. Yes.

Q. How do you account for that, if you consider tha' the atmospheric conditions on the Long Island are worse than on the Pennsylvania cars?

A. That car was in a wreck.

Q. I see. Now——

A. You take the Pennsylvania cars for instance.

Mr. FORT. That is a Pennsylvania car you are speaking of?

The WITNESS. Yes. Well, go down the Pennsylvania cars. All those retirements, until you get down to 1935, are cars generally retired on account of accident.

1501 By Mr. THOMPSON:

Q. Well, would that be true of——

A. You get into the first real retirement there in the year 1935, the 1,643 cars, and then you go to 1936, 397; 1937, 4,542; and 1938, 47. Now, similarly on the Long Island, you get into the retirement of those cars. If you will notice, about 1939——

Examiner HOY. You mean up to 1929 on the Long Island most of them were retired because of wrecks?

The WITNESS. Yes.

By Mr. THOMPSON:

Q. I understood you to say that these exhibits indicated that the retirements were due to corrosion, but you qualify that now, do you?

A. Well, they do show the difference in the retirements of cars between those on the Long Island and those owned by the Pennsylvania. Now, when you take an individual case, why, you have to analyze that case, and from your experience, you know that you would not retire a car built in 1902 in the year of 1904 for corrosion.

Q. Well, I just want to get that clear, because I understood you to testify in the beginning that these retirements were due to corrosion?

A. Well, the retirements are due to corrosion on those Long Island cars, and they are also due to corrosion on the Pennsylvania

cars, but the difference in the average—you have to take the
1502 average. One is 20.4 years and the other is 33 years, with still 6,858 cars—with still about 9,000 cars in service.

Examiner HOY. What does the average mean, if most of them were retired on account of wrecks?

The WITNESS. Most of them were not retired on account of wrecks, Mr. Examiner.

Examiner HOY. That is it. How many were? You say on the Long Island, up to 1929, they probably were retired on account of wrecks.

The WITNESS. Yes.

Examiner HOY. And you say on the Pennsylvania, up to about 1935, why, you get into your real retirements?

The WITNESS. That is right.

Examiner HOY. Indicating that prior to that time they were retired on account of wrecks.

The WITNESS. That is right.

Examiner HOY. Well, beyond 1929, you have life of 23, 26, 28 and 29 years on the Long Island; and you have 30, 32 years, 34 years on the Pennsylvania.

Mr. FORT. Not on the Long Island, do you?

Examiner HOY. Yes; those that were retired in 1937 were 29.7 years old when they were retired.

Why stop at 1929 for the wrecks? Why don't you stop at 1926 or 1932?

Mr. FORT. May I ask the witness one or two questions?
1503 I think that can be easily cleared up.

Mr. THOMPSON. May I finish my cross?

Mr. FORT. Yes; go ahead.

Examiner HOY. Continue.

By Mr. THOMPSON:

Q. Will you turn now to Exhibit 51, and tell me if the class repairs you show on that exhibit include accident repairs?

A. As I say, no; not on this exhibit.

Q. Not on 51?

A. No, sir.

Q. Well, does it include cost of improvements in the way of additions and betterments other than the couplers?

A. Well, I have——

Q. Air brakes, rather?

A. Well, I have explained that the air brakes and the couplers and the draft gears are improvements.

Q. Well, would that be true to any extent of the other items that you show on the exhibit?

A. No, sir.

Q. Well, can you tell me how long the cars that you—the type of cars that you use on this exhibit were maintained as Class A cars, or in Class A condition, from one shop into another?

A. These cars were practically maintained as Class A cars until such time as they got in bad condition.

1504 Q. Well, then, would there be additional repair costs in between shopping, besides the costs you have shown on this exhibit?

A. Naturally, you would have lining repairs, you will have flooring repairs; you will have coupler repairs, draft gear repairs.

Q. Well, now, on your Exhibit 52, please, are you familiar with the proceeding that Mr. McCollester asked you about, Docket No. 17801, in which the Commission approved of the dollar per day per diem?

A. Generally, yes.

Q. Well, in the Commission's report, based on the evidence in the case, it is shown that this dollar per day—this one dollar per diem includes an item of 42 cents per day for repairs. Wouldn't that 42-cent repair item include repairs due to corrosion and things of that sort?

A. Yes.

Q. So that——

A. Running repairs, everything; heavy repairs, accident repairs.

Q. In other words, it includes all the costs that entered into the life of the car?

A. Yes.

Q. Based over the period of its existence?

1505 A. Part of inspection is in there.

Mr. THOMPSON. That is all I have.

Examiner HOY. Just how many cars were represented in this test here, in Exhibit 51?

The WITNESS. Why, that was run for about a two months' test.

Examiner HOY. Two months' test at one shop?

The WITNESS. At one—because the cars of one class are usually repaired at the one shop, and at that time I think we were turning out 16 cars a day for 25 days, and that is a couple of months' record.

Examiner HOY. Mr. Fort.

Mr. WARE. Mr. Examiner, I have a couple of more questions.

Examiner HOY. All right, Mr. Ware.

By Mr. WARE:

Q. Mr. Kleine, on your Exhibit 56, I noticed there during the year 1935, the year 1937, you repaired 1,643 and 4,542 cars respectively. Now, were those cars in each of those two years, in active service right up to the time of their retirement?

A. They were not. The way you handle your dismantling of cars is this way: You set aside the cars when they come due for a certain amount of repairs, which is heavy repairs, and then, when you start a tear-down program, you take only those cars that have been set aside.

1506 The policy on the Pennsylvania Railroad is for every car that is torn down—it is passed upon by myself, through records submitted to our office, and the supervisor of motor power expenditures, and that car is approved for tear-down by myself and by the chief of motor power. We do not tear them down, as you infer, by—in certain years some roads do that, but we take them down as they come due for heavy repairs, if that car is no longer to be maintained.

Q. Well, now, were these cars set aside for heavy repairs in these years in which they were retired, or were they set aside for heavy repairs sometime prior to that?

A. Sometime prior to that.

Q. Well, can you tell me how long, prior to 1935 and 1937, were these cars set aside for heavy repairs?

A. Well, I should say they accumulated within a year or two on account of the corrosive condition of the underframe.

Q. Well, then, how does it happen, Mr. Kleine, when those cars were set aside for these heavy repairs, that they were not retired right at that time?

A. Retired immediately?

Q. Yes.

A. They may not have lived out their full depreciated life at that time, and you may not have been in a position in your expenses to take the cars out of the equipment.

Q. What do you mean by "you may not have been in a
1507 position, with your expenses to take them out of equipment"?

A. You know, you have a depreciation reserve account, and when a car has a certain estimated life or certain life that has been placed on that particular car, if it hasn't lived out that life, you have to charge the difference been the age of that car and the full depreciated value to your expenses and credit your reserve account.

Q. Well, then, is it true, Mr. Kleine, then, that in the years 1935 and 1937, your expenses, or, probably, the allocation to your department of money was such that you could retire this number of cars in those two years?

A. That I could?

Q. Yes.

A. No, sir; could not.

Mr. Fort. You did, did you not?

By Mr. WARE:

Q. You did, though?

A. Oh, you mean in those years?

Q. Yes.

A. That is correct.

Q. Take the year 1934 and the year 1936. That situation might not have been true, and you would not want to have retired those cars in those two years?

A. Plus a tear-down program which you set up. You don't tear the cars down singly, you know. You set up a program and you take down 10 or 16 cars a day, so that you will take
1508 them down in the least expensive way.

Examiner HOY. Well, I do not understand here why you have practically no retirements up to 1935, and then, all of a sudden, had 1,643. They were running in around 4 and 10 and 15, and there is one 43, and then, in 1935, you had your big retirement, 1,643.

The WITNESS. Yes.

Examiner HOY. Now, the question is in my mind: how long were those 1,643 cars out of active service before 1935, when you retired them on your books?

The WITNESS. They accumulated for a year of two.

Examiner HOY. For just a year of two?

The WITNESS. Yes, sir.

Examiner HOY. In other words, the deterioration on those cars was such that it did not warrant to maintain them in repairs, and furthermore, at that particular time, there wasn't need for cars in transportation service, because there was a surplus?

Mr. FORT. Mr. Examiner, may I ask a question right there on the same line?

Examiner HOY. Go ahead.

By Mr. FORT:

Q. As to that 4,542 in 1937, is it true also that that might carry an accumulation for a year or so?

A. That is correct.

Q. But not for any longer period?

1509 A. No; because they accumulated between this period of 1935 and 1937, when they were torn down.

Q. Yes.

Examiner HOY. I can understand why the 4,542 should have accumulated over a two-year period, when two years previously 1,643 were retired, but I still do not quite understand why there was very little retirement in the cars until 1935.

Mr. FORT. All bought about the same time, this exhibit shows, you see, Mr. Examiner, and they naturally would run somewhat parallel lives.

Mr. MCCOLLESTER. It depends on the financial prospect.

Examiner HOY. When they were retired, here, in the last column, from one to two years could be deducted from the active service of the car, could it not, in any year?

Mr. FORT. I would not say necessarily in any year, but as to that 1,600, that would be apparently so.

The WITNESS. That is right.

Examiner HOY. Well, take the ten in 1924. Why couldn't they have been accumulated for a year or two, too?

Mr. FORT. As a matter of fact, there were so few—

The WITNESS. You see, out of 16,000 cars, those ten were accident cars.

Examiner HOY. All right, continue.

Mr. FORT. Are you through, Mr. Ware?

Mr. WARE. No; I have a few more questions.

1510 By Mr. WARE:

Q. Now, Mr. Kleine, is it not a fact that you might have had a far greater amount than the total of the number of cars that were retired in 1935 and 1937, which accumulated over a period of years, and you retired just so many each one of those two years?

A. No; we cleaned them up when we started in on the retirement.

Q. In other words, you retired 1,643 cars in 1935, you cleaned up your accumulation of cars, which were set aside for——

A. That is right.

Q. Major repairs; is that right?

A. That is right.

Q. Was the year 1935 and the year 1937—were they pretty good revenue years, so far as the Pennsylvania Railroad was concerned?

A. No; 1937 was fair; 1935 was poor.

Q. Well, does the fact that 1937 was pretty good—does that account for the fact that you retired a greater number of cars in that year than in any other year, as shown on your exhibit?

A. (To the reporter.) Will you read that question, please?

(Question read.)

A. The average charge to expenses of retirement of a car is $24.00 a car, so you have 76—over 76—$80,000 there, you see, in expense charge. 1937 was a fair year, and these cars had lived

by that time practically their depreciated lives, and they
1511 were due for heavy repairs on account of the center sills which were corroded out, and we didn't renew center sills and side sills corroded out, cross bearers, so that was the decision of the management—to take the cars down at that time.

Q. Well, Mr. Kleine——

Examiner HOY. What is the life of a car for depreciation purposes?

The WITNESS. The G. R. car?

Examiner HOY. Yes.

The WITNESS. 33 years.

Examiner HOY. Well, that brings me back to my question. The 33 years expired in 1935. Then you retired 1,643 cars. I am wondering how many of those went out of active service, and were put on a side track to wait for the depreciation to accrue—perhaps two, three or four years before 1935. That is what I am wondering about.

The WITNESS. Yes; I say one or two years, Mr. Examiner.

Examiner HOY. You say one or two years.

By Mr. WARE:

Q. Mr. Kleine, could you furnish us with an exhibit, breaking down that number of cars—the number of cars retired in 1935 and 1936, showing the time when those cars, making up those totals, were set aside for heavy repairs?

A. We don't keep an individual car record on that; no, sir.

Q. Can you show when they were taken out of service?

A. I say, we don't keep an individual car record on that.

1512 Q. Don't you have some information which would show the number of cars that were in bad order, or set aside for these heavy repairs each year?

A. We have for bad order.

Q. How about heavy repairs?

A. Well, bad order—heavy repairs.

Q. Heavy repairs is the same?

A. Yes, sir.

Q. Well, then, have you some record which shows, as these cars were set aside for bad order——

A. Well, as I said before, they are accumulative.

Q. Well, could you show me how they accumulate over a period of years?

A. Yes, sir; I can.

Q. I would like to have that.

A. I can't give you by car numbers. I can give you totals.

Q. That is what I want, the totals.

Mr. FORT. I want to be sure we know what you want, so the record will not mislead anyone. That is 1,643 cars that were retired in 1935—do you have records or do you not have records that show when that 1,643 cars were taken out of actual service as being unserviceable?

The WITNESS. No: not those particular cars, I don't.

Mr. FORT. You see, I do not want you to think he is
1513 going to give you something he hasn't any records on.

Mr. WARE. Off the record.

(Discussion off the record.)

By Mr. WARE:

Q. Mr. Kleine, you stated that these cars are finally retired, subject to your final approval. You have the last word.

A. That is correct. No; Mr. Hankins has the last word. I recommend, and he makes the final approval.

Q. Now, haven't you some record which shows the cars, by number, which are in active service, and the cars, by number, which are set aside for heavy repairs?

A. No, sir. We have the number—Let me explain how the matter is handled. I have already stated that in 1929—I am taking all the cars now, all the freight cars in transportation service. In 1929, we had 5.5 percent bad order cars. At the present time we have 22 percent bad order cars. Now, you have got an accumulation of heavy repairs from time to time. In the meantime, you repair a certain number of those heavy repair cars, depending on what your budgets will allow you. Now, you have no use for the cars, so you select the cars that you require for service. When you come to the point of making a program for tearing down, then

you go out and inspect the individual car. That is, you send
1514 inspectors out to inspect the individual car, and you take the cars down that have the heaviest repairs, and that have lived their depreciated lives.

Mr. FORT. Mr. Kleine, I do not like to interrupt you, but I think that counsel is trying to find out from you what information he can get as to these 1,600 cars, just whether or not you can tell him when they were taken out of active service.

The WITNESS. I can't do that.

Mr. FORT. The witness has already testified it was within a year or two years before this time, of his personal knowledge. I think that is getting about as close as any practical person requires, but if we can get any closer, we will be glad to do it. Are there any further questions?

Examiner HOY. Are there any further questions, Mr. Ware?

Mr. WARE. No; I guess not.

Examiner HOY. Is there anything further on redirect?

Mr. FORT. I just have one question.

Redirect examination by Mr. FORT:

Q. These cars, on the Long Island, were retired, you said, by reason of corrosion?

A. That is right.

Q. Now, is that corrosion of underframe?

1515 A. That corrosion was underframe; complete.

Q. Underframe, complete, including the center sills?

A. Center sills and side sills. The big expense, of course, is when your center sills corrode.

Q. Now, were those cars used primarily for dry crushed stone on the Long Island Railroad?

A. Yes, sir; roadway building materials.

Q. Was there anything loaded in those cars which would hasten the corrosion of the center sills in the way of lading?

A. Nothing, excepting, as I stated, where your sand or gravel may be damp, or wet when loaded. The trouble on those cars, of course, is the atmospheric condition on the Long Island Railroad.

Mr. FORT. That is all.

Examiner HOY. Mr. Kleine, you previously stated—you stated in response to Mr. Fort's last question, that those cars on the Long Island were retired because of corrosion.

The WITNESS. Yes.

Examiner HOY. I understood you to say in response to a question of mine previously that up to about 1929, the retirements were not due to corrosion.

Mr. FORT. Mr. Examiner, I rather imagine you can not make a mathematical division, but, generally speaking, that would be true, as you could see.

1516 The WITNESS. No; I would say, Mr. Examiner, those 12 cars which were taken out there in 1915—there was very specific reason for 12 coming due unless they had a very serious wreck. Of course, I cannot recall from memory now why those 12 were taken out, but, you see——

Examiner HOY. But you would say they were not taken out because of corrosion; is that it? Would you say they were taken out because of corrosion at an age of 7.8 years?

The WITNESS. They had corrosion in them, but I wouldn't say off the bat that they were taken out for corrosion.

Examiner HOY. Yes.

The WITNESS. I would have to—if it could be checked back, but I don't think it can at this time—that is 15 or some years back, but take, here, in 1929, '30 and '31, I went over on the Long Island to inspect these cars, because I couldn't believe that they were in the corrosive condition as was reported.

Examiner HOY. Well, I simply wanted to get the record straight, and my own mind straight. Is it your testimony that up to about 1929 corrosion was not the cause for the retirements?

The WITNESS. Not the actual cause.

Examiner HOY. Not the actual cause for the retirements?

1517 The WITNESS. Although repairs had previously been made to correct certain corrosive conditions.

Examiner HOY. All right; that is all.

Mr. WARE. Mr. Examiner, may I just ask this one question?

Examiner HOY. Proceed.

Mr. WARE. And see if I can come near where I am trying to go.

By Mr. WARE:

Q. Mr. Kleine, when a car is set aside awaiting a decision as to whether that car will be repaired or scrapped, do you not keep some sort of a record of that car?

A. Of that individual car; no, sir. The car is not set aside.

Q. Well, how do you——

A. The car is shopped for heavy repairs, and that may be located in Chicago, or it may be located in St. Louis, Columbus, or any place on the railroad, and that car is held for heavy repairs. Now, you have got a depreciation——

Mr. FORT. Mr. Kleine, I was just wondering. You are answering a direct question. He asked you if you have any record during that period, and you say you have none.

The WITNESS. I have no record of the individual cars.

Mr. FORT. There is no point going beyond that unless the Examiner wants him to go.

By Mr. WARE:

1518 Q. How do you know, then, Mr. Kleine, what to do with a car?

A. Well, you have a shopping list—what you call a Class 1, Class 2, Class 3, Class 4 repair car, and the regions themselves—when the inspector shops that car, why, that particular car is looked over and classed for the repairs. Now, you set up certain shops to make repairs for an individual car, and those cars are trained to that particular shop, but they are not set aside for tear-down. That is done on a special instruction, when you have an accumulation.

Mr. WARE. All right. That is all.

Mr. FORT. That is all, sir.

(Witness excused.)

(Discussion off the record.)

Examiner HOY. We will adjourn to tomorrow at ten o'clock.

(Whereupon, at 4:35 o'clock p. m., February 28, 1939, the hearing was adjourned until 10:00 o'clock a. m., March 1, 1939.)

1520 IN THE MATTER OF DOCKET NOS. 25728 AND 25878

HOTEL NEW YORKER, NEW YORK, N. Y.
March 1st, 1939. 10:00 o'clock, A. M.

Before Hon. E. J. HOY, Examiner, Interstate Commerce Commission. Hon. M. J. WALSH, Examiner, Interstate Commerce Commission.

Appearances (same as previously noted).

1522 PROCEEDINGS

Examiner HOY. Proceed, Mr. Fort.

Mr. LARIMORE. Mr. Examiner, I was not here yesterday morning, and I am one of those representing Missouri-Pacific Lines. I want to make some inquiry about the appearances here. Now, this is no reflection on Mr. Fort, but I understand that he entered his appearance as counsel for the Association of American Railroads.

Examiner HOY. Yes, sir.

MR. LARIMORE. And that he is through that Association attempting to speak for certain lines who are members of that Association that are defendants here. Now, of course, it goes without saying that if he, whatever clients he happens to represent, insofar as this case is concerned—if he is speaking for these defendants as counsel for them, it is very proper, and I can have no objection, but if as counsel for the Association of American Railroads he is attempting as counsel for that association to speak for any individual defendants here, I am objecting, on this ground: That the articles of Association, whereby the Association of American Railroads was formed, give him no such authority.

1523 I might as well come in here and say that I represent a tea and coffee company, and I want through that company to speak for these defendant lines. Now, I am familiar with the articles of that association and I know that where there is a conflict between certain sets—one set of members of the Association and another set, the Association is not authorized to speak. Now, I am not going into the question of the propriety or impropriety of the appearance of the Association in this case. That speaks for itself. But I am objecting, and I am going to continue to object all through this hearing and up to the time this case is finally decided, to the Association appearing in anywise in this case, unless they bring before you gentlemen the articles of the Association, and file them with these examiners, so that you can see whether or not they have injected themselves into a situation in which they have no legal right to be, and until those articles are filed here, and until the Examiner passes upon them, I am going

to object to any participation by counsel for the Association of American Railroads in this case and I make that objection now.

Mr. McCollester. Mr. Examiner, I would like to supplement what Judge Larimore has said, and supplement what I said yesterday on the same point. I think there are two questions here. In the first place there is the question of the intervention of the Association of American Railroads in this proceeding.

1524 Now, I agree with Judge Larimore, and he agrees with the points I made yesterday that the Association, as we understand its articles of organization, has no power to intervene in a proceeding of this kind. Apart from that, I would submit—I do submit that it has no interest, and can have no interest entitling it to intervene in this proceeding as an entity apart from the railroads themselves. It owns no cars, it will not itself be affected by any order that may be entered in this proceeding, and to the extent that it may be affected, it would be affected as much by the way the order operates on the complainants as the way the order operates on the defendants, because all of them are members of the Association. Therefore, I ask your Honor to reconsider your ruling permitting the intervention of the Association, and we would ask for argument before the Commission on the question of the Association's right to intervene.

Now, the second question, apart from the intervention of the Association of American Railroads in the proceeding, is whether Mr. Fort, as counsel for the Association can appear here, has the authority to appear here as counsel for individual railroads.

Now, it is perfectly possible for individual railroads to designate Mr. Fort as their counsel in this proceeding, whether he is

1525 counsel for the Association or not. You have accepted his statement that he is counsel for the Association, but I do not think that his connection with the Association carries with it the authority to represent the individual railroads in this proceeding.

Now, the Commission has in a number of proceedings questioned the authority of counsel who claimed to represent complainants, to represent them, and I think that it is appropriate in this proceeding to question Mr. Fort's authority to represent any individual defendants and to ask what individual defendants, if any, he claims to represent, and what his authority to do so is.

Now, the point is important, if the Examiner please, because we have had offered here yesterday, and I assume we will have offered today considerable amount of opinion testimony.

Now, that opinion testimony may be binding, and it is binding upon the defendants on whose behalf it is offered. Therefore, it is important to know as to what defendants that testimony is offered, and on whose behalf it is binding.

Now, if Mr. Fort claims to represent individual railroad defendants, by virtue of his connection with the Association of American Railroads, then I think that we are entitled to ask that there be produced here any action of the Association or through the Association which would empower him through
1526 the machinery of the Association to act for individual railroads, and to find out what those individual railroads are.

Now, Mr. Fort stated yesterday that his appearance here would not prevent any individual railroads that did not want him to appear for them from appearing. I take it that that, turned the other way around, is in effect saying that he claims to represent any railroads who do not come here and say that he does not represent them.

Now, I can do the same thing, and I can claim to represent all the defendants who do not say that they do not want me to represent them, but that does not give me the authority to represent them, and the Commission should not accept my statement in that regard.

Now, therefore, I think we are entirely within our rights, Mr. Examiner, in asking that there be produced here not only the action of the Association of American Railroads by which it claims to intervene in this proceeding, but if it is claimed that Mr. Fort, through the Association of American Railroads, or otherwise, is here to act for any individual defendants, the action through the Association, or otherwise, or any authority from individual defendants empowering Mr. Fort to speak for them in this proceeding, and to introduce evidence on their behalf.

We would like to know, for example, what authority Mr. Fort has to appear in this proceeding and to offer opinion
1527 evidence directed at an apparent claim that the compensation for cars should be something different from the regular per diem rate, in the case of those defendants who have consented to their cars going via Seatrain at the established per diem rate, and there are a lot of them, if Your Honor please.

Is it claimed that as to those railroads the Association binds them to oppose Seatrain, and binds them to contend for some different compensation, because the Association purports to appear in this proceeding? If that is so, we want to know, by virtue of what authority such a contention can be made.

So that, if Your Honor please, to bring the matter to a head, I think we will have to move to strike from the record the testimony which has so far been offered by Mr. Fort as counsel for the Association of American Railroads. If any individual defendants, through their properly authorized counsel, want to come in here and reoffer that testimony as testimony of the individual defend-

ant railroad, why, of course, they can do so, and we will not impose upon the record the burden of repeating the testimony, but as testimony of the Association of American Railroads, we submit that it cannot bind either the Association or any defendants, or be properly considered as evidence offered in this proceeding by anyone that has authority to appear here.

1528 Mr. LARIMORE. I ask that he be required to file with this body the articles of Association which formed the Association of American Railroads which I assert——

Examiner HOY. I did not hear you.

Mr. LARIMORE. I ask that he be required to file the Articles of Association, the compact which has now become an alleged compact, to establish the Association of American Railroads in this case because I assert that from that very compact there would appear his complete lack of authority to appear as counsel for the Association of American Railroads.

Mr. FORT. Do you wish to have an encore, too, Mr. McCollester?

Mr. MCCOLLESTER. I am all through.

Mr. FORT. If the Examiner please, I do not think anything developed this morning that did not develop yesterday. I am sorry Mr. Larimore was not able to be here yesterday. Perhaps then it would not have been necessary to have this repeated. There has been some misapprehension exhibited in Mr. Larimore's statement, also in Mr. McCollester's statement. My appearance here, as stated yesterday, is for the Association as such, not for individual lines. I also stated that any member of the Association was, of course, free to appear, and take any position it wished, offer any evidence that it wished.

1529 As far as the Articles of Association are concerned, and internal powers of the Association, as I stated yesterday, obviously, that is not a question for the Interstate Commerce Commission.

I believe the articles are in this record. I think I found them in the record when I looked over the early record. If not, we will be very glad to give anybody a copy all through the United States. Everybody has one. I think Mr. Larimore probably has one in his bag now. There is no additional argument I wish to make.

Mr. LARIMORE. I do not think they are of record in this case, and I want them of record in this case.

Mr. FORT. We will be very glad to furnish it. I think it is in the case.

Mr. LARIMORE. I want it furnished, not for my information, but for the information of the Examiners in the case. That is what I want—for the Commission.

Mr. McCollester. The Association of American Railroads was not in existence when this case was started.

Mr. Fort. I will be very glad to file it, if the Examiner wants it.

Examiner Hoy. Yesterday, the Examiner permitted the Association to intervene over the objections of Mr. McCollester and Mr. Ware and Mr. Thompson, I believe, and he accepted Mr. Fort's statement that he appeared for the Association in
1530 this proceeding, without requiring him to file specific evidence of his authority to appear. There has been nothing said this morning that would make the Examiner change his mind on that question. Now, accordingly, Mr. McCollester's motion, as far as the Examiner is concerned, is denied. He can renew it to the Commission.

Mr. McCollester. Well, Mr. Examiner, may I point out that the Commission's rules of practice permit interventions only upon a showing of interest. Now, we have had no showing of interest here, so far as the American Association of Railroads is concerned, and I fail to see how it can have an interest, either under its own articles or in the nature of the issues—in light of the nature of the issues in this proceeding, and I think we should have a statement before the Association is permitted to intervene of its claimed interest, which entitles it to be an intervening party in this proceeding. The mere fact that they may have a counsel here who enters that appearance does not prove interest.

Examiner Hoy. The intervention was permitted yesterday morning, and the Examiner does not feel that he will change his action or his ruling yesterday morning permitting the Association to intervene. They already are, and have been since
1531 yesterday morning, an intervener in the proceeding.

Mr. Larimore. I want to note an exception on the record to the ruling of the Examiner that permits counsel for the Association as such to appear in this case for any purpose, in face of the fact that up to now there has been nothing filed with the Commission in anywise indicating that it is within the authority of the Association of American Railroads or the power of such association to appear in this case.

Examiner Hoy. The record will show the exception. Proceed with the witnesses, Mr. Fort.

Mr. Fort. Yesterday, Mr. Examiner, there was an exhibit introduced, marked exhibit 56 by Mr. Kleine, and that exhibit dealt with certain Pennsylvania cars, 16,275 in all, showing that up until 1938, 6,858 had been retired at an average age of 33 years, and that the balance had not yet been retired.

Mr. McCollester. I think, or, at least, some one of counsel, asked what percentage of those cars not yet retired were awaiting repair at this time.

Mr. Kleine telephoned this morning to Mr. Eshelman, and gave these figures: As of January 31, 1931, 564 of those cars were awaiting heavy repair, 394, awaiting light repairs, which totals 958.

Mr. McCollester. Mr. Examiner, in view of the fact that it is now apparent that Mr. Kleine can tell us how many cars
1532 are awaiting heavy repairs at any particular time, I ask that the defendants be—the Association of American Railroads be called upon to furnish for each of the years—well, beginning 1925, the number of these cars awaiting heavy repairs at the end of each year.

Mr. Fort. On the Pennsylvania Railroad, you mean?

Mr. McCollester. Of the cars shown on exhibit 56.

Mr. Fort. Oh, each year from 1925 on?

Mr. McCollester. Yes.

Mr. Fort. Mr. Eshelman was in contact with Mr. Kleine. Perhaps he can——

Mr. Eshelman. Mr. Examiner, if I might explain, Mr. Kleine telephoned me this morning and gave me the figures beginning January 30, 1937. He said that prior to that period, the G. R. cars were combined with another class of gondola, and that he cannot separate them, but he does have the figures here beginning January 30, 1937, also as of December 31, 1937, December 31, 1938, and January 31, 1939. Those I could ask the reporter to copy, but his records do not permit of his making the separation earlier.

Mr. McCollester. We should also like to have furnished advice as to how many of these cars were cars with arch bar trucks that had to be retired anyway.

Mr. Fort. Mr. McCollester, I wish you could have thought of these questions when Mr. Kleine was here, and on the
1533 witness stand.

Mr. McCollester. They can be furnished.

Mr. Fort. We will be glad to furnish them, but you are just beating over the same ground time after time. Let us get along and try this case.

Mr. McCollester. Mr. Kleine showed a surprising ignorance.

Mr. Eshelman. Mr. McCollester, that is hardly a fair statement.

Mr. Fort. Anything else you want from Mr. Kleine, I wish you would think of it now.

Mr. McCollester. I have made my request.

Examiner Hoy. Well, the first request, apparently, cannot be complied with because they did not keep the records except for

the years 1937 and 1938. Mr. Eshelman has those figures. I think he could put those in the record.

Mr. FORT. Do you want——

Examiner HOY. Mr. Fort can read them in with the others. You read them in, Mr. Eshelman.

Mr. FORT. Mr. McCollester: Do you want these other figures?

Mr. MCCOLLESTER. Yes.

Mr. ESHELMAN. Mr. Examiner, Mr. Kleine advises as follows:

On January 30, 1937, there were awaiting class one repairs
1534 1,535 of these G. R. gondolas; awaiting class two repairs 1,636, a total of 3,171.

On December 31, 1937, there were awaiting class one repairs, 357 cars; awaiting class two repairs, there were 108 cars; a total of 465 cars. On December 31, 1938, there were 571 cars awaiting class one repairs; 366 cars awaiting class two repairs; a total of 937. As of January 31, 1939, there were 564 cars awaiting class one repairs; 394 cars awaiting class two repairs; a total of 958 cars. Prior to January 30, 1937, the G. R. cars were combined with another classification of gondola, and he cannot separate.

Examiner HOY. Now, the second request—how about complying with Mr. McCollester's second request?

Mr. ESHELMAN. We will be glad to get that information. I assume there are none of them in that class, but we will get the information.

Examiner HOY. Call your next witness. Are you ready to call your next witness?

Mr. FORT. Yes. Mr. Benton.

ARTHUR BENTON was sworn and testified as follows:

Direct examination by Mr. FORT:

Q. Mr. Benton, are you connected with the Long Island Railroad?

1535 A. Yes, sir; I have general supervision of car maintenance.

Q. Just answer one question at a time. Are you connected with the Long Island Railroad?

A. Yes, sir.

Q. In what capacity?

A. General car inspector.

Q. How long have you held that position?

A. On the Long Island, since 1928.

Q. What are your duties as general car inspector on the Long Island?

A. General supervision of car maintenance inspection.

Q. What were you doing prior to 1928, when you became general car inspector?

A. I was general car inspector on the Pennsylvania Railroad, New York zone.

Q. New York zone—what territory did that cover?

A. It comprised at that time the old Trenton, Atlantic, and New York Divisions.

Q. How long did you hold that position?

A. Since 1924.

Q. In that position were your duties similar to your duties now on the Long Island?

A. The same.

Q. The same?

A. Yes, sir.

1536 Q. You have had an opportunity to personally inspect a good many Long Island Railroad cars, have you?

A. Yes, sir; I have inspected practically all the equipment on the Long Island since 1928.

Q. You also had occasion to inspect cars in general service on the Pennsylvania Railroad?

A. Yes, sir.

Q. As a result of your experience and observation, have you any conclusion as to whether or not—whether corrosion is greater or less on cars which spend the most of their time on the Long Island than it is with respect to cars which are in general service on the Pennsylvania?

A. The corrosion is greater on the Long Island.

Q. Now, if you have any concrete example which illustrates your conclusion, or is in part responsible for it, will you state what it is?

A. The Long Island had acquired some class G-24 gondolas in the year 1919.

Q. How many——

A. There were about a total of 400. I don't think they acquired quite all at that time. I can give you the exact dates they acquired them. They acquired 200 of them in 1924, and the balance in 1919.

Q. Now, all those cars were built in 1919?

A. They were all built in 1919.

1537 Q. And at that time the Long Island took 200 of them?

A. The Long Island took 200 from the Pennsylvania in 1924, but at that time they——

Q. Wait a minute, Mr. Benton. In 1919, when they built the 400, did the Long Island take 200 of them?

A. The Long Island took 250 of them at that time.

Q. Two hundred and fifty. How many did the Pennsylvania take?

A. The Pennsylvania—I don't know how many they took in total, but the Pennsylvania turned over to the Long Island in 1924, 200 of these cars.

Q. Now, you are talking about 1924 and I am talking about 1919.

A. 1919?

Q. Yes. Were the cars made in 1919?

A. They were all built in 1919.

Q. What happened to them in 1919? Who got the cars?

A. The Long Island got 250 of them.

Q. Who got the balance?

A. The balance the Pennsylvania got.

Q. That is right. Now, then, in 1924, did the Pennsylvania turn over to the Long Island the cars it had taken in 1919 of that batch?

A. They turned over 200; yes, sir.

Q. Yes.

Examiner HOY. How did they turn over 200 if they only
1538 got 150?

The WITNESS. They sold some more back to them at a later date.

Q. Mr. Benton, how many cars were made in 1929 of this class that you are talking about?

A. I don't know how many were build at that time. They are built by the Government, and prorated under Federal control, prorated to the different roads; various roads over the country got their percentage of these cars.

Q. I see, and at that time how many did the Long Island get?

A. The Long Island got 250.

Q. Two hundred and fifty and in 1924, the Pennsylvania turned over to the Long Island how many more?

A. Two hundred.

Q. And the 200 it turned over it had gotten in 1919—the Pennsylvania?

A. Yes, sir.

Q. I understand. Now, what have to say about the condition of those cars from your inspection with respect to corrosion?

A. I made an inspection of these cars early in 1928, and I find that the under frames are corroded practically out.

Q. At what time was that—in 1928, you say?

A. 1938, early in 1938.

Q. Yes, sir. Now, what type of cars were these?

1539 A. Originally they were steel underframes with a wooden superstructure. In 1930, they had steel sides applied to them.

Q. Gondola cars, you say?

A. Gondola cars; yes, sir.

Q. Now, were those cars which the Long Island first got in 1919 and the cars which the Pennsylvania turned over to it in 1924 largely in the service of the Long Island, and did they largely remain on the Long Island Railroad?

A. Practically remained on the Long Island Railroad. There were some offered in interchange; not many.

Q. What class of service were these cars in on the Long Island Railroad?

A. I would say they were mostly used for hauling of short poles and lumber.

Q. In 1937, were certain of these cars turned back to the Pennsylvania by the Long Island?

A. 1937?

Q. Yes.

A. Yes, sir.

Q. Do you know what the condition of those cars was with respect to corrosion?

A. Those cars had the underframe pretty well corroded at the time they were turned back. It was necessary for the Pennsylvania to put them through shop on account of the
1540 condition of the underframes.

Q. Where are the cars now remaining on the Long Island of this class, G-24?

A. Well, they are scattered at various points.

Q. Are they in service now?

A. About 13 of them are in service.

Q. What about the others?

A. There are some few of them that we have stored steel rails in, that they unloaded from other cars, in order not to load them in the ground, and they are held that way, but they are not serviced for revenue service.

Q. Are these cars serviceable in ordinary revenue service?

A. Only the 13 of them.

Q. Only the 13?

A. Yes.

Q. Will you state again why they are not serviceable?

A. They are not serviceable due to the corroded condition of the underframes.

Q. That is nineteen years after they were built?

A. Approximately nineteen years after they were built.

Q. Yes, sir. Now, how does the state of corrosion of those underframes compare with the state of corrosion of cars in general Pennsylvania Railroad service, of somewhat the same type, or have you any way of making such a comparison?

A. Well, in general, the center sills and side sills, of
1541 cars are the things that you mostly look at to last.

Q. You have been talking about underframes.

A. Underframes; yes, sir.

Q. Now, I am asking you for a comparison between these Long Island cars and the Pennsylvania Railroad cars of somewhat the same type.

A. About 33 to 35 years of the Pennsylvania.

Q. To bring the same state of corrosion?

A. Same state of corrosion.

Q. Now, have you had any occasion to make an extensive inspection of a large number of Pennsylvania Railroad cars with respect to corrosion?

A. I did in the year 1933.

Q. Where was that, sir?

A. At West Morrisville, Pennsylvania.

Q. How many Pennsylvania Railroad general service cars did you inspect at that time?

A. I inspected a total of a little over 3,000 general service cars, of which about 900 were gondola cars.

Q. About 900 were gondola cars?

A. With the fish-belly type, G. R. car that Mr. Kleine had on the exhibit yesterday.

Q. Were these cars comparable with this G-24?

A. The construction is a little different. They compare with
that G. R. D. car on the Long Island which had about
1542 nineteen years' service.

Q. Well, so far as underframes are concerned, is this G-24 car a heavier or lighter car than the Pennsylvania gondolas you inspected at Morrisville?

A. It is a better underframe.

Q. That is, the G-24?

A. G-24 is; yes, sir.

Q. What condition did you find the underframes in with respect to corrosion in this Morrisville test, or examination on the Pennsylvania in 1933?

A. Those cars were built around 1902, up until 1905, and of the 900 cars I inspected of that particular type I found them all fit for Grade A loading yet. The corrosion had not set in enough so that they would be taken out of service. In other words, those cars are in service yet, some of them.

Q. Well, is this correct, then—is this my understanding of what you said: after twenty-five or thirty years of service, these Pennsylvania cars which you examined at Morrisville showed a much less severe state of corrosion than the Long Island G-24's showed after nineteen years; is that true?

A. Yes, sir.

Mr. Fort. Thank you, Mr. Benton.

Examiner Hoy. Cross-examination.

Cross-examination by Mr. McCollester:

1543 Q. Does the Pennsylvania Railroad interchange cars with the Long Island?

A. Sir?

Q. Does the Pennsylvania Railroad interchange cars with the Long Island?

A. Yes, sir.

Q. And some of these Pennsylvania cars that you examined moved over the Long Island; do you know?

A. I couldn't say; I don't follow individual cars; I don't follow car numbers.

Q. Well, do you know the Pennsylvania gondola cars do go to the Long Island?

A. I would say they go to all railroads.

Q. Including the Long Island?

A. Yes.

Examiner Hoy. That includes the Long Island—all railroads.

Q. When was the last time that you inspected these Pennsylvania cars?

A. I have occasion to inspect Pennsylvania cars every day, as far as that is concerned, in my line of duty. I made a comprehensive inspection in 1933.

Q. Well, are you currently inspecting Pennsylvania Railroad gondola cars and other cars?

A. Yes, sir.

Q. And is it your testimony here that you have noted no
1544 extraordinary corrosion on those Pennsylvania cars that you have inspected?

A. Not in the same period of time. I note corrosion on the Pennsylvania cars, but the periods, I would say, are around thirty-five years, to get an equal corrosion with the cars continuing on the Long Island.

Q. Has the Long Island Railroad had the same equipment maintenance program as the Pennsylvania?

A. I would say yes, to my knowledge, since 1928.

Mr. Fort. Mr. Benson, you may not understand that question. I would not myself understand it, and I do not want——

Mr. McCollester. He evidently did understand it, because he answered it.

Mr. Fort. He answered it in the light of his understanding, but I just thought maybe it was a question that could be interpreted more than one way.

Mr. McCollester. I have nothing further.

Examiner Hoy. Is there any further cross-examination?

Mr. Ware. No.

Mr. Fort. That is all. Thank you, Mr. Benton.

(Witness excused.)

Mr. Fort. Mr. Randall.

George C. Randall was sworn and testified as follows:

1545 Direct examination by Mr. Fort:

Q. Mr. Randall, are you connected with the Association of American Railroads?

A. I am.

Q. What is your position with that association?

A. Chairman, general committee, operating and transportation division.

Q. How long have you held that position?

A. Seven years.

Q. Were you connected with the association prior to that time?

A. Yes, sir.

Q. Or its predecessor—wait until I finish my question—were you connected with the association or its predecessor prior to that time?

A. Yes, sir.

Q. In what capacity?

A. Ten years with the car service division, district manager at Dallas, 1923 and 1924; district manager at Birmingham, 1924 and 1925; district manager at Boston, 1925 to 1932.

Q. In your present position as chairman of the general committee—is that the term?

A. That's right.

Q. Can you tell us briefly what your duties are, having in mind more particularly car service and per diem?

1546 A. Well, reporting to the general committee we have the operating, transportation, freight station, protective, safety, medical and surgical, and the telegraph and telephone sections.

It is the duty of the Chairman to see that these sections function in a satisfactory way, and that the committees of each section consider the various questions that come before them.

The transportation section has two committees for the considerations of matters appertaining to car service and per diem.

Action taken by either of these committees goes to the general committee for approval, and if changes in the rules are involved, following approval by the general committee, it is referred to the membership for letter ballot.

Matters of dispute under the per diem rules are referred to a per diem rule arbitration committee of which I am chairman.

Q. Has the association published any car service or per diem rules?

A. They have.

Q. Have you copies?

A. Yes, sir.

Q. Mr. Randall, this seems to be made up of a printed pamphlet headed "Circular No. DII–499" and a number of
1547 mimeographed sheets. Will you explain what it comes to in all?

A. The car service and per diem rules in effect as of January 1, 1937, are found in the printed pamphlet. Any changes in the rules since that date are published as supplements to this circular, and those are the mimeographed sheets.

Q. Mr. Randall, who makes these rules?

A. The changes in the car service rules have their origin in the committee on car service, and the changes in the per diem rules, have their origin in the Committee on Records, as a general proposition, and both go into the general committee for approval.

Q. Now, the committee on car service is a committee of the Association of American Railroads, is it?

A. Yes, sir.

Q. How is that made up?

A. Made up of representatives of the member roads, territorially selected.

Q. How many on that committee?

A. Fifteen on the committee on car service.

Q. Now, what does the committee on records have to do with this?

A. They formulate and submit to the general committee suggestions for changes in the per diem rules.

1548 Q. How is the committee on records made up?

A. Similarly made up, from—usually car records men of the railroads, selected territorially.

Q. Does the general committee finally pass on those matters?

A. Yes, sir; in all cases.

Q. And those rules and regulations that are reflected here are rules and regulations which have been passed on by that general committee; is that true?

A. Yes, sir; and any changes in the rules have also been approved by letter ballot of the membership.

Q. Now, what is this general committee you speak of?

A. The general committee is made up of chief operating officers, speaking generally, of member roads, territorially selected. It has the supervision over all affairs of the operating and transportation division.

Q. Who selects that general committee?

A. The membership is selected by the member roads. Each representative on the general committee has a term of four years.

Q. How many members are there on the general committee?

A. 16.

Q. And you are the chairman?

A. Yes, sir.

1549 Q. Mr. Randall, are you familiar with the handling of business which comes to New York for delivery to Seatrain, and the business that comes off the Seatrain at New York for delivery to railroads?

A. Yes, sir.

Q. Will you explain please, briefly, the way that business is handled, what roads it goes through, and the physical handling of it.

A. All cars for movement via Seatrain must be delivered to that carrier by the Hoboken Manufacturers Railway. A direct connection with that road is made by only two carriers, the Erie, and D. L. & W., the latter by float. This means that cars arriving at the port via any other roads than these two must be delivered, one or the other for switching to the Hoboken. The Erie is used as the intermediate switching carrier in practically all cases. A car for movement via Seatrain is delivered the Hoboken through the Erie, and is held on the rails of the Hoboken until delivered to Seatrain.

Q. On business originating locally, in the New York district, going out-bound by Seatrain, how would that go?

A. It would be the reverse of that just described.

Q. Wait a minute. Why would it be the reverse. I am talking about out-bound business that originated locally in New York.

1550 Examiner Hoy. Out-bound movement over the Seatrain.

A. That would be delivered to the Hoboken through the Erie, if necessary, and would be held on the Hoboken for delivery to Seatrain.

Q. That is, if they were local switching movements?

A. That's right.

Q. Now, take the in-bound through business, coming in on the Seatrain, going to the interior by rail; how would that be handled?

A. That would be the reverse of the movement just described, all deliveries except for the Lackawanna being made via the Erie, as an intermediate carrier.

Q. In some instances, would you have two intermediate carriers?

A. Yes, sir.

Q. Two intermediate switch movements?

A. Yes, sir.

Q. Now, is there any business that comes in over Seatrain that is local to the New York district?

A. I understand there is.

Mr. McCollester. Does he know?

Mr. Fort. I am asking him now.

Q. Do you know?

A. Not from personal observation; no, sir.

Q. Don't you know that business comes in over Seatrain
1551 for delivery on the Hoboken points? When you say "not personal observation" you mean that you have not been there when the car was rolling, do you not?

A. That's right.

Q. Does business come in over Seatrain for delivery on Hoboken in New York?

A. Yes, sir.

Q. Now, Mr. Randall, will you give your opinion as to what would be reasonable and fair car detention and reclaim per diem rules and practices to govern these movements that you have been speaking about, in connection with Seatrain movements through the Port of New York?

Mr. McCollester. I object, Mr. Examiner. I object first on the ground that under the Organic Act of the Association of American Railroads, the witness is not entitled or empowered to give an opinion in a controversial matter between members of the association.

I object on the further ground that the question is irrelevant and immaterial. The issue, and the only issue in this proceeding relates to the refusal of owning roads to permit their cars to be delivered to Seatrain.

Now, per diem, reclaim, and detention, is not a matter which concerns the owning roads as such. It is a matter between the
carriers actually handling the cars, which may not be the
1552 owning roads. Also, any issue on that point is essentially a matter between the Hoboken Manufacturers Railroad and its trunk line conections, and there is no issue in this proceeding as to the terms and conditions under which the Hoboken shall interchange cars with its trunk line connections.

Let me illustrate it in this way, Mr. Examiner: Supposing a Pennsylvania car is destined for movement via Seatrain. The mat-

ter of detention or reclaim may be a matter between the Pennsylvania and the Erie Railroad, on the witness's testimony the Erie being the Hoboken's direct connection.

Supposing you have the Pennsylvania Railroad using a Missouri Pacific car. Now, the Missouri Pacific has consented to the delivery of its cars to Seatrain. There is no issue in this proceeding involving any refusal of the Missouri Pacific to permit its cars to go by Seatrain.

The questions of reclaim, however, would be equally applicable to that Missouri Pacific car, and reclaim settlement or per diem settlement would be made between the Hoboken and its direct connections with respect to that car, and would not have anything to do with the Missouri Pacific as owner of the car.

We are concerned here with the rights of the car owners, and their duties, to permit their cars to be interchanged, and not
1553 with matters between connecting carriers, affecting everybody else's cars.

Mr. FORT. Do you wish to hear argument, Mr. Examiner?

Examiner HOY. Well, I would like—my inclination is to rule that the evidence is not material here to the issue we have got here, which is the terms and conditions, including compensation, under which the owners of cars shall interchange them with Seatrain. I do not see where his opinion as to what he thinks would be proper car service on per diem rules is pertinent to that issue.

Mr. FORT. Well, let us see what the issue is. Take the background of the controversy, as I understand it. There are many people in the room more familiar than I am, and I am sure they will not hestitate to correct me, so I will undertake to tell you what I understand it to be.

Some railroads refuse to turn the cars over to Seatrain, or attempted to refuse.

Car service rules were put into effect, whether it was observed or not, and as I understand that rule—it is in the record—its general purport was to make it contrary to the rules to turn over the cars of railroads to Seatrain, except with special permission, which was granted in some cases.

The reasonableness of that rule was attacked in this
1554 proceeding, and the Commission, as I understand it, found that that rule was unreasonable, under certain conditions. That is to say, that where the Commission had established through routes, including the Seatrain, the Commission could also require that these cars be interchanged, on the theory that the Commisison as incident to its power to establish through routes, had the right to require the cars to be interchanged, and to establish reasonable rules in connection with the interchange, and in connection with the use of the through route.

On cars that come to New York—and I am stating this not as a fact, but as a situation which might exist theoretically, at any rate, and we will develop the facts—suppose that the Seatrain was not ready to take that car when it came to New York, and there had to be a certain amount of detention with respect to that car.

The question of who should bear the cost of the car service for that detention of the car is certainly a subject matter and a term and condition in connection with the use of that through route, and in connection with the interchange of those cars which the Commission would certainly have a right to settle if it had a right to fix compensation, and if it has a right to require the cars to be interchanged at all, those rights being in dispute.

I do not know how any language could be any broader
1555 than this: "Under what terms and conditions including compensation, cars shall be interchanged."

Who shall bear that detention when there is either necessary detention, and one line is responsible for it or another line is responsible for it—that is all a part incident to the interchange of the cars.

I think the question of the reclaim per diem on the switch line is also a part of the terms and conditions in connection with the interchange of those cars. At least, that is the way the case looks to us.

Mr. McCollester. Mr. Examiner, may I make the point that there may be a dispute between the Hoboken on the one hand and its trunk line connections as to who should bear the expense of detention of cars, but that is not a matter which affects the owners of the cars, and this proceeding is a proceeding against the owners as such, for their refusals, because it is only the owners, under Car Service Rule 4, who record their refusals.

Now, if you take a Rutland Railroad car, the Rutland has refused to permit the interchange of its cars to go to Seatrain, and that car arrives at Hoboken—it does not affect the Rutland Railroad one way or the other whether the detention—cost of detention of that car is borne by the Hoboken Manufacturers Railroad, by the Erie Railroad, or by Seatrain.

1556 The question is—under what terms can the Rutland, if it is a party to a through route, be required to permit its cars to be delivered to Seatrain, and I submit that this just indicates that the Association of American Railroads as an intervener is seeking to broaden the issues in this proceeding, which an intervener cannot do.

Examiner Hoy. I will overrule the objection and allow the witness to proceed. I now think that the evidence is admissible as to the terms and conditions under which the interchange shall be made.

Mr. McCollester. Exception, please.

Mr. Fort. Mr. Reporter, will you read the question?

Examiner Hoy. The record will note the exception.

(The last question was read by the reporter as follows:)

"Now, Mr. Randall, will you give your opinion as to what would be reasonable and fair car detention and reclaim per diem rules and practices to govern these movements that you have been speaking about, in connection with Seatrain movements through the Port of New York?

Mr. McCollester. Excuse me, Mr. Examiner, will you rule on my further objection that this witness is not under the Organic Acts of the Association of American Railroads empowered to express an opinion in a controversial matter between members of the Association.

Examiner Hoy. Yes; I will overrule that objection.

1557 You can develop that on your cross-examination of the witness, but I cannot go into all those questions here.

Mr. McCollester. Exception.

Examiner Hoy. He is produced by the attorney representing the Association of American Railroads, and he has stated his experience, his position. I will permit him to testify.

A. In my opinion, if the railroads permit, under requirement of the Interstate Commerce Commission or otherwise, their cars to move via Seatrain in connection with through routes, the responsibility of the Seatrain with respect to car hire should be that assumed by a road haul rail carrier under similar circumstances.

This would mean that with respect to movements via the Seatrain from New York, any detention on the Hoboken awaiting delivery of the car by the Hoboken to the Seatrain should be Seatrain responsibility, inasmuch as it is a fundamental rule between railroads that a road must always be in a position to receive business, and failing to do so, must assume the responsibility for car hire incident thereto, under provisions of Per Diem Rule 15.

The rail carrier bringing these cars into New York should be responsible to the Erie and Hoboken for an intermediate switching reclaim with a maximum of one day, if earned, but they

1558 should not be required to assume any time beyond that because of the failure of Seatrain to accept these cars currently.

With respect to cars arriving at New York on Seatrain for unloading within the switching limits at New York, Seatrain should be required to assume the intermediate reclaim of the Hoboken and the Erie each of one day, if earned, and should be required to assume terminal switching reclaims of the terminal

switching road upon whose tracks the car is unloaded within the New York switching rate itself.

As an illustration, on a car unloading at an industry on the New York Central tracks, the Seatrain should assume the intermediate reclaim of the Hoboken and the Erie, if earned, and the terminal switching reclaim of the New York Central unless the switching charge of the New York Central applicable to this movement includes car hire.

With respect to a car arriving at New York on Seatrain destined to a point beyond the New York switching district, the Seatrain should assume the intermediate reclaim of one day, if earned, of the Hoboken and Erie.

With respect to a car arriving at New York destined to an industry on the Hoboken, Seatrain should assume the terminal switching reclaim of the Hoboken unless the switching charge of the Hoboken includes car hire.

The principles underlying these opinions are those
1559 upon which per diem Rule 5, the reclaim rule of the association, is based.

Q. Mr. Randall, if one railroad brings interchange traffic up to its connection with another railroad, and offers that traffic to the second railroad, the second railroad is unable to take it, fails or refuses to take it, with a resulting detention on the line that brings it up to the connection, under the Car Service Rules and the general practice, who bears the cost of that detention?

A. Under per diem Rule 15 the holding line makes an offering report to the line failing to receive, and, having done so, they reclaim from the line unable to take the car the per diem accrual on the car until they do take it.

Q. And the purpose of that is to put car ownership costs on the person responsible for the detention; is that true?

A. Exactly.

Q. Now, when an intermediate line, intermediate switch line is used in making the connection between two road haul rail carriers, for reclaim per diem purposes, which railroad is the intermediate switch line supposed to be acting for? In other words, which road haul carrier bears the cost of the reclaim per diem?

A. In the case of a loaded car the line from whom it receives the car. As a matter of fact, it looks to the line from whom it
1560 receives the car for the reclaim in each case, but in the case of an empty car being returned over its loaded route, the line paying the reclaim to the intermediate switching carrier can in turn make a counter-reclaim against the road haul carrier for whom the service is performed.

Q. Well, now, let us take a loaded car and get that straight. If Railroad A brings a car up to an intermediate switch line called X, and the intermediate switch line X turns it over to Railroad B, then, as I understand it, Railroad A reclaims a per diem of the switch line X; is that true?

A. Intermediate Line X reclaims from Road A; yes, sir.

Q. Yes. A pays——

A. That is right.

Q. A pays X?

A. That is right.

Q. On the other hand, if the shipment is moving the other way Railroad B would stand the cost of that reclaim?

A. That is right, if it is a loaded car.

Q. If it is a loaded car. Now, if it is an empty car what is the difference?

A. If that same car which went from A to X loaded, thence to B—if B returns it in home route to X for delivery to A, B would pay X the reclaim in the first instance, but it may counter reclaim for that same amount against Road A, because A is the road for whom the service was performed.

1561 Q. On the theory that the returning of the empty is for A?

A. That is right.

Q. Now, as to the terminal switching and reclaim of Terminal switching, in each case that reclaim is paid by the road haul carrier that connects with the terminal carrier?

A. That is right.

Q. That would be whether it is originating or being delivered?

A. Yes, sir.

Q. On the switch lines; is that true?

A. Yes, sir.

Q. Getting back to Seatrain, if the Erie Railroad should turn a car over to the Hoboken, and Hoboken should turn the car over to Seatrain, who would stand the reclaim costs there under this general principle you have been talking about? The Erie Railroad brings a loaded car in-bound, gives it to Hoboken, and Hoboken gives it to Seatrain?

A. The Erie pays the Hoboken the intermediate switching charge, if earned.

Q. As a reclaim?

A. Yes, sir.

Q. Now, suppose the shipments should come from the Seatrain or go over the——

Mr. MUCKLEY. He said intermediate switching charge.

1562 The WITNESS. I should have said reclaim, intermediate switching reclaim, if earned.

Examiner HOY. What do you mean by "if earned"?

The WITNESS. Very often these cars are handled on the intermediate switching road without the accrual of per diem. In other words, the car is received and delivered, and therefore, no per diem is earned. They get no reclaim under those conditions.

Q. Suppose a car should come in by Seatrain and move over the Hoboken, and be delivered by the Hoboken to the Erie for road haul movement. Under general principles, to which you have referred, who would stand the cost of the reclaim to Hoboken in that case?

A. Seatrain.

Q. Are the practices in New York in connection with Seatrain business in accord with these principles to which you have referred as fair and reasonable, in your opinion?

A. No, sir. Although the exact status of these accounts is not clear, it is my understanding that Seatrain has never been willing to assume car hire except for the time that the cars are actually in its possession, and except as it may have assumed it in connection with the absorption of switching charges in which the car hire element has been included.

1563 Seatrain has taken the position that it is the duty of the rail carriers to make the Hoboken whole for all car hire incident to movement to and from Seatrain. Because of this, and because of the unwillingness of Seatrain and Hoboken to recognize the service of Hoboken as being that of an intermediate switching carrier, between other rail lines and Seatrain, no per diem or reclaim settlements have been made as between Hoboken on the one hand, and Central of New Jersey, D. L. & W., Erie, Lehigh Valley, New York Central, or Pennsylvania on the other, since 1932 or 1933.

Q. You mean they have been held up by reason of the dispute?

A. That's right. It is the position of the rail carriers that with respect to business moving to and from Seatrain——

Mr. MCCOLLESTER. What rail carriers are you taking about?

The WITNESS. The New York Harbor Lines.

Mr. FORT. I think he is simply speaking of the fact of the dispute of the position taken.

Mr. MCCOLLESTER. Yes, but I challenge his authority to speak for them. It can only be hearsay if he is talking for the Harbor Lines.

I will say that there is no unanimous position of the New York Harbor Lines on that point.

The WITNESS. I did not say unanimous.

Mr. MCCOLLESTER. I object, Mr. Examiner.

Examiner HOY. How do you know what their position is?

1564 The WITNESS. Because the reclaims of the Hoboken Manufacturers Railroad are under the supervision of the general committee of which I am chairman, and I know that we have been unable to make any settlement of those reclaims since 1932 or '33 because of this dispute.

Mr. MCCOLLESTER. That is all you do know, is it not?

The WITNESS. That is enough.

Mr. MCCOLLESTER. No, but you do not know the position of the Harbor Lines or the basis on which they are willing to make settlement?

Examiner HOY. You just know that there is a dispute?

The WITNESS. Yes, sir.

Examiner HOY. And that settlement has not been made?

The WITNESS. That is right.

Examiner HOY. I think the Harbor Lines had better state their own position here.

Mr. FORT. Yes.

The only impertance here——

Examiner HOY. That is, if you want it.

Mr. FORT. He is just trying to show that there is a difference of opinion as a result of which the settlements have not been made.

Examiner HOY. He stated that settlements have not been

1565 made since 1932 or '33, and necessarily, that carries with it an implication that there had been a difference of opinion.

The WITNESS. All right. As a result of these differences of opinion, Hoboken is now indebted to the carriers named for approximately 278,000 car days as of December 31, 1938, and in turn, these carriers are indebted to Hoboken in connection with terminal switching reclaim computed on the basis of the current arbitrary of 2.54 days per car, and for some intermediate switching reclaims, the exact amount of which can only be determined by check.

Q. Mr. Randall, is this what I understand you to say: That there are a certain number of car days, where per diem is accrued either on the Hoboken or the Seatrain?

A. Right.

Q. You mentioned the number as to which no settlement has been made.

A. That's right.

Q. Regardless of what that would be in money. You are talking about days?

A. That is right.

Q. You also said that there was a reclaim controversy which has not been settled; is that true?

A. That's right.

Examiner HOY. We will have a five minute recess.

(Whereupon a short recess was taken)

1566 Mr. FORT. Mr. Examiner, I distributed when Mr. Randall first went on the witness stand "Code of Car Service Rules and Code of Per Diem Rules," in pamphlet form, together with supplements and orders that have been made, or rules that have been made subsequent to the publication of the pamphlet.

I do not think it was marked, and I now offer it and ask that it be marked as Exhibit 57 and received.

Examiner HOY. Without objection, Exhibit 57 is received.

(Exhibit #57, Witness Randall, received in evidence.)

Mr. MCCOLLESTER. That includes the supplements in one exhibit?

Examiner HOY. Yes.

Mr. FORT. Yes; is it necessary to make any further description of it?

Examiner HOY. No; I do not think so. It includes printed copy of the rules and the mimeographed supplements.

Mr. MATHEY. Unprinted supplements, too.

The WITNESS. The supplements all carry the same number as the original circular, with suffix letter, you see.

Examiner HOY. Continue, Mr. Fort.

By Mr. FORT:

Q. Mr. Randall, you have been speaking about the reclaim per diem for intermediate switch lines and reclaim per diem for terminal switch lines.

1567 Is there a distinction in the amount of the reclaim between switching terminal lines or switching terminal services and intermediate terminal services?

A. There is.

Q. What is the reason for that?

A. Well, terminal switching service involves the receipt of a loaded car from connecting carrier, switching of that car to an industry, the unloading of it by the consignee, and the return of the empty to the connection from which received.

It may also involve the receipt of an empty car from connection, the switching of it to an industry, the loading of the car by a shipper, and the return of the load to the connection.

Generally speaking, switching charges throughout the country do not include an allowance for car hire, so that ever since the per diem rules have been in effect, the right of a switching road to remain whole for car hire paid the car owner in connection with terminal service for which it acts as the agent of another carrier, has been recognized.

To avoid the necessity of computing this upon every car so handled, it is ordinarily the practice to determine the average detention of cars in switching service by any road, at any point, through an examination of the records for a representa-
1568 tive period—usually a year—and the average detention thus determined is applied to every car handled in terminal switching service by that road.

Intermediate switching service, on the other hand, involves the overhead movement of a car from one carrier to another. There is no requirement of the switching road, except that of the movement of the car between two points.

The rules provide that an intermediate switching carrier may reclaim actual time with a maximum of one day on any car handled in such service. By unanimous local agreement of the roads interested, in any switching district, an arbitrary may be established for application to cars handled in intermediate switching service, in which event the arbitrary is applicable to every car so handled.

The basis for the arbitrary, however, is actual time, with a maximum of one day on any one car.

Q. Mr. Randall, generally speaking, the reclaim in connection with the terminal switch is greater than the reclaim in connection with an intermediate switch; is that true?

A. That is true.

Q. Now, that would cause, without any fault on the part of the switch lines, or any connection of the switch lines—there is more detention involved in intermediate switching than—I mean, in terminal switching than in intermediate switching?

1569 A. Right.

Q. And that is because the shipper, in connection with terminal switching, either has to load his car or unload his car, which requires time?

A. That is right.

Q. Is that true?

A. The demurrage rules give him 48 hours for either transaction.

Q. Yes.

Now, when you get to intermediate switch movement, all the switch line has to do is to pick the car up from the line that turns it over to it, and carry it to the next line, turn it over to the next line, and in connection with the movement of that kind, here would not be any car detention unless the second line was not able to take it from the switch line; is that true?

A. Unless the car was in possession of the switching line at midnight.

Q. Well, I do not think you heard my question.

Mr. FORT (to reporter). Will you read that last question over again?

(Last question was repeated by the reporter.)

Mr. FORT. Let me add to that——

Q. When I say there would not be any detention, I mean there would not be as much detention as in connection with
1570 the terminal switching?

A. That is right.

Q. And if there should be detention to a switch line because of intermediate switch movement, because the second line fails or refuses to accept the car from the switch line, then, under Rule 15, the line which refuses or fails to accept it, must pay for the detention; is that true?

A. That's right.

Q. What is the terminal reclaim—terminal switch reclaim in the New York district—what does it amount to in money, if you know, or in number of days that will be reclaimed?

A. Well, it varies with each carrier. I do not happen to have the arbitraries for each carrier. That of the Hoboken is 2.54 days.

Q. On terminal switching?

A. On terminal switching, which is——

Q. Now, what is the ordinary reclaim in connection with intermediate switching in New York?

A. The New York intermediates are all on an actual time basis, one day, if earned.

Q. One day if earned?

A. Yes, sir.

Q. But the maximum of one day?

A. That is right.

1571 Q. So there is quite a substantial difference in the amount of the reclaim, depending on whether it is a switch movement—an intermediate switch or terminal switch; is that true?

A. Right.

Q. Now, has the Hoboken claimed, if you know, in connection with cars, going to Seatrain, delivered by Hoboken by road haul carriers, or their switch lines coming into New York, per diem on the basis of a terminal switch in connection with Seatrain business?

A. I have seen those reclaims, and they are claiming the terminal switching reclaim of 2.54 on all cars going to or from Seatrain.

Q. To or from Seatrain?

A. Yes, sir.

Q. Now, under what you said to be fair in your opinion, as I understood you, on cars going to Seatrain, you think the road

haul carrier should reclaim the intermediate switch reclaim rather than the terminal?

A. That is right.

Q. Which would be $1 if earned, instead of $2.54; is that so?

A. Correct.

Q. And on cars coming the other way from Seatrain, going to road haul carriers, taking it out of New York, you think that the road haul rail carrier going out of New York should
1572 pay no reclaim, but the Seatrain should pay to the Hoboken and any other switch line the intermediate reclaim; is that true?

A. That is my opinion; yes, sir.

Q. Now, is the failure of the Seatrain, Hoboken, and road haul carriers of New York to reach an agreement as to that reclaim—I understand there is not only the reclaim accounts open, but the Hoboken and the Seatrain have also refused to pay per diem over a number of years; is that true?

A. That is my understanding.

Mr. McCollester. I object, Mr. Examiner. That is his understanding. That is not correct.

Mr. Fort. Mr. McCollester, would you mind stating what is correct?

Mr. McCollester. What is correct is that the Hoboken has regularly tendered all the per diem earned by the Hoboken and received from Seatrain to the various railroads, and it has been refused by those railroads because of the dispute as to the amount of the reclaim.

Mr. Eshelman. Mr. Examiner, I should like to ask that that be not considered as a statement of fact until it is shown to be so.

Mr. McCollester. Well, counsel just asked me the question, and I was answering him.

1573 Examiner Hoy. Counsel asked him to state what the fact was. It is a statement of the attorney in the record; it is not considered as evidence of that fact, because Mr. McCollester is not a witness. He is just answering on the record the question of Mr. Fort.

Mr. Eshelman. I thought he answered a different question than the one that Mr. Fort asked him.

Examiner Hoy. I do not think so.

Mr. Fort. The only point I had in mind, and I hope we can leave it this way on the record—Mr. McCollester suggested in a remark made in the record that what the witness said about a certain thing was not correct.

Mr. McCollester. That is right.

Mr. FORT. And what I meant to ask Mr. McCollester was not for a stipulation or anything of that kind, but what he understood to be correct; in other words, what he understood the witness to err about, and I do not mean to accept, of course, your statement, Mr. McCollester, as you know.

Mr. MCCOLLESTER. Whether you mean to or not, I have made the statement at your request.

Mr. FORT. Yes; thank you very much for the statement.

Q. Mr. Randall, you explained what the physical situation with respect to handling cars in New York with Seatrain is. Now, what is the situation at New Orleans?

1574 A. All business to and from Seatrain at New Orleans must move via the New Orleans and Lower Coast Railroad, which interchanges with the Seatrain at Belle Chasse. The N. O. L. C. has direct connection with the Illinois Central, L. & N. Missouri Pacific, New Orleans Public Belt, T. & N. O., and T. & P. Cars to and from other New Orleans roads, such as the G. M. & N., Southern, and L. & A., must be handled by an intermediate carrier.

Q. Mr. Randall, I want to keep the record straight. Is there controversy as to the status of the New Orleans Lower Coast on this business handled to and from Seatrain?

A. I understand there is; yes, sir.

Q. And that controversy has to do with whether or not that is a switch movement or a road-haul movement?

A. Right.

Q. Is that involved in some proceeding now before the Commission?

A. It is my understanding.

Q. Do you know what proceeding that is?

A. I do not know the number; no, sir.

Mr. FORT. I state that, Mr. Examiner, because we do not want anything we say here inadvertently to be taken as an admission in connection with that situation.

Mr. Randall is going to say what the situation would be if the N. O. L. C. should properly be regarded as a switch line,

1575 and what it should be if it should be regarded as a road haul carrier in connection with this movement, not meaning to take any position as to whether it is a switch line or a road haul carrier.

Q. Continue, Mr. Randall.

Mr. LARIMORE. I would like to ask the witness—when he said he had connections through other roads through a switching line—were you referring to the T. P. M. P.?

The WITNESS. No, sir; New Orleans Public Belt.

Mr. FORT. This interruption was caused because some people thought the witness was in error, but it turned out that the people were in error, so we may go ahead.

Q. Please go ahead, Mr. Randall, and explain that handling at New Orleans.

A. I did that.

Q. Is that all you have to say about it?

A. Yes, sir.

Q. Take road haul business coming in New Orleans for Seatrain, and tell how that is handled to get to Seatrain.

A. A car coming in on the Missouri Pacific, for example, would be delivered to N. O. L. C., to be switched or moved to Seatrain. A car coming in on the Southern Railway would be delivered to the New Orleans Public Belt, and by it to the N. O. L. C.

1576 Q. When you say N. O. L. C., you mean New Orleans and Lower Coast?

A. That's right.

Q. Now, on business coming in on the Seatrain at New Orleans, that is going to get a road haul movement out of New Orleans, that would be handled just in the reverse, would it?

A. In the reverse; yes, sir.

Q. Now, is the business which originates in the switching district at New Orleans for Seatrain movement?

A. Yes, sir.

Q. Does it get a switch movement or rail movement before it gets to Seatrain?

A. Yes, sir.

Q. How is that handled?

A. If the call would originate at an industry of the Southern Railway, the Southern would deliver the car to the N. O. P. B., and it would deliver it to the N. O. L. C., and it to the Seatrain.

Q. Now, is the business that is to be delivered in the New Orleans district—that comes in by Seatrain?

A. Yes, sir.

Q. And that would be handled in the reverse way?

A. Correct.

1577 Q. Now, what, in your opinion, are the per diem and reclaim rules that should govern such situation as you have described in New Orleans?

Mr. MCCOLLESTER. Mr. Examiner, I make the same objection here. We have the further complication of going into this question that two of the line haul carriers in New Orleans are the Missouri Pacific and the Texas and Pacific.

I submit that there is no issue in this proceeding as to any basis of settlement for per diem or reclaim between those railroads, the Lower Coast and Seatrain.

Examiner Hoy. Well, the Examiner will rule that the evidence may be admitted, on the same ground that he admitted the evidence as to the Hoboken situation.

Q. Continue, Mr. Randall.

A. In my opinion, the same principles which I have stated as being applicable at New York should be applied at New Orleans. In other words, Seatrain should be responsible for per diem reclaims and the car detention upon other carriers, to the same extent as would a road haul railroad under similar conditions.

Although the question as to whether or not the N. O. L. C. is properly a switching road, is now before the Commission, the following is assuming that it is a switching carrier.

On business originating within the New Orleans switching district moving to Seatrain, Seatrain should be required to assume the terminal switching reclaim of the road on whose tracks the shipment originated, unless the car moves on a
1578 switching charge which includes car hire.

It should also assume the intermediate switching reclaim of the N. O. L. C., and that of a second intermediate switching road when it is necessary to use such switching road in getting the car to the N. O. L. C.

With respect to a car arriving at New Orleans from a point outside the switching limits for movement via Seatrain, Seatrain should be required to assume the car hire incident to any delay because of its failure to accept cars as offered.

Road haul carriers are entitled to deliver cars for movement via Seatrain to the N. O. L. C. or any other infermediate switching road when they are prepared to do so, and if for any reason Seatrain fails or refuses to accept business as offered, it should assume the responsibility for car hire incident thereto.

In other words, the principle of per diem Rule 15 should be applied.

With respect to cars arriving on Seatrain destined to New Orleans, Seatrain should assume the intermediate switching reclaim of the N. O. L. C., and of any other intermediate switching road, and the terminal switching reclaim of the road on whose tracks the car is unloaded, the same as a road haul carrier would do under similar circumstances.

1579 With respect to a car arriving at New Orleans via Seatrain destined to a point beyond the New Orleans switching district, the Seatrain should assume the intermediate reclaim of the N. O. L. C., and of any other intermediate road used, incident to placing the car on the outbound road haul railroad's tracks.

Mr. McCollester. You see, Mr. Examiner, that the association by its intervention here is seeking to impose upon parties to the case terms and conditions which they have not contended for and which are not in dispute as between them. I submit that is going beyond the issues.

Examiner Hoy. Continue, Mr. Fort.

Q. Mr. Randall, are the present practices at New Orleans in accord with these principles which you have stated to be just and reasonable, in your opinion?

A. They are not. In New Orleans——

Q. Are the present practices settled, or are they in dispute, and in more or less——

A. In suspense.

Q. Yes. Well, go ahead and develop what the situation is.

A. In New Orleans, as at New York, there is a dispute as to the responsibility for reclaims. With respect to cars originating within the switching district at New Orleans,
1580 Seatrain has, of course, assumed responsibility for car hire, because of its absorption of the switching charges, the car hire being a part of that charge. Except for this, I do not understand that seatrain has accepted any responsibility for car hire at New Orleans.

Mr. McCollester. Well, now, do you understand anything about it, Mr. Randall?

The Witness. I hope so.

Mr. Ware. Mr. Randall, let me ask you a question. You say that the car hire is included in the switching charges. Do you make that statement?

The Witness. Yes, sir; on business originating within the New Orleans switching district—on the New Orleans Public Belt, at least.

Mr. Ware. How do you know that?

The Witness. I have the tariff of the New Orleans Public Belt.

Examiner Hoy. I think, Mr. Ware, that probably would be a subject for cross-examination.

Mr. McCollester. I would like to know for what railroads, if any, Mr. Randall is speaking when he understands that Seatrain has not——

Mr. Fort. He is speaking of his personal understanding. We are very glad——

Mr. McCollester. I know, but as to what railroads——

1581 Mr. Fort. It is his understanding that he is speaking of. You mean as to what railroads——

Mr. McCollester. I know, but we do not want his understanding which is only a guess about the situation, unless it is based

on personal knowledge. Now, it happens to be contrary to the facts again.

Mr. Fort. Well, Mr. Examiner, we are very anxious to have this precise in the record, and we welcome any clarifying questions that may come even at this time. Of course, if you want to turn this into cross-examination, that is a different matter, but if anyone thinks that any statement Mr. Randall makes is in error, and he is in a position to tell what the truth is, we will be very glad to have it.

(Colloquy off the record.)

Q. Mr. Randall, you made the statement that as to business originating in New Orleans, and moving to Seatrain, for Seatrain movement, that the switching rate includes the car hire, did you?

A. The New Orleans Public Belt tariff No. 13 provides that when the New Orleans Public Belt furnishes the car it adds an item representing car hire to the switching charge.

Q. Have you that tariff here?

A. Yes, sir.

Mr. Fort. Does anyone want to see it?

1582 (No response.)

Q. Now, take the Lower Coast—the Public Belt turns that shipment over to Lower Coast, does it not?

A. That is right.

Q. And does the Lower Coast have a separate switch charge?

A. Yes, sir.

Q. Does that also include car hire?

A. That would be——

Q. If you know?

A. No, sir; I don't know.

Q. So the point you mean to make is not so much what switch rate does include car hire and which does not, but that if it does there should be no reclaim connected with it?

A. That is the point.

Q. And if it does include the car hire, of course, there should not be another reclaim?

A. That is right; it is the principle.

Mr. McCollester. On the first part of your question, we agree.

(Colloquy off the record.)

Q. Mr. Randall, what else have you to say with respect to that New Orleans situation?

A. It is my opinion that the same principles should govern here as have been recited heretofore. Seatrain should assume the

1583 same responsibility as to per diem reclaims, both terminal and intermediate as would a rail haul carrier under similar circumstances.

There is a considerable volume of reclaims, both terminal and intermediate, in connection with cars arriving at New Orleans on Seatrain and terminating within the New Orleans switching district, now in suspense. There is also in suspense a considerable volume of intermediate reclaims incident to cars arriving on Seatrain for road haul movement beyond New Orleans.

Q. Now, is it your understanding that on that business which is delivered in New Orleans that the car hire is included in that switch rate, as it is in the outbound switch rate?

A. It is not; no, sir.

Q. All right. Now, have you a situation at New Orleans which is distinctive to New Orleans, a new factor you did not mention in connection with the New York business?

A. Yes, sir.

Q. What is that?

A. On business moving to the Seatrain from points beyond the New Orleans switching district the inbound road haul carriers have been required to assume the car hire after arrival at New Orleans and until the Seatrain has indicated its readiness to accept the cars. This is covered by Tariff filed by the New
1584 Orleans and Lower Coast, originally effective July 14, 1935.

Q. Have you a copy of that tariff provision?

A. Yes, sir [handing to counsel].

Mr. Fort. Mr. Examiner, I offer as Exhibit 58 an excerpt from this tariff which is shown on the exhibit, as Terminal Charges, Tariff No. 3-A.

Have you got the I. C. C. number of that tariff?

The Witness. 3-A No. 18, I think it was—I. C. C. No. 18.

Mr. Fort. I. C. C. No. 18.

Examiner Hoy. Exhibit 58 will be received.

(Exhibit #58, Witness Randall, received in evidence.)

Mr. Fort. While the tariff provisions speak for themselves, just for the convenience of the Examiner, will you say what is in general the purport of that tariff provision?

The Witness. The purport is that the New Orleans and Lower Coast will not accept business moving to the Seatrain until the written delivery orders hereinafter termed the "O. K." of the Seatrain Line has been obtained.

Q. Now, the effect of that, if enforced, would be to require the road haul lines bringing business in to haul them on their own lines until the Lower Coast was willing to accept them and carry them to Seatrain; is that so?

A. That is right.

Q. So it throws the detention and the cost of car hire
1585 during that period on the road haul line which is in no way responsible for the detention—or, that is the at-

tempt—rather than upon the Lower Coast or the Seatrain, which is responsible for the detention; is that true?

A. That is right.

Q. Now, as a practical matter, has there been any detention on the road haul lines bringing Seatrain business into New Orleans?

A. Yes, sir.

Q. Have you had a check made of that to develop it?

A. Yes, sir; the car service division representative at New Orleans has recently completed such a check, which shows that in the last six months of 1938 New Orleans roads were compelled to hold approximately——

Mr. McCollester. I object, Mr. Examiner. Of course, it is understood that we object to all of this line of testimony.

Examiner Hoy. Yes.

Mr. McCollester. And I make the further point that—I do not know what the purpose of counsel is in offering Exhibit 58, and the testimony now to be given, but if it is intended to lay a foundation for arguing that the tariff rule of the New Orleans and Lower Coast is unreasonable, I offer the objection that there is no such issue in this proceeding. That tariff rule is not under attack here.

1586 Mr. Fort. The purpose is to show, from the point of view of car detention and car hire, and reasonable interchange, and detention rules, that roads are being required to bear the cost of car hire during these detention periods, when the roads themselves are not responsible for the detention, and that the carriers responsible for the detention are seeking to avoid it. Now, whether the tariff is a legal tariff or not is not the thing I am asking the witness to talk about at this time.

Mr. McCollester. In other words, as I understand it, Mr. Examiner, the detention—it is claimed that the detention is brought about by the tariff, exhibit 58, and that this detention is detention for which the road haul carriers should not be responsible, as they are bound to be responsible under the tariff, Exhibit 58. I think that is an attack on the tariff, which is not in issue in this proceeding.

Mr. Fort. Mr. Examiner, car hire rules and car detention rules and car service rules and regulations are nevertheless rules of that character, whether they purport to be established in the way such rules are generally established, or by tariff publication. Whether that publication is a publication which the law requires to be published in the tariff, and therefore has such

1587 validity as a tariff publication has or has not, is not a question I meant to argue. The fact is that just as if that had been published as a car service rule, it affects the matter of who pays for car ownership at a certain period of the time

in connection with this interchange, and, therefore, I think that it is a matter which should be before the Commission for its consideration.

Examiner Hoy. In its general substance. I will overrule the objection and let the witness answer.

Mr. McCollester. Exception, please.

Examiner Hoy. Have the record note the exception.

A. The car service division representative at New Orleans has recently completed such a check, which shows that in the last six months of 1938, New Orleans roads were compelled to hold approximately 2120 cars for 6896 days, and average of 3.3 days per car under this item.

Q. When you speak of New Orleans roads, you mean the road haul carriage bringing it into New Orleans?

A. Yes, sir.

Q. And you mean that those road haul carriers held it that long awaiting the O. K. that is spoken of in the tariff?

A. That is right.

Q. From the Lower Coast?

A. Yes.

Mr. Muckley. From Seatrain.

1588 The Witness. Seatrain.

Q. Well, from Seatrain through Lower Coast, is it not?

A. Well, the tariff item provides it must be obtained from Seatrain.

Q. Who is going to obtain the O. K. from Seatrain?

A. The road haul carrier.

Q. The road haul carrier?

A. Yes.

Q. I see, and it shows at the Lower Coast, and the Lower Coast then takes it; is that right?

A. That is right.

Q. Have you prepared a statement with respect to this holding on the road haul carriers at New Orleans?

A. Yes, sir.

Q. Is this the statement?

A. It is.

Mr. Fort. I offer this statement in evidence as Exhibit No. 59.

Mr. McCollester. The same objection, Mr. Examiner. You see, this exhibit states that these cars were held under these provisions of this tariff. Now, assuming that fact to be correct, which may or may not be true, the evidence can only be relevant through a contention either that the carriers had violated the tariff because of the wish of the car service division of the

1589 A. A. R., or that the tariff itself is for some reason unlaw-

ful because contrary to the wishes of the car service division of the A. A. R., and that issue is not in this proceeding.

Examiner HOY. I think it is admissible. It does show the detention, whether it is under the tariff provisions or outside of tariff provisions. It seems to me that that is material here. It does show the actual detention down there, and I think such evidence is pertinent to the issue here. The exhibit will be received.

Mr. MCCOLLESTER. Exception, please.

Examiner HOY. Note the exception.

(Exhibit No. 59, Witness Randall, received in evidence.)

Q. Mr. Randall, are there any comments that would be necessary or helpful in connection with that exhibit, or does it speak sufficiently for iself?

A. I think it speaks for itself.

Q. All right. In connection with that practice of detention at New Orleans, and the establishment of this tariff rule, did you have any personal participation or connection with it?

A. I did.

Q. Will you explain what that was?

A. When the question of acceptance of business currently for the Seatrain first developed at New Orleans, I wrote Mr.
1590 J. L. Kendall, then general superintendent of transportation of the N. O. L. C.—that was in January, 1935—calling attention to the fact that the N. O. L. C. was declining to accept cars for movement via the Seatrain, as offered.

Mr. MCCOLLESTER. Well, now, just a minute. Do you understand that the question of acceptance of business via Seatrain first developed in January, 1935?

The WITNESS. Yes, sir; currently.

Mr. MCCOLLESTER. What do you mean by currently?

The WITNESS. In this way, Mr. McCollester: the New Orleans roads complained to me as chairman of the general committee that the N. O. L. C. was failing to accept business currently, and the first complaint I received was in January, 1935.

Examiner HOY. By "currently," you mean that the New Orleans and Lower Coast was refusing to receive the cars as offered to them?

The WITNESS. That is right, and, as I say, I wrote Mr. Kendall, then general superintendent of transportation of the N. O. L. C. and told him that there would seem to be——

Q. What were Mr. Kendall's initials?

A. J. L. Kendall, and I said to him that there would seem to be no authority under the rules for the refusal of the N. O. L. C. to accept business currently, because of its inability to deliver to Seatrain.

1591 This question continued to be a contraversial one, and in an effort to place the burden on the delivering road haul carriers the N. O. L. C. published Item 122 above referred to, in its Tariff 3-A.

Mr. McCollester. I object to the statement as to the reason why the N. O. L. C. published the tariff. It is not within the witness' knowledge. All he knows is that the tariff was published.

Mr. Fort. There was this controversy, and then the tariff was published.

The Witness. That is right.

Examiner Hoy. His testimony will be so understood.

A. (Continuing.) When this was brought to my attention, I again wrote to the N. O. L. C. people, to the effect that this tariff item did nothing more or less than embargo business moving via Seatrain until Seatrain was ready to accept it, and that this method of controlling interchange seemed improper under the circumstances. Although the N. O. L. C. did not withdraw the tariff item, the Association did not make an issue of the matter, because the whole question of Seatrain interchange was before the Commission and it was felt that the subject could and would be satisfactorily ironed out, following the clarification of the situation by the Commission.

1592 Q. Mr. Randall, is there uniform per diem charge for the use of freight cars when on the rails of other than the owning railroads in the United States?

A. Yes, sir.

Q. What is that charge?

A. $1.00 per car per day.

Q. What does that charge purport to cover; in other words, what is the basis for it?

A. $1.00 is $\frac{1}{365}$ of the yearly cost of ownership.

Q. Are all items of car ownership cost, generally speaking, included in that $1.00, when you understand that that is $1.00 for each of the 365 days of the year?

A. There are some items that are not included. Among others there was nothing included to cover return on the value of tracks used for storing surplus cars or bad order cars, and nothing was included to cover the maintenance of those tracks, but, generally speaking, $365.00 covers the cost of ownership per car per year.

Q. Now, are all freight cars as a matter of fact in active railroad service every day of the year?

A. No, sir.

Q. The cost of ownership runs on each day whether they are in active service or not?

A. That is right.

1593 Q. Now, if you say that all freight cars are not in active service every day, it necessarily follows from that that all freight cars are not in revenue producing service every day, are they?

A. That is right.

Q. Have you any figures that indicate the proportion of the total time of a car that it spends under load, using the term, "under load" with a particular significance—and it may be used with a different significance. I mean now—take the time between the placement of the car for the consignee to load it, and the release of that car, and we will call that inaccurately for this purpose "loaded time." What part of that time—what part of the total car time is that time which I have called "loaded time"?

A. It is less than one-third of the time.

Q. In other words, how many total car days are there in railroad operation to one car day of the kind that I have described, and called loaded time, meaning now the time between the placement for the consignee and the release?

A. Approximately 3.82.

Q. 3.82 total days for one such day?

A. That's right.

Mr. McCollester. Just let me be sure I understand. Is it 3.82—is that the total days, including the one day?

1594 The Witness. Yes, sir.

Mr. McCollester. In other words—oh, I see, all right. That's right.

Q. Have you prepared a statement in support of the assertion which you have made as to the 3.82 total days?

A. I have.

Q. Is that a copy of the statement?

A. It is.

Mr. Fort. I offer that exhibit as Exhibit No. 60.

(Exhibit No. 60, Witness Randall, received in evidence.)

Q. Will you explain the calculations involved in that exhibit?

A. I ascertained the number of freight car—average number of freight carrying cars on line from the so-called O. S. reports of the Interstate Commerce Commission, for each of the five years, 1933 to 1937, and the average number of cars loaded yearly in those same years, shown in the second column. Multiplying the average number of freight carrying cars on lines by 365 gives the total car days. Multiplying the average number of cars loaded by six, gives the loaded car days. The ratio of one to the other is 3.82.

Q. Now, Mr. Randall, I am very much concerned that there be no misunderstanding about the so-called loaded car days.

When you say "loaded car days," what do you mean, in
1595 this particular connection?

A. From the time elapsing from the placement of the car for loading until it is released by the consignee at destination.

Q. As a matter of fact, there may be empty days there while it is awaiting load, or empty time, after it has been unloaded; is that true?

A. That is right.

Q. Mr. Randall, did you hear Mr. Tessin testify in this case?

A. I did.

Q. He spoke of a total of 19 days to one day, or one day out of 19 days, and I believe that perhaps in his testimony he may have used that same expression, "loaded day." I think he called it a "loaded rolling day." What I am trying to bring out now is—you have here one day out of 3.82. He had one day out of 19. Now, if you understand the difference between the time he used in getting one out of nineteen, and the time you used in getting one out of 3.82, will you explain that?

A. Mr. Tassin eliminated the time when the carriers had the cars in their possession at intermediate terminals and at terminals at point of origin and destination. This 3.82 does not eliminate that time.

Q. And he also eliminated all the time the shipper or consignee had it?

A. Yes, sir.

1596 Q. The only time he put in was the time the car was actually rolling in road service, with allowance on his judgment for the time it was rolling in this service; is that true?

A. That is right.

Q. All right, sir.

(Discussion off the record.)

Q. Mr. Randall, I notice on your Exhibit 60, you use six days as the average covering this particular period from the time the car is given to the consignor until it is released by the consignee.

A. That's right.

Q. Why do you use that six days?

A. That was a figure developed by the traffic study of the Federal coordinator of transportation. He explains that figure in the following excerpt from his report on page 71 of Volume 2, Freight Traffic Report, Federal Coordinator of Transportation:

"In the study all railway cars which were terminated on December 13, 1933, were analyzed to determine the car service incident thereto. The average elapsed hours from the time the car was placed for loading until it was released by the consignee after unloading were 144; about 68 hours of the 144 were utilized by the

shipper and the consignee in loading and unloading the car, about 34 hours each.

"On the average it was detained by the carrier in the
1597 origin terminal about 11 hours before it departed in a road train, and at the destination terminal, about 15 hours before it was delivered to the consignee.

"In addition, it was detained at intermediate terminals about 27 hours, so that, out of the 72 hours of carrier time, only 23 hours, or less than one day, were spent in road trains."

Q. Now, the figure which you have used to get your ratio 3.82 is 144 hours; is that so?

A. Right.

Q. Now, if you exclude from that 144 hours or six days, the amount of time utilized by the shipper, and the consignee in loading and unloading, how much time do you have left?

A. Seventy-six hours.

Q. Which is just about one-half of this 144, is it not?

A. That's right.

Q. So, taking that time, now, as the basis for your loaded days; that is, excluding the time that the shipper had to load and unload, instead of it being one day out of 3.82, what would it be—one day out of what?

A. I haven't that figure here, Mr. Fort.

Q. Can you make a calculation?

A. It is about 7.

Q. It would be about twice?

A. Yes, sir.

Q. It would be about 7?

1598 A. Yes, sir.

Q. Now, suppose that you exclude not only the time that the shipper and consignee had it, but the time it was necessary for the originating line to detain it, and the delivering line to detain it in connection with the origination and delivery of the business; that is to say the origin switching time and the destination switching time, how much do you have left out of your six days or 144 hours?

A. Fifty hours.

Q. Fifty hours?

A. Yes, sir.

Q. What does that take out? I want to make this perfectly clear.

A. That takes out all the time the car was in the possession of the shipper and consignees; takes out the time of terminal point of origin and at destination.

Q. But it leaves in any intermediate switching time?

A. Yes, sir.

Q. Now, using that figure as the measure of a loaded car, so-called loaded car——

A. You get——

Q. Just a minute. Whenever you use the expression "loaded car" in this connection, it is bound to be somewhat inaccurate, but we want to explain just what we mean by it. Then,
1599 what part of the total car time would be represented by this car time, taking out the detention by the shipper and the consignee and the terminal and destination, and the origin and destination loss of time as shown in the excerpts.

A. Well, for every loaded car day you would have a total of 11 car days.

Q. Have a total of 11?

A. Yes, sir.

Q. And still that would not be taking out any intermediate switching?

A. That's right.

Q. Mr. Randall, getting back to the first measure you gave for loaded car day, which includes the time it is with the shipper and consignee, how many cars would a railroad have to own for the number of cars under load in that sense, each day?

A. 3.82.

Q. Yes. Now, taking the term, "loaded car day," to mean excluding the time that the shipper or consignee had it, and excluding the terminal origination and delivery switch, how many cars would they have to own—car days would they have to own for each car falling in that category?

A. Eleven.

Q. Why is it necessary to own so many rail cars on a given day than would be found in these respective services that you have been talking about?

1600 A. Well, because of the necessity of maintaining a reserve so that a road may be able to meet the current demand at all times. Cars must be repaired, they must be switched at terminals, to and from industries, or team tracks; they must often be moved considerable distances, empty, to provide an adequate supply at each loading point, and there must be a surplus in ordinary times to meet peak demands which may reasonably be expected each year.

Then, there is the problem of conditioning. A car placed for loading must be fit for the commodity intended to be loaded. This requirement alone often means that cars in the vicinity of the loading point cannot be utilized, and it is necessary to move cars of a higher classification from distant points.

Q. And inherent in the nature of the railway business, you must have that idle time of cars?

A. That is right.

Q. Using "idle time" in the sense indicated by your testimony?

A. Correct.

Mr. FORT. Mr. Examiner, I think that concludes the examination of this witness, but if I should want to ask one or two questions after luncheon, may I do so?

Examiner HOY. Yes. We will adjourn now until 1:30.

(Whereupon an adjournment was taken at 12:25 o'clock, p. m. until 1:30 o'clock, p. m. of the same day.)

1601 AFTERNOON SESSION, 1:30 P. M.

Examiner HOY. Did you have any more questions of the witness?

Mr. FORT. One or two.

Q. Mr. Randall, does the Seatrain report per diem information to the owning carriers, owning railroads, in connection with the railroad cars which move on the Seatrain?

A. No, sir.

Q. Do the owning carriers get any information from Seatrain as to the number of days their cars are on Seatrain?

A. No, sir.

Q. How is that handled?

A. The cars——

Mr. MCCOLLESTER. That has all been gone into, Mr. Examiner, in the original record.

Mr. FORT. This will just take a second.

A. The car remains in the possession of either the Hoboken Manufacturer or the New Orleans and Lower Coast until it is delivered to the other one.

Q. Well, you mean so far as the owning line is concerned, it merely gets a report covering the time not separated between the Hoboken and the Seatrain or the Lower Coast and the Seatrain; is that so?

A. The Illinois Central, for example, would get a junction car showing the car delivered from the Erie to the Hoboken.

1602 The next they would get would be a junction showing the car from the Hoboken to the Lower Coast.

Q. What is your opinion as to whether or not, if Seatrain is to use these cars, it should make direct reports and assume direct responsibility to the owners of the cars?

Mr. MCCOLLESTER. Well, now, Mr. Examiner, on that point it has been stated heretofore in the record by me that if the railroads will consent to the interchange of their cars with Seatrain, Seatrain is willing to become a party to the per diem rules agreement, and to make direct settlement.

The record shows that the reason it does not do that is that the A. A. R., or the A. R. A., as it then was, ruled that it should not do so. I do not think that we need to go into that question further.

Mr. Fort. It will only take a minute. I should like to have the witness answer the question.

Examiner Hoy. Let him answer.

A. The Seatrain should report direct to the car owners, in my opinion.

Q. And make direct settlement with the car owners?

A. Yes, sir.

Q. Mr. Randall, you mentioned certain per diem absorption and detention practices which in your opinion would be just and
1603 reasonable on these cars interchanged with Seatrain. For example, you said that when Seatrain brought a shipment into New York, you thought Seatrain should absorb, or should pay the reclaim to the intermediate line, and if it is to be delivered in New York, to the terminal switch line.

A. That's right.

Q. You said you thought that if there is any delay because Seatrain cannot take a car that is to go out on Seatrain, it should stand the cost of the detention during that time?

A. Yes, sir.

Q. And some other features of that. I would like to ask you about how many car days would be involved if Seatrain did meet those obligations which you think it should meet, and if it is necessary to give the question an intelligent answer, to divide it between through business and local business, and so on, you can do that.

A. Well, I think you would have to divide it to give it intelligent handling because the reclaim absorptions, so-called, would vary under different movements.

To illustrate the point, southbound, you take a car originating within the New York switching district, and going to a point within the New Orleans switching district. At the New York end, the Seatrain, in my opinion, should absorb the terminal switching reclaim of the originating carrier, unless the car was included in the switching rate.

It should also absorb a maximum of one day on each of
1604 any intermediate roads at New York. That would make a possible total of, say, five days at the New York end.

At the New Orleans end it should pay the terminal switching reclaim of the carrier on whose rails the car releases, and a maximum of one day on any intermediate handling. That would make a possible five days at the New Orleans end.

So that, on a car moving from a point within the New York switching district to a point within the New Orleans switching district, there might be a possible absorption of ten days.

Q. That would, generally speaking, be the maximum involved in such a move?

A. It is; yes, sir.

Q. And ordinarily, might it be less?

A. Yes; you take a case of a car moving from a point beyond the New York switching district——

Q. I am not now talking about beyond; I am talking about this particular type move that you are referring to, from the switching district here to the switching district in New Orleans, and you say there would be a possible ten days?

A. That is right.

Q. So, as a matter of ordinary practice, would it be less than ten days?

A. It would very likely be less than ten days, because that intermediate reclaim is if earned. You do not have to pay it unless the intermediate road has the car on its line, and
1605 pays the car owner for a day.

Q. And in some cases you would not have any intermediate at all, for example?

A. That is right.

Q. All right. Take other types of movement.

A. Take a movement from a point beyond the New York switching district to a point within the New Orleans switching district. In that case, of course, the absorptions at New Orleans would remain the same, but the only detention at New York would be a possible detention of two days under Per Diem Rule 15, because of Seatrain's responsibility for any detention on the Hoboken awaiting the boat.

That would make a possible maximum of, say, 7 days on that movement.

Take another possibility of a car moving from the New York switching district to a point beyond the New Orleans switching district. In that case, the Seatrain, in my opinion, should assume the terminal switching reclaim of the road on whose tracks the car originates in New York, and the maximum of one day if earned, on any intermediate line at New York.

That would make a possible five days at New York. At the New Orleans end it should pay the intermediate, if earned, on either of two intermediate lines, making a possible two days at New Orleans.

That would make a total of 7 days on that movement.
1606 The other movement, to complete the cycle of the southbound movements, from a point beyond the New York

switching district, to a point beyond the New Orleans switching district: In that case, you might possibly have two days under Per Diem Rule 15 detention on the Hoboken, and——

Examiner HOY. Why two days?

The WITNESS. It is my understanding that two days is the average detention on the Hoboken for cars going to Seatrain.

Mr. MCCOLLESTER. Where do you get that understanding? We are having a lot of understandings here.

The WITNESS. That is right, but I do not know that I should put it in the record, Mr. McCollester, because I think you people told me that.

Examiner HOY. Well, there would be a possibility of six days, would there not?

The WITNESS. Yes, surely; but I am taking what I understand the average detention to be.

Examiner HOY. Yes; what you think the average detention is.

The WITNESS. That is right, and then there would be the possibility of an intermediate reclaim on two connections at New Orleans, making a possibility of 4 days on that type of car.

Now, if the business were divided equally between those four types of business, south-bound, there is an average of
1607 about seven on the whole business.

Q. Take the north-bound. Is that about the same? Or do you have some——

A. It's just a trifle more on the north-bound.

Q. How much?

A. Well, 7½, I figure, on the north-bound, separating each class the same way.

Q. Well, give it as to the different types of movement north-bound. You do not have to say——

A. North-bound, from a point within the New Orleans switching district to a point within the New York switching district, it remains ten days, the same as in the reverse direction.

From a point beyond the New Orleans switching district to a point within the New York switching district, there is a possible 3 days on the N. O. L. C. on account of Per Diem Rule 15, and 3 days—that is the only detention at New Orelans—and 3 days terminal switching reclaim at New York, and one day on each of two intermediates, making a total of 8 days.

From a point within the New Orleans switching district to a point beyond the New York switching district, it would be a terminal reclaim of about 3 days at New Orleans and one day on each of two intermediates. That is 5 at the New Orleans end, and a possible intermediate reclaim on 2 intermediate roads at New York, making a total of 7 days altogether.

The other movement is from a point beyond the New
1608 Orleans switching district to a point beyond the New York switching district. You would get a possible Per Diem Rule 15 reclaim of 3 days at New Orleans, on account of Seatrain not ready to accept. You would have no other detention at New Orleans, but you would have the possibility of one day, if earned, on each of two intermediates at the New York end—5 days. That averages up about 7½ days.

Examiner HOY. Why do you use 3 days at the New York end on your north-bound movement and 2 on your south-bound movement? Isn't that what you do?

The WITNESS. Under Per Diem Rule 15?

Examiner HOY. Yes.

The WITNESS. Because the detention, as shown by this statement here, Mr. Examiner, is 3.3 days.

Mr. MUCKLEY. Which statement?

Mr. FORT. What exhibit?

The WITNESS. That is Exhibit No. 59.

(Discussion off the record.)

Q. On the business coming through from New Orelans, inbound to New York, and going beyond New York, how many days did you figure at New York?

A. Going beyond New York?

Q. Yes.

A. No days at New York.

1609 Q. Well, then, being delivered within the terminal at New York——

A. The possibility of two intermediates, each of one day.

Q. I am talking about delivered in New York.

Examiner HOY. The detention here——

The WITNESS. Oh, I see. Three days for terminal switching reclaim and one day for each of two intermediates.

Q. So, it comes to five all together?

A. Yes, sir.

Mr. FORT. Now, Mr. Examiner, you see, the reason is that the detention he is figuring on the out-bound from New York is merely the time that it is held on Hoboken for Seatrain to take it. Now, the detention he is figuring on the in-bound business into New York; not necessarily detention, the reclaim, is your one-day reclaim on each of two possible intermediate switches, under the reclaim rule to which reference has been made, and a three-day reclaim to the terminal switch in New York, which is in accordance with the practice in New York.

Q. Is that true?

A. That is about an average; yes, sir.

Q. About an average?

A. Each road has a different arbitrary, but there is about an average.

Mr. Fort. So the differences—those differences are
1610 not in corresponding items, you see. There is no reason why it should not be two days going down and five days coming up.

Examiner Hoy. Have you finished with your questions?

Mr. Fort. Yes, sir.

Examiner Hoy. Cross-examination.

Mr. Fort. I have finished mine, but Mr. Eshelman has one or two.

Cross-examination by Mr. Eshelman:

Q. Mr. Randall, what was that figure of some 277,000 car-days that you mentioned?

A. 277,810 car-days, owing to the trunk lines; that is, named by the Hoboken.

Q. As of what date?

A. As of December 31, 1938.

Q. And I understood you to say that you could not compute according to the rules that you consider appropriate what the reclaims would be for that period.

A. That is correct.

Q. However, can you tell what the detention would be that would correspond to that 277,000 on the basis of 2.54 days for each car, regardless of where it went?

A. Those same roads have reported to me that there was outstanding as of the same date reclaims in amount of $141,127, computed on the basis of 2.54 days per car.

Q. So that if Hoboken's claim were recognized in full,
1611 that would be the amount of the offsetting reclaims?

A. That is right.

Mr. Eshelman. That is all.

Examiner Hoyt. Are there any further questions?

Mr. Fort. No.

Examiner Hoy. Cross-examination.

Cross-examination by Mr. McCollester:

Q. Mr. Randall, you gave some testimony about the cost of car ownership. Is my understanding correct that the present per diem rate of $1.00 was approved by the Interstate Commerce Commission, in Docket 17801, based upon testimony offered in that proceeding as to the cost of car ownership, which testimony related to costs of car ownership in the year 1925?

A. If I remember correctly they said that the measure of the rate was not in issue in that case.

Q. Well, whether the measure of the rate was in issue or not, do you know whether or not the testimony offered by the railroads in support of the rate related to the year 1925?

A. Yes, sir; it did.

Q. And that showed total ownership cost of 98 and a fraction cents?

A. Right.

Q. Has your Association from time to time made studies
1612 of cost of car ownership, including the same items?

A. Not since that time.

Q. Did you not make a study and promulgate the results of a study in 1930?

A. No, sir; not of that type.

Q. Well, did you not promulgate figures found by your organization for the cost of car ownership as of the year 1930?

A. Yes; but it did not involve all of the items which the so-called Demarest study included, Mr. McCollester. You have reference, I presume, to our circular T-5.

Q. I do not know, by that name, but there was some circular promulgated by the Association?

A. That is right.

Q. Do you know the figure which it gave as the cost at 1930?

A. It did not have all of those items in there. It was simply the cost of repairs. I think I have a copy of that circular here.

Q. Yes; I have that. That was simply—I agree with you on that.

A. That is all we have.

Q. And you have not made another study as of 1930, including later figures?

A. No, sir.

Q. You are sure that the association has not?

A. That's right.

Q. Now, I think the record shows, but I want to be sure
1613 that it does—is the dollar a day—is the per diem rate paid by railroads that own no cars the same as that paid by railroads that do own cars?

A. Under the terms of the order in 17801, it is.

Q. Some question has been raised during the course of this proceeding as to the reciprocal nature of per diem, and to the fact that Seatrain owns no cars at the present time. From your study of the car situation, in your opinion, would there be any advantage to the railroads if Seatrain should now acquire 500 or a thousand cars, making the railroads handle them and pay the per diem for their use?

Mr. FORT. Mr. Examiner, I must object to that question as being too general, as being without definite ascertainable meaning, and perhaps being misleading. Any answer that might be given to it is not clear as to what the term "advantage" means, for one thing. I would not know how to answer the question, and I do not think any one could answer it.

Mr. MCCOLLESTER. Well, I think that the witness——

Mr. FORT. In other words——

Mr. MCCOLLESTER. Can answer.

Mr. FORT. There are many factors implied in the question. If counsel wishes to bring those out, I think he should break down, and ask as to particular things, not just a broad general question as to whether this is advantageous or that is advantageous.

1614 "Advantageous" is too broad a term. I object to the question and I ask the witness not to answer it unless directed to do so by the Examiner.

Examiner HOY. I think the question is proper. The witness can qualify in his answer what he means by "advantageous" when he answers the question.

A. I wouldn't consider myself competent to answer that question, Mr. McCollester. There are so many factors involved there that are indeterminate.

Q. Have you followed the handling of cars via Seatrain more or less since the inception of its operation?

A. No; I haven't, Mr. McCollester. I am not competent to answer that with respect to the handling of the cars.

Mr. FORT. I was going to ask what you mean by the handling. He may know what you have in mind.

Q. Well, the question which I have in mind—I will ask it this way: From the standpoint of the car supply of the country as a whole, supposing there was a shipment originating at Dallas, destined to Albany, N. Y. If that shipment were to move via break-bulk lines, the carrier at Dallas would have to supply a car to move the shipment from Dallas to New Orleans; that would be correct, would it not?

A. I should presume so; yes.

Q. And then, when the freight got to New York, whatever rail line was to handle the car here would have to place the car

1615 and load the car, and move it to destination here; is that correct?

A. I am not sure about the loading of the car.

Q. Well, the car would have to be loaded. I do not mean to make a point of it.

A. That's right.

Q. The car from Dallas to New Orleans, after it got to New Orleans, would have to be disposed of somehow, would it not, either returned or——

A. Put in other service.

Q. Put in other service. Now, considering those factors, is your study of the effect upon the car situation of the country of Seatrain's operations sufficient to enable you to express an opinion whether or not the existence of Seatrain for the handling of freight which would otherwise move by rail and water over the break-bulk routes, has been of advantage to the car supply of the country, in enabling the cars to come straight through?

A. I can't answer that.

Q. You have not studied that question?

A. No, sir.

Q. I understood you to testify that Hoboken Manufacturers Railroad on cars delivered to Seatrain had made claims for reclaims of $2.54.

A. Yes, sir; that is what I testified.

1616 Q. But hasn't Hoboken offered, from the very beginning, to take only its actual detention, whatever that might be determined to be?

Mr. FORT. Do you mean in using "actual," that the detention includes that?

Mr. MCCOLLESTER. The time the cars are actually in Hoboken's possession.

Mr. FORT. Even though it might be because Seatrain is unable to take the cars?

Mr. MCCOLLESTER. Yes.

A. Yes, sir; that is a fact.

Q. That is a fact, and the Hoboken has offered and has suggested that a check be made of the detention of cars on its line; has it not?

A. Yes, sir.

Q. And that has not been done as yet; no new check has been made for many years?

A. No, sir. Of course, the point there is that the Hoboken offer was that that time should include the time of cars held for Seatrain.

Q. Well, didn't the Hoboken offer to have the Seatrain cars counted separately from its local cars?

A. Right, but it wanted to be reimbursed for all the time of those cars on Hoboken.

1617 Q. Yes. Now, you understand, do you not, that the Hoboken's position in that regard is that its divisions or allowances do not include and are not based upon including any cost to it for car hire?

A. Well, I don't understand that.

Q. That has been stated to you, has it not?

A. I think you stated it to me, yes, sir; but I have no knowledge of that first-hand.

Q. But my point is that you understand that that is the reason for the Hoboken's position in that regard: that its compensation does not include cost of car hire and, therefore, it expects to be made whole by somebody or other?

A. I think that is.

Q. And not more than made whole; isn't that right?

A. That is your position; yes, sir.

Q. And we have never sought to make a profit on car hire?

A. That is right.

Mr. FORT. May I say something there, Mr. McCollester: that would leave open the question as to whether Seatrain should participate in making them whole, would it not?

Mr. MCCOLLESTER. That is right, which is my next question.

Q. Then the only issue—it boils down to this, on the assumption of my previous question: The only issue would be whether the detention of cars for movement via Seatrain, when de-
1618 tained on the Hoboken, should be borne by the trunk lines or should be borne by Seatrain or borne partly by the trunk lines and partly by Seatrain?

A. Of course, that is a question as to——

Q. Yes; that is the only question, is it not?

A. As to by whom it should be borne?

Q. Yes.

A. It is my theory, if you want to call it that, that under the per diem——

Q. I do not care for your theory, but the question is whether it should be borne by the trunk lines or by Seatrain, and there is no question of the Hoboken bearing that expense for detention?

A. I think that is correct.

Q. Yes. Now, as to whether the detention should be borne by—the cost of the hire of the cars while they are being detained on the Hoboken should be borne by the trunk lines or by Seatrain—the answer to that question does not concern the car owner at all, does it, unless the car owner happens to be the direct connection of the Hoboken?

A. That is correct.

Q. Now, have you examined the tariffs of the railroads at New York, to see whether they will hold freight in cars, and hold the cars for other steamship lines serving New York Harbor?

A. No, sir.

1619 Q. You have made no examination of those tariffs?

A. No.

Mr. Fort. We will have a witness on that point.

Q. Do you know whether or not by reason of the per diem rules or reclaim rules or anything else, if the trunk lines hold cars of freight for some other steamship line, the expense of car hire is charged to the steamship line?

A. There is no per diem—no such per diem rule.

Q. Yes. There is no per diem rule that makes any other steamship line absorb any of the cost of car hire if cars are detained for its account in New York Harbor?

A. The cars are not interchanged to the steamship line.

Q. No, but if the freight is held in cars, and the cars are held, there is no per diem or reclaim rule that makes the steamship line absorb the cost of that detention; isn't that correct?

A. Well, I couldn't say as to that because that might be included in a demurrage charge.

Q. But so far as the per diem rule or the reclaim rules are concerned, there is no provision having that effect?

A. That's right.

Q. Now, did you examine the tariffs of the railroads with respect to freight destined to steamship lines docking at the docks served by the New York Dock Railway, or the Bush Terminal Railway?

1620 A. No, sir.

Q. If it be the fact that the trunk lines will hold cars—let me ask you first: Do you know that freight is transferred in cars between the trunk line terminals and the New York Dock Railway and the Bush Terminal Railway?

A. Yes, sir; I know that.

Q. Now, if it be the fact that the trunk lines will hold such freight for five days on their terminals, awaiting orders from steamships docking at the Bush Terminal or piers served by the New York Dock Railway, is there anything in the per diem rules or the reclaim rules imposing the obligation of that reclaim upon the steamship lines?

A. Will you read the question again? I want to make sure I understand it.

Examiner Hoy. Read the question, Mr. Reporter.

(Question read.)

A. No, sir.

Mr. Fort. Mr. McCollester, are those ships that you speak of at the Bush Terminal and New York Dock engaged in foreign business as distinguished from coastwise?

Mr. McCollester. They are in both.

Mr. Fort. They are in both?

Mr. McCollester. Yes. There are a lot of intercoastal lines, several intercoastal lines that dock there. I can't give it to
1621 you at the moment. I will if you want to, but I am not testifying here. There are steamship lines that dock at those piers.

Mr. Fort. I just do not want to leave the record where it might be fuzzy there. There is no implication that there are coastwise lines in connection with which railroads have through routes docking at Bush or New York Dock Terminal, is there?

Mr. McCollester. I think there are, but I am not sure about that.

Mr. Fort. Of course, there is no proof in the record.

Mr. McCollester. There is no proof on it. There are lines that accept freight on through export bills of lading, just the way Seatrain does on freight to Cuba.

Mr. Fort. That would not be a through route, would it?

Mr. McCollester. The same as on freight via Seatrain to Cuba.

Mr. Fort. I do not think that is involved here, is it—freight to Cuba?

Mr. McCollester. I think it is.

Mr. Fort. I do not think so. That is another issue.

Mr. McCollester. There is a discrimination allegation in the complaint on the Cuban situation.

Q. Well, is it a fair statement, Mr. Randall: That you have approached the question of reclaim and the bearing of the per diem expense solely or primarily from the standpoint of a
1622 man looking at the reclaim and per diem rules themselves, and without regard to the division of the revenue on freight, which may be handled in those cars?

A. We have a uniform method of assessing per diem and reclaims, and that is set up without regard to the revenue, and my—the basis of my opinion as expressed here today is that because the Seatrain takes the car, it should assume the same obligations as a railroad haul carrier would under similar circumstances.

Q. And that is without any reference to the service covered by the revenue, or how the revenue is divided between Seatrain and the road haul carrier?

A. That's right.

Mr. Fort. The question is—which would come first, is it not?

Mr. McCollester. It may be.

Q. Now, with reference to your theory as to Seatrain's absorbing the per diem on freight originating at or destined to points wholly within New York Harbor area, as I understand

it, your theory is predicated upon the assumption that switching charges ordinarily do not include compensation for car expense?

A. I think I made that clear; yes.

Q. And, therefore, in stating that Seatrain should absorb the car expense of the railroads in the terminal area, it
1623 was based upon that assumption of yours?

A. Yes; I think the chips would fall where they will. If you do absorb it, you don't want to pay it a second time.

Q. And that theory would not obtain in the case of freight moving on road haul rates, because there you assume, and I think properly, do you not, that road haul rates include compensation to the carrier for car hire expense?

A. Generally speaking, that is right.

Q. Now, you have talked about freight originating in or destined to the New York switching district. Now, will you define the New York switching district?

A. I think that is a matter of tariff definition, Mr. McCollester. I cannot define it right offhand, but your tariffs of each of the roads define what is their switching limits.

Q. Is there a switching district in New York?

A. Well, there is a district to which rates apply that are considered as switching rates.

Q. Well, now, to what area do switching rates apply from Hoboken?

A. I am not informed as to that. When we speak of a terminal switching reclaim, we mean that reclaim is applicable—it follows the switching charges, and wherever the switching charges are applicable, the reclaim is applicable.

1624 Q. Well, now, did you not, in preparing yourself to testify here, examine into whether or not there are switching rates in the New York district?

A. No, sir; it wasn't necessary, because if there are not switching rates, there are no reclaims.

Q. And you talked about two intermediate switching carriers in the New York area. Can you name any point to which freight may move from Hoboken where there would be two switching services covered by switching charges?

A. Yes, a movement from Seatrain going to a point on the Pennsylvania.

Q. Would that be under switching charges?

A. I am not sure about that. If it is under switching charges, the reclaim applies; if it is not, it doesn't apply.

Q. Well, now, you did not look into whether there were switching charges or not?

A. It wasn't necessary.

Q. Now, supposing it is a fact, as it is, that that movement would be under road haul rates?

A. No reclaim is necessary.

Q. No reclaim at all?

A. That is right.

Q. And the car hire expense in that instance for the time the car is on the Pennsylvania Railroad would be borne by
1625 the Pennsylvania Railroad?

A. Not the Pennsylvania—they are not an intermediate.

Q. But if they are a party—if the Pennsylvania is a party—

A. I see what you mean. You are right. It would be assumed, if they get a division of the rate, that the rate includes the reclaim, per diem expense.

Q. Don't you know that all—or do you, that all movement from Hoboken is covered by joint rates in which the participating carriers get division of the rates?

A. Well, the Hoboken itself does, but we give you a reclaim just the same, by joint agreement. That can be done in any switching district.

Q. But, now, are the rates—or do you know—from Hoboken, switching rates?

A. I do not know personally.

Q. You don't know, all right. Now, as I understood your testimony, Mr. Randall, you testified that on a car coming in, we will say, over the Erie, to go out via Seatrain, delivered by the Erie to the Hoboken, any reclaim for detention over one day on the Hoboken would be for the account of Seatrain?

A. Yes, sir.

Q. Similarly, if Seatrain delivers a car to the Hoboken for movement over the Erie, the one day intermediate reclaim
1626 would be for the account of Seatrain in that instance?

A. Seatrain should pay Hoboken one day, if earned.

Q. Now, that is predicated upon the provision of the switching reclaim rules relating to intermediate switching carriers, is it not?

A. That is right.

Mr. FORT. Is that predicated on the rule or the principle of the rule?

The WITNESS. It is on the rule itself.

Q. Now, the definition of an intermediate switching road in the switching reclaim rules, page 37 of Exhibit 57, was changed some time after Seatrain began operation; isn't that correct?

A. Effective April 1, 1934.

Q. And prior to that time, an intermediate switching road was defined as one handling cars between two railroads?

A. Or from one railroad to another.

Q. Or from one railroad to another?

A. That is correct.

Q. And the change was to include steamship ferry or barge line in the definition?

A. That's right.

Q. And that was designed purposely to meet Seatrain, was it not?

A. It was a new type of service, and we had to have a rule
1627 to cover it.

Q. Now, I notice that that definition on page 37 of Exhibit 57 defines that intermediate switching road as a road handling a car from one railroad, steamship, ferry, or barge line to another railroad, steamship, ferry, or barge line, within designated switching limits.

Now, what designated switching limits are there at Hoboken?

A. Well, I couldn't answer that.

Q. Do you know that there are any?

A. No, sir; I know that Hoboken has been considered a switching carrier, by unanimous agreement of the connections.

Q. The rule also provides, does it not, that the switching road shall be a road performing the service "not participating in the freight rate"?

A. That is right.

Q. Now, you know, do you not, that the Hoboken participates in the freight rate?

A. I understand that they do, in some cases, anyway.

Q. And is it not on that ground that the Hoboken has insisted that it is not an intermediate carrier within the definition of this rule?

A. No, sir; it is not on that ground.

Q. Haven't you ever heard that contention made?

A. No, sir; never did before.

1628 Mr. FORT. The same restriction with respect to terminal switch reclaim, too, is there not, Mr. McCollester— by participation in rates?

I call the Examiner's attention to the fact that there is.

Mr. MCCOLLESTER. There is nothing in the definition of a terminal switching road providing that the road shall not be one that participates in the freight rate.

The WITNESS. Oh, yes; there is. It says at a switching charge.

Mr. MCCOLLESTER. But that is something different.

Mr. FORT. Just that I might follow the examination, is it laying the foundation for the contention that Hoboken should be—there

should be no reclaim in respect to Hoboken at all because it gets a division of the rate?

Mr. McCollester. Well, on that point, it is laying a foundation simply for the argument that the A. A. R. rules on which reliance is placed here are inapplicable to Hoboken.

Now, the situation is one which has got to be worked out between the trunk lines and Hoboken in a proper way, and this is not the place to do it, and we have told that to the trunk lines right along.

We do not care whether the Hoboken gets a reclaim. If the Hoboken does not get a reclaim, its divisions are going
1629 up, and the trunk lines must agree to that, because they agree that its compensation does not include the expense of car hire.

Now, we do not care whether it gets a reclaim and keeps its present divisions or whether it gets increased divisions and no reclaim. All we contend is that it cannot be put in a straitjacket of a rule drawn by the A. A. R., in one instance, when the rule is not applied fairly otherwise.

Mr. Fort. We understand that the question here is as to what the reasonable practice in the future would be, and not as to whether it falls in those rules, and I agree with you as to that.

Mr. McCollester. Well, we do not concede that there is any issue in this proceeding involving the reclaim rules, and, of course, in my cross-examination, based on the direct, I am not waiving my objection to the direct examination.

Q. Now, Mr. Randall, do you know, in the case of railroad freight cars delivered to the Florida East Coast car Ferry Company, when those cars are held awaiting a sailing of the car ferry, whether the car ferry is charged for the per diem, or is charged reclaim?

A. I do not.

Q. You did not look into that?

A. No.

Q. Did you look into the similar question with respect
1630 of any of the other water carriers listed on the A. A. R.'s special order of March 17, 1933?

A. No, sir.

Q. Which is an exhibit in this case?

A. No, sir.

Mr. Fort. The car ferries are made railroads by the terms of the statute, are they not, Mr. McCollester?

Mr. McCollester. No; they are ferries defined for the purposes of the car service rules as steamship ferry or barge lines.

Mr. Fort. Yes; but they fall within the definition of railroad in the statute?

Mr. McCollester. Oh, that is not so. Some of them do, and some of them do not, but the Commission has held that they are common carriers by water.

Mr. Fort. The Commission has not held anything of the kind.

Mr. McCollester. Excuse me. Counsel had better look up the cases on the point, because it has.

Examiner Hoy. Let us not argue about what the Commission has held in some other case.

By Mr. McCollester:

Q. Now, take the Canadian Pacific Car & Passengers Transfer Company. If cars have to wait for delivery to its ships, does the railroad absorb the per diem or is it charged to the water carrier?

1631 A. The general committee has never received any complaint from the carriers involved there, and I would not know of that first-hand.

Q. And is that true of the Drummond Lighterage Company?

A. Yes, sir.

Q. And of the Florida East Coast Car Ferry Company?

A. Yes, sir.

Q. And the Foss Tug & Barge Company?

A. Yes.

Q. And the Grand Trunk Milwaukee Car Ferry Company?

A. Yes.

Q. And the Mackinac Transportation Company?

A. Yes.

Q. And the Ontario Car Ferry Company, Ltd.?

A. Yes.

Q. Canadian Corporation?

A. Yes.

Q. And the Pennsylvania Ontario Transportation Company?

A. Yes.

Q. And the Puget Sound Navigation Company?

A. Yes.

Q. And the Toronto Hamilton & Buffalo Navigation Company?

A. Yes.

Q. And the York and Sun Barge?

A. Yes.

1632 Q. Now, do you know of any instance of a water carrier with which cars are interchanged, where the detention of the cars awaiting the convenience or necessity of the water carrier is charged to the water carrier?

A. There have been no complaints before the general committee in that respect.

Q. Your answer is that you do not know of any instance; is that right?

A. No; my answer is that the general committee has received no complaints of any instance——

Mr. McCollester. That is not my question. I am sorry, Mr. Randall.

(To the reporter.) Would you read the question?

(Question read.)

A. I think probably the answer is no. I don't——

Q. All right.

Mr. Fort. Might there be such cases that you would not know?

The Witness. Yes.

Q. Are we to understand, Mr. Randall, that the testimony that you have given here and the views that you have expressed are given by you as chairman of the general committee of the operating division of the Association of American Railroads?

Mr. Fort. Mr. Examiner, may I say a word, please? The witness has said that he holds that position. That is an indica-
1633 tion of what his occupation is, and what opportunity he has to——

Mr. McCollester. I object to counsel coaching the witness, Mr. Examiner, which he is about to do.

Mr. Fort. I am not trying to tell the witness a thing. I am trying to tell you something, Mr. McCollester.

May I continue?

Mr. McCollester. I would be glad to be told——

Mr. Fort. I think you will agree with this. The witness takes the stand, and he is speaking as the witness, Mr. George Randall. His connections are just his occupation. He is not appearing here as counsel or as advocate. He is appearing as a witness. I think your question is an improper one.

Mr. McCollester. I agree with counsel that that ought to be the fact, but in most of these cases, as counsel well knows, the witness speaks in his official capacity, and I was asking whether he was speaking in his official capacity. I am asking him whether he was speaking in his official capacity.

Mr. Fort. He is my witness, and I will ask him.

Mr. McCollester. I can ask him that question.

Mr. Fort. I do not think that is a proper question.

Examiner Hoy. I do not think it is, Mr. McCollester. The wit-
ness is here, and he has testified and has put in his
1634 evidence.

He gave his experience and qualifications to testify.

What we are interested in is his testimony rather than whom he is speaking for.

In other words, he is here, and has been sworn, and has testified to certain things, and that is sufficient.

Mr. McCollester. Well, Mr. Examiner, he has given statements of opinion as to how the provisions of the car service and per diem rules should be interpreted, and plainly, the design was to create the impression that he was speaking in his official capacity as the chairman of the committee having to do with those, and voicing the views of the committee.

Q. Is that correct, Mr. Randall?

Mr. Fort. I think the whole thing could be cleared up this way: Have you given any opinion here that was not your own opinion?

The Witness. No, sir.

By Mr. McCollester:

Q. Although it was your own opinion, is it also the opinion of the committee of which you are chairman?

Mr. Fort. If the committee has gone on record with any opinion as to the particular question. Now, pick out a question and answer, and ask whether or not——

Mr. McCollester. Now, I object, Mr. Examiner, to having my cross-examination interrupted. I am entitled to examine the witness.

1635

Mr. Fort. I have interrupted you much less than you have interrupted me, Mr. McCollester.

Mr. McCollester. May I have the question?

Examiner Hoy. Read the question, Mr. Reporter.

(Question read.)

Mr. Fort. I ask Mr. McCollester to particularize and point out some particular thing, and ask whether that is the opinion of somebody other than the witness.

Examiner Hoy. Just what do you mean by his opinion, Mr. McCollester—all of his opinions that he has expressed here?

By Mr. McCollester:

Q. Where you have expressed opinions here as to the proper interpretation of the car service and per diem rules, and their proper application in the case of the interchange of cars with Seatrain, have those opinions been the opinions of your committee as well as of yourself?

A. No, sir, the committee have not passed on them. They have not been before the committee.

Examiner Hoy. In other words, the committee has no opinion as yet that you know of?

The Witness. That's right.

Q. Within the nature of your employment, Mr. Randall, can you appear in cases and give opinion testimony on contro-

1636 vertial matters within the scope of the functions of the

Association of American Railroads without your superiors—

Mr. Fort. I think I will object to that as being immaterial.

Examiner Hoy. I will sustain that objection.

Mr. McCollester. Exception, please.

By Mr. McCollester:

Q. Was there any official action of the Association of American Railroads directing you to appear as a witness in this proceeding?

A. My understanding is that the Board of Directors instructed that the Association appear in this case, and in accordance with that action, counsel for the Association has developed, the witnesses, and I am one of them.

Q. Was that instruction of the Board of Directors that the Association appear in this case in support of the complainants?

A. Well, I am not in a position to answer that.

Q. You do not know what the instructions are. Can you produce a copy of the action of the Board of Directors?

Mr. Fort. I object to that as immaterial, and not bearing on any issue in this case.

Mr. McCollester. I was told, Mr. Examiner, a while ago, when I objected to the witness in the first instance, that I could go into it on cross-examination.

Examiner Hoy. Of some of this; yes. He has testified, as just stated, on cross-examination, why he is appearing; and
1637 the action of the Board of Directors—

Mr. McCollester. But he does not know which way the Board of Directors was.

Examiner Hoy. No.

Mr. McCollester. I am entitled to have the action produced here.

Examiner Hoy. Well, I presume that the Board of Directors instructed their counsel to take action, and as the witness just testified.

Now, he is here and he is testifying. I do not know that the Board has taken any particular position yet. They have put in certain evidence.

Mr. McCollester. That is what I want to find out.

Examiner Hoy. And the witnesses have not taken any particular position here yet. They have testified as to certain facts.

Mr. McCollester. He has testified to a lot of opinion, Mr. Examiner.

Examiner Hoy. And opinions—well, opinion evidence based on his experience. Now, what was your last question?

Mr. McCollester. We are entitled to find out whether the opinion evidence is in accordance with the authority of the Board of Directors by which he appears here.

Mr. Fort. Why are you entitled to find that out?

Mr. McCollester. Why not?

1638 Mr. Fort. The witness has gone on the stand and given his qualifications. He has tried to testify to facts that are within his knowledge, and he has tried to testify to opinion matters in connection with which his experience would qualify him to testify.

Now, what more is there to it than that?

I object to this line of questioning.

Examiner Hoy. He has authority to come here; he came here——

Mr. McCollester. Mr. Examiner, please bear in mind that we are members of this association; the complainants in this proceeding are.

Mr. Eshelman. Who is "we" now?

Mr. McCollester. Hoboken Manufacturers Railroad and the New Orleans & Lower Coast Railroad are members of this association.

Now, we have never been consulted about the appearance of this witness here. Neither has the Missouri Pacific, so far as I know, nor the Texas & Pacific, nor the Rock Island, nor any number of railroads.

Mr. Fort. Mr. McCollester, of what interest is that to the Commission? It might be a matter of some interest in some other place, but certainly not to the Commission.

Mr. McCollester. It is certainly pertinent to find out whether a witness called by the association, granted he is

1639 expressing his personal opinion, is expressing opinions in conformity with or contrary to the official action of the Association, and we are entitled to find that out.

Examiner Hoy. I do not see it that way. This man has come up here and he has testified, and on cross-examination he said that the opinions he gave were his own opinions, and that, so far as he knows, up to this time, the committee of which he is chairman has no opinion.

The Witness. That is right.

Examiner Hoy. Now, his opinions are his opinions. He said that. Now, whether they would correspond with what the Association wants him to testify to, I do not know, and I do not think it is material.

Even if the Association wanted him and directed him to testify in a contrary way he has come up here and testified and given his personal opinions, and that is what the record has got.

There is no evidence in here yet from this witness as to what the association, as such, thinks of these rules, as I understand the record as it has gone in.

Are there any further questions?

Mr. McCollester. I have no further questions. I ask that the action of the Association pursuant to which the witness has appeared here, and counsel has appeared here, be produced here for the record.

1640 Examiner Hoy. Are you asking opposing counsel?

Mr. McCollester. Asking opposing counsel.

Mr. Fort. That was the same question that was asked the first day, and denied, and I again say that I see no occasion to produce it. It seems to me that it has nothing whatever to do with this case.

Examiner Hoy. All right, is there any further cross-examination?

Mr. Thompson. I have a couple of questions.

By Mr. Thompson:

Q. Mr. Randall, am I correct in understanding you to say that the $1.00 per diem approved by the Commission in No. 17801 is applied uniformly throughout the United States?

A. I didn't say it was approved by the Commission in 17801. That question was not in issue in 17801.

Q. I see. This $1.00 per diem that was approved there—whether you say it or not—did you say it was applied uniformly throughout the United States?

A. It is the reciprocal per diem rate; yes, sir.

Q. Are you familiar with the Commission's decision in that proceeding?

A. Yes, sir.

Q. Is it not a fact that the Commission in that proceeding provided that cars furnished by the trunk lines to the short line

1641 connections should be allowed a credit of one day, or at least $1.00 per diem on each delivery?

A. No, sir.

Q. Under that decision?

A. The Commission under the decision said that the trunk lines should allow the short lines two days, but that was overruled by the Supreme Court.

Q. Arrangements now made with each line——

A. The final outcome of the matter was that it was arranged by the Commission before it closed out 17801, that there would be

individual settlements made under the supervision of the car service division, and those individual settlements have now been made with some 275, I think, or in that neighborhood, short lines, not on any common basis, but rather upon what the merits of each case showed.

Q. But there are instances, then, where they do allow the short lines one or two days' time?

A. Oh, yes; surely; yes, sir.

Q. To that extent, they would not be uniform reciprocal arrangements, would they?

A. The Commission approved those arrangements under the supervision of the Car Service Division; yes, sir.

Q. Yes; and these short lines do not have equipment of their own, at least to any substantial extent, do they?

A. Some of them do not; others do.

Q. Most of them do not; is that correct?

1642 A. Well, there is a large percentage that do not, but there is still a large percentage of them that do.

Mr. THOMPSON. That is all.

Examiner HOY. Is there any further cross-examination?

By Mr. WARE:

Q. Mr. Randall, will you refer to Exhibit 58, please?

A. All right, Mr. Ware.

Q. Is that rule which you have reproduced there identified as Item 122 of that tariff?

A. That is my understanding; yes, sir.

Q. Now, you did not reproduce that rule in its entirety, did you, Mr. Randall?

A. Well, I thought we did. I have a copy of the supplement here. I presume you have.

Q. I do, too, Mr. Randall.

Will you take my word for it that you did not reproduce it in full?

A. If you tell me what I did not reproduce——

Mr. FORT. Is there some part that you think should go in?

Mr. WARE. I just want to ask him if he had any reason for not reproducing it in full.

The WITNESS. You mean the form here?

Mr. WARE. The form and the bottom portion down there.

The WITNESS. No; I think it was purely an oversight

1643 if we didn't reproduce it all.

Mr. WARE. All right, sir.

Mr. FORT. Mr. Ware, does that failure to include what you call attention to make what is there incomplete, or change its meaning at all?

Mr. WARE. It would not change the meaning as far as he has gone, Mr. Fort, but I just wanted to know why he did not reproduce it in full. He says it is an oversight.

The WITNESS. Purely an oversight.

Mr. FORT. I ask an opportunity to—

Mr. WARE. We can refer to the tariff.

Mr. FORT. Put it in in complete form.

Examiner HOY. All right; you may do that.

The WITNESS. I have a copy of the tariff itself here, if they want it.

Examiner HOY. As a revised Exhibit 58?

Mr. FORT. We will put in anything Mr. Ware thinks should go in there to make it complete.

Examiner HOY. Well, just a copy of the rules, complete.

By Mr. WARE:

Q. Now, Mr. Randall, do you have any personal knowledge as to why that rule was published?

A. Well, I know the result of my conversations with Mr. Cannon, Mr. Kendall, and Mr. Trobaugh of the Missouri Pacific.

Q. Well, now, isn't the extent of your information—it goes to what has happened since that rule was published, rather
1644 than the reason why the rule was published?

A. No; I think not, because I was in on it long before the tariff item was published. They first attempted to control that movement through the New Orleans and Lower Coast under the provisions of Car Service Rule 7, which we overruled them on, and said that the Car Service Rule 7 was not applicable.

Q. Now, Mr. Randall, do you know whether or not there was any difference in the methods of handling cars prior and subsequent to the publication of that rule?

A. You mean the physical handling of the cars?

Q. Yes, sir.

A. I couldn't say, Mr. Ware.

Mr. WARE. That is all.

Examiner HOY. Is there any further cross-examination?

(No response.)

Examiner HOY. Is there any redirect?

Mr. FORT. No.

Examiner HOY. You are excused, Mr. Randall.

(Witness excused.)

Examiner HOY. We will take a five-minute recess.

(Whereupon a five-minute recess was taken.)

Examiner HOY. We will resume, gentlemen.

Mr. FORT. Mr. Examiner, some question was raised as to whether Exhibit No 58 fully sets forth the rule which is, at

1645 least, set forth in part on the Exhibit. In order to avoid any question in that connection, I would like to offer as revised 58 the tariff itself, which is Supplement No. 20 to I. C. C. No. 18, New Orleans and Lower Coast Railroad Company tariff.

Examiner HOY. It will be received as Revised Exhibit No. 58.

(Discussion off the record.)

(Revised Exhibit No. 58, Witness Randall, received in evidence.)

Mr. FORT. Mr. Examiner, I take it that Exhibits heretofore marked in Mr. Randall's testimony are accepted and received.

Examiner HOY. They have already been received in evidence.

(Discussion off the record.)

Examiner HOY. Call your next witness.

Mr. FORT. Mr. Kendall.

WARREN C. KENDALL was sworn and testified as follows:

Direct Examination by Mr. FORT:

Q. Mr. Kendall, will you give the reporter your name?

A. Yes, sir; Warren C. Kendall.

Q. What is your position?

1646 A. Chairman of the Car Service Division of the Association of American Railroads.

Q. How long have you been in that position?

A. Six years.

Q. What were you doing prior to that?

A. I was a member of the same commission, or same division, for about fourteen years.

Q. Adding the fourteen to the six, you mean?

A. Yes, sir.

Q. So that you have been connected with that committee for twenty years?

A. Twenty-one years.

Q. And prior to that time, were you with railroad service?

A. Yes, sir.

Mr. MCCOLLESTER. We will admit Mr. Kendall's qualifications.

Mr. FORT. Qualifications for anything he may say?

Mr. MCCOLLESTER. Anything he will say.

By Mr. FORT:

Q. Mr. Kendall, what are the duties of officers or functions of that committee, very briefly?

A. Mr. Randall left an exhibit, Car Service Rules, and I would refer you to Per Diem Rule 19, which outlines very specifically what our duties are. I thought I had a copy of it with me.

(Document handed to witness.)

1647 The WITNESS. I will read very briefly:

"The Board of Directors of the Association of American Railroads shall appoint a Car Service Division composed of a Chairman and the requisite number of members, territorially selected, invested with plenary powers to—

"(a) Supervise the application of Car Service and Per Diem rules;

"(b) Suspend or permit departures from Car Service rules 1 to 6;

"(c) Exempt unnecessary cars of any type from the provisions of Car Service Rules 1 to 6 inclusive, and provide other regulations under which such cars shall be handled;

"(d) Transfer cars from one railroad or territory to another when necessary to meet traffic conditions, with due regard to car ownership and requirements;

"(e) Conduct investigations, including examination of car records, as may be necessary to insure the observance of Car Service and Per Diem rules, and of any orders issued by the Car Service Division;

"(f) Obtain car location statements and other car performance statistics as deemed necessary."

I have not read all of them, but I think that is sufficient for the occasion.

Q. Mr. Kendall, is the per diem movement, if you call it movement, on the Seatrain, of empty cars or loaded cars in
1648 coastwise traffic?

A. Loaded cars.

Q. Do you care to make a more elaborate statement on that?

A. We have an exhibit which can be presented which shows that the predominance of the traffic is loaded traffic, that which is in coastwise movement.

Q. Mr. Kendall, is this the statement to which you refer?

A. It is.

Mr. FORT. I ask that this exhibit be marked No. 61, and received in evidence.

Examiner HOY. The exhibit will be received.

(Exhibit 61, Witness Kendall, received in evidence.)

Q. Mr. Kendall, will you explain what the exhibit contains, and what conclusions you draw from it?

Mr. MCCOLLESTER. Will he state how it was prepared and what the source of the data is?

Mr. FORT. Yes.

A. This exhibit is taken from Exhibit No. 56 in ICC Docket 25727, witness G. M. Brush. The important of this exhibit for my purpose is, on page 2, a list of 1,479 loaded cars handled in

domestic service out of New York and 1,422 in domestic service out of New Orleans for the first six months of 1936.

Q. Loaded cars?

A. Loaded cars in domestic service.

1649 Q. Yes, sir. Now, during that same time, how many empty railroad cars moved in coastwise business over the Seatrain?

A. Turning to page 3——

Q. Railroad owned cars.

A. There is shown to have been moved out of New York a total of six railroad owned cars, and on page 4 a total of fourteen railroad owned cars.

Q. Wait a minute.

Examiner HOY. Page 2, 2½, and 5——

The WITNESS. Page 3 is under 5, Mr. Examiner.

(Discussion off the record.)

The WITNESS. A total of six railroad owned cars handled empty out of New York, and on page 4, a total of fourteen railroad owned cars handled empty out of New Orleans.

Now, I refer to the letter from Mr. McCollester, shown as Stencil 24788–5 dated November 9, 1936, the P. S. at the bottom of the page: "Of the six railroad owned empty cars handled out of New York on the Seatrain 'Havana' and Seatrain 'New York,' one moved in coastwise service and 5 went to Cuba.

Of the fourteen railroad owned empty cars handled out of New Orleans by the Seatrain "Havana" and Seatrain "New York," two moved in coastwise service and twelve went to Cuba.

Q. Then, during that six months, Mr. Kendall, if I understand you correctly, in both directions, only three empty railroad

1650 owned cars moved over Seatrain in coastwise; is that correct?

A. That is my understanding of the statement, yes, sir.

Q. Now, during that same period, how many loaded cars moved in both directions, railroad and privately owned?

A. 2,901.

Q. What part of that 2,901 would you say was railroad owned cars?

A. There is no definite count shown in the statement. My best judgment is that they are not to exceed fifteen percent private line cars as a total.

Q. If you take fifteen percent as an outside, how many would that leave, approximately of 2,900?

A. About 2,600.

Examiner HOY. Why do you take off fifteen percent?

The WITNESS. Because I know—I feel that is an outside figure of any possible inclusion of private cars in the loaded movement in coastwise service.

Q. Well, then, so far as railroad owned cars are concerned, there would be 300 empty moves as against 2,600 loaded moves?

A. That's right.

Q. So you reach the conclusion which you expressed that the empty movement is a mere fraction of one percent, a negligible part of the entire movement; is that correct?

A. Yes, sir.

Q. Now, Mr. Kendall, what is the situation in general railroad operation with respect to the relationship between the movement of empty cars and the movement of loaded cars?

1651

A. Movement of what?

Q. Empty cars and loaded cars?

A. So far as railroads are concerned, in 1936 there were 53 empty cars moved for every 100 loaded cars, and in 1938, for the entire year, there were 55.8 empty cars handled for every 100 loaded cars.

Q. You are speaking of cars now, or car miles?

A. Car miles.

Q. Of course, your reference to empties and loads on the Seatrain was reference to cars rather than car miles, but the relationship would be the same because the empties and the loads on the Seatrain moved an equal distance; is that correct?

A. That is correct.

Q. What conclusion would you draw from these facts to which you have called attention?

A. That Seatrain in that portion of the through movement of cars in which it is directly and solely concerned, is bearing practically none of the burden of empty handling to which all railroads are obligated. This, however, is only a part of the story. The greater portion of the traffic handled by Seatrain originates or terminates, or perhaps both, beyond its switching carrier connections.

1652

This means that this carload traffic which orginates or terminates on these other connecting lines, usually so-called trunk lines, is on a basis exactly parallel with the traffic which they handle which in no way involves Seatrain. That is, under these circumstances, the trunk lines originating or terminating traffic moving via Seatrain are assuming a burden for Seatrain which the latter in no way reciprocates.

(Discussion off the record.)

Q. In what respects, assuming a burden?

A. Well, in the case of an originating railroad, the originating carrier is responsible——

1. For the creation and holding of reserve supply of equipment;

2. For the general——

Q. That involves car time, does it?

A. Yes, sir.

Q. For which there is a car ownership expense?

A. Yes, sir.

Q. All right, go ahead.

A. 2. General distribution of empties to loading territory;

3. The location and movement and placement of an empty for a shipper;

4. The preparation of a car for loading;

5. Assuming the time element which the shipper con-
1653 sumes in loading;

6. Switches, and classifies for road haul movement cars which are loaded by the shipper;

7. Assumes any time for repairs for any cars which are placed for loading, or which are to be placed for loading, and switching to and from repair tracks of that car.

Mr. McCollester. What was No. 4?

The Witness. Preparing the car for loading, conditioning.

Q. You are speaking of time consumed in the life of a car which is incidental to the actual movement under load, are you not, Mr. Kendall?

A. Yes, sir.

Q. Now, you were restricting yourself, as I understood you, to time incident to orginating traffic?

A. That is right.

Q. Were you, so far?

A. That is right.

Q. Have you anything more to say about that time in connection with the delivery, or anything like that?

A. There is a corresponding detention or obligation on the part of the railroad which delivers the car to the consignee. In the first place, a car must be switched from a terminal yard to a public delivery track or to a private team track.

Second, they must assume the time element of the shipper
1654 for unloading purposes.

Three, there is a switching of the car to the classification yard for forwarding or to hold yards from which location it will subsequently have to be moved.

Four, sometimes the cars are switched to a special cleaning track, to be cleared of debris before it is forwarded.

Five, there is switching to or from repair tracks, in case repairs are necessary, and the assumption of time for this purpose.

Six, frequently, there are differences in inspection between the foreman who is going to load the car, and the railroad foreman and one has to be switched out and another car has to be switched in.

Q. Are these losses of time incident to business which moves over the Seatrain as well as to business which moves all rail?

A. All of these obligations have to be assumed by the terminating railroad, whether originating or delivering, and irrespective of whether the shipper moves via Seatrain or otherwise. This burden of expense Seatrain almost entirely avoids and as regards to which there is no reciprocal service.

Q. Mr. Kendall, perhaps you have covered this, but I want to ask the direct question: You have shown that there is a great deal of idle time necessarily incident to loaded time, regardless of how that loaded time may be calculated?

1655 A. Yes, sir.

Q. In railroad operations generally?

A. Yes, sir.

Q. Now, would it be true or would it not be true in your opinion that with respect to business which moves wholly by Seatrain, there would be an equal amount of idle time or empty time although that time did not take place on the Seatrain?

A. There is.

Q. Well, now, will you please develop that a little, as to why you think so, and so on?

A. All the railroad owned cars moving loaded via Seatrain must be relocated to their owners after release, or be otherwise disposed of, and the fact that Seatrain itself does not perform any empty haul or any empty movement of cars does not mean that there is not an empty movement, or empty haul of cars incident to the use of cars by Seatrain. In this connection, there is nothing to distinguish cars moving by Seatrain from loaded cars handled by railroads from New York to New Orleans, or from New Orleans to New York. In connection with such a movement by railroad, there would be a large amount of what I have roughly called idle time, and there is a corresponding

1656 amount of idle time in connection with the cars which have been loaded via Seatrain. There is nothing to distinguish this idle time which would be incident to and attributable to the Seatrain movement, or that which would be incident to or attributable to loaded movement on railroads between New York and New Orleans, from the idle car days incident to the general operation of railroads in the United States. It is fair, therefore, to assign to the loaded days on Seatrain the same proportion of idle days which are bound to exist in connection with railroad operations generally in the United States.

Q. Well, as illustrative, let us select certain items which cause this idle time, not meaning to cover them all. Take cars which are stored as excess cars to take care of peak movements. That is an idle time, is it not?

A. That is.

Q. And equally assignable to Seatrain in railroad operation?

A. Yes, sir.

Q. Take the time that cars are under repairs. That is an also an item equally assignable to the two operations, is it not?

A. Yes, sir.

Q. As to shipments moving from an interior point to New York, thence via Seatrain to New Orleans, and to an interior
1657 point in the South, you have the matter of getting the car to the loading point, just as you would have if that shipment were all rail?

A. Just the same.

Q. You have whatever delay may be involved in placing the car for the shipper, whatever delay might be involved in the shipper loading, whatever delay might be involved in the classification or switching after it is loaded at point of origin. There would be no distinction between those things, whether it moved Seatrain or all rail, would there?

A. None whatever.

Q. And when you get to destination, and have to set the car out for the shipper, and he has to unload, there would be no distinction with respect to those features?

A. No, sir.

Q. The car, then, after it is released in the interior south, must one way or another move to its home line in accordance with the rules, picking up loads for all the way or part of the way, or moving empty, as the case may be; is that true?

A. As the case may be; yes, sir.

Q. And there would be no distinction as to that, and as to the time lost in that connection, whether that car got to Dallas by an all-rail move, for example, or whether it got
1658 there by rail-Seatrain-rail, would there?

A. None whatever.

(Discussion off the record.)

Q. Mr. Kendall, did you make a check of the cars moving over Seatrain at any time to see to what extent they loaded a car down and returned it under load coming back, and to what extent they loaded a car in one direction, and it had no loaded movement back on Seatrain, or empty movement either, as far as that is concerned?

A. Yes, sir; I did.

Q. Will you explain the nature of that check and what it shows?

A. I had a check made for a one month period in 1936, during the same period that has been referred to in the exhibit, and at that time it was found that during this month there were 442 cars handled one way, loaded, which cars had no previous loaded or subsequent empty or loaded movement via Seatrain, and there were 82 cars which were handled loaded on the round trip, between New York and New Orleans.

Q. You mean 82 each way?

A. Yes; 82 each way, round trip, and 442 single trips.

Q. 442 single trips both up and down?

A. Up and down.

Q. Were there 442 up?

A. No; that is both ways.

1659 Q. Both ways. Of those cars which came there and which were unloaded either in the north or the south, and did not move back either loaded or empty via Seatrain—they were handled—they were handled after that just as if they had gotten there by an all-rail movement, were they not?

A. Yes, sir.

Q. Mr. Kendall, is there any further comment that you would like to make on that point of the idle time incident to the loaded time on Seatrain?

A. I think not.

Q. Did you hear Mr. Randall's testimony this morning?

A. I did.

Q. Did you hear him using the term loaded car day to mean that car after it had been given to the consignor and until it is released by the consignee—using that method of determining loaded car day, your loaded car days would only be one out of 3.8 total days?

A. Yes, sir.

Q. In general railroad operation?

A. Yes, sir.

Q. Would you think that that would be a corresponding figure in connection with the loaded days on Seatrain?

A. I would say so.

1660 Q. Mr. Randall also gave some other figures based on other calculations, one of which showed one day out of eleven to be loaded under the sense that I was using "loaded" in that particular connection. Would it be your opinion that that would also hold true with respect to business which moved via Seatrain?

A. I think so; yes, sir.

Q. Now, Mr. Kendall, have you made any check to determine the detention of railroad cars on business moving to New Or-

leans via a railroad for further move by the break-bulk water lines in coastwise traffic?

A. Yes, sir.

Q. Have you prepared an exhibit in that connection?

A. Yes, sir.

Q. Will you give me a copy? [Witness handing to counsel.] Is this the statement to which you refer?

A. Yes, sir.

Mr. Fort. I ask that it be marked Exhibit No. 62 and received in evidence.

(Exhibit No. 62, Witness Kendall, received in evidence.)

Q. Mr. Kendall, explain what that exhibit shows, please.

A. There was an examination of all of the cars which were delivered by four railroads at New Orleans during the months of July, August, September, October, November, and December, 1938, consigned for coastwise movement, via coastwise
1661 water carriers.

You will note the exhibit shows this total of 1,050 cars, that are destined to coastwise carriers, including Clyde-Mallory, Coast Transportation Company, Moore-MacCormack, Morgan Line, Pan-Atlantic.

The average detention on the total 1,050 cars was 0.02—2/100 of a day. That is, the total detention for the 1,050 cars was 25 days.

Three of the lines, Moore-MacCormack, Morgan, and the Pan-Atlantic, performed the same type of service in that they run from relatively—operate from the same and through the same territory as Seatrain—had a total of 839 cars, which took up the whole detention of 25 days referred to.

Q. Mr. Kendall, how is that business——

Examiner Hoy. Did you say 839?

The Witness. Yes.

Mr. McCollester. 839 is the total of what?

The Witness. 849. I am sorry.

Q. How is that business handled, which keeps the detention down to such a very small figure?

A. It is delivered by the trunk-line carriers at New Orleans, to the coastwise lines immediately upon arrival at New Orleans.

Q. Carried to a dock and unloaded on a dock?

A. That is my understanding; yes, sir.

1662 Q. Well, the general conclusion which this exhibit justifies would seem to be that on that coastwise break-bulk movement to New Orleans the railroad cars are not detained in awaiting the sailing of the ship, or for any other reason; is that true?

A. There is practically no detention of cars at New Orleans, break-bulk service.

Q. Now, have you got all the railroads coming into New Orleans there?

A. No, sir.

Q. Which ones haven't you got?

A. Southern Railway, Texas & Pacific, Missouri Pacific, T. L. & A.

Q. Why are those roads not included?

A. They did not have time to get one of them. This was a tremendous job, running through these detailed records. That was the Southern Railway, and we were unable to get the others because we were refused access to the records.

Q. Now, as to the railroads that you have there, you have got all the cars that came during the period shown on the exhibit?

A. We believe we have every one; yes, sir.

Q. There is nothing selective about it?

A. No, sir.

Q. All right, sir. Did you testify as to the year?

1663 A. I said 1938; yes.

Q. Did the L. & A. refuse to let you see their records?

A. I think their cars come there through another carrier. I am not sure about that, Mr. Fort.

Q. Mr. Kendall, did you make a similar check or investigation as to interchange between railroad and coastwise break-bulk lines in New York?

A. Yes, sir.

Q. Have you a statement on that?

A. Yes, sir.

Q. Is this a copy of the statement?

A. It is.

Q. It is?

A. Yes, sir.

Mr. Fort. I offer this statement to cover the New York situation, and ask that it be marked Exhibit No. 63. May it be received?

Examiner Hoy. It will be received in evidence.

(Exhibit No. 63, Witness Kendall, received in evidence.)

Q. Mr. Kendall, please explain what is shown on this exhibit?

A. This is a record of all of the cars loaded with coastwise traffic delivered to the break-bulk lines at New York, New York harbor district, for one week, in each of three months—November and December 1938 and January 1939.

1664 Q. You are taking the first week in the month, or what?

A. I am unable to say. We took one week, the same corresponding week in each of the three months.

Q. I see.

A. And for the reason only that it was a big job, and we thought this would be truly representative of the entire period.

Q. Now, what railroads did you get in New York?

A. These are all railroads delivering cars in coastwise traffic.

Q. What did you find out there, Mr. Kendall?

A. During these three representative weeks of the three months, a total of 553 cars delivered to these lines for coastwise movement, which were detained a total of 409 days, or 7/10—an average of 7/10 of a day per car.

Going a little further, the delivery of cars to the Morgan Line and to the Pan-Atlantic may be considered comparable with deliveries to Seatrain, so far as territories served are concerned, and for these three representative weeks of the three months, there were 257 cars delivered to these two lines, which were detained an average 206 days, or an average of 7/10 per day per car.

I might add that all of the deliveries to coastwise lines, break-bulk coastwise lines, in the New York area, are on the basis of standing orders to deliver upon arrival, and there is
1665 no detention for which the break-bulk lines are responsible. There may be an occasional day's delay due to some railroad disability or railroad preference.

Q. Mr. Kendall, did you attend the former hearing in this case, which I think was in 1933, was it not—when was it, 1933?

Mr. MATHEY. 1933.

Q. (Continuing.) In 1933?

A. No, sir.

Q. Have you read the testimony given in that proceeding by Col. Ballentine?

A. Yes, sir; parts of it.

Q. He undertook, did he not, to make a comparison of the time to be consumed in a round trip all-rail from New York to New Orleans, or from an interior point near New York to an interior point near New Orleans, all-rail—strike that, please.

Did he attempt to make an estimate comparing the time in which a car would be in service making a round trip from New York to New Orleans all-rail, and making a move between the same points for Seatrain?

A. If I recall correctly, Col. Ballentine testified that the round trip time via Seatrain was 16 days, and he compared that
1666 with a round trip of 37 days, one way Seatrain and return empty, I think, all-rail, if I recall correctly; anyway, the comparison was 16 against 37.

Q. Yes. Now, as a matter of fact, how long does it take Seatrain to get to New Orleans from New York—6 days?

A. Six days, in my understanding.

Q. And when would that come back?

A. The next day, usually, after arrival.

Q. The next day. If a loaded car were taken down there and there unloaded, and loaded for movement back by Seatrain, it could not catch that boat, could it?

A. It would not seem possible.

Q. The next boat would be a week later, would it not?

A. Yes, sir.

Q. So, as a practical matter, if a car went down loaded and came back loaded via Seatrain from New York to New Orleans, how long would that trip take?

A. That would be 19 days, without allowing any terminal time at this end.

Q. Without allowing any terminal time at this end?

A. Yes, sir.

Q. Now, take an all-rail movement from New York to New Orleans, loaded. How much time would that consume?

A. We have various examples—three, four, and five days. I would say the average was somewhere between four and five on loaded traffic.

1667 Q. Yes. Now, if that car were unloaded in New Orleans, and again loaded like the corresponding Seatrain car, and came back to New York, how long would you allow for the loading and unloading at New Orleans, as a rough estimate, and then how long would it take you to get back to New York?

A. I think a fair estimate would be two days for the unloading and two days for the reloading. I think that is reasonable, and that is what Col. Ballentine allowed in his case.

Q. Then how long would it take to come back to New York loaded?

A. Well, 4½ days down; 4 there, is eight, and—8½, I mean, and 4 on the way back—that would be about 13 days.

Q. About 13 days as against 21, and taking those figures against Col. Ballentine's 16 days for Seatrain and 37 for rail; is that correct?

A. Yes, sir.

Q. Now, we have been contemplating a loaded movement both ways. Suppose that Seatrain car is unloaded after it gets to New Orleans, and is not reloaded for movement back via Seatrain, but is an empty car, in New Orleans, to come back to New York either loaded or empty, or the best way it can: Would it

make any difference in the time it would require to do that, whether it got down to New Orleans by Seatrain or railroad?

A. It would not.

1668 Q. So any effort to make it appear that under any circumstances the movement all-rail to New Orleans and back, whether it is loaded both ways, or empty one way—it would take more time than the same movement via Seatrain, or in connection with the Seatrain movement—that is, in your opinion, erroneous; is that correct?

A. Correct; yes, sir.

Mr. McCollester. Of course, Col. Ballentine's testimony will speak for itself. What he actually testified to is in the record. I do not recall.

Mr. Fort. Oh, yes; of course.

Mr. McCollester. His testimony, rather than the witness' interpretation of it.

Mr. Fort. That is right. That is all, Mr. Kendall.

(Discussion off the record.)

By Mr. Fort:

Q. Mr. Kendall, in connection with the amount of time consumed in Seatrain movements as contrasted with the amount of time consumed for all-rail movements, did you make any check of actual shipments for the purpose of a basis for your judgment?

A. Yes, sir.

Q. Will you indicate the character of the checks that you made, and the results that you got from that check?

1669 A. I took a random list.

Examiner Hoy. Is that going to be an exhibit?

Mr. Fort. It is going to be an exhibit after he gets along a little further and tells what it is.

Examiner Hoy. All right.

Q. What kind of check did you make?

A. A random check of 25 cars moving during the months of December and January 1938, and 1939, south-bound, via Seatrain, from various points of origination to various destinations; also a check of about 15 or 20 cars moving all-rail into the southwest, and from somewhat comparable points of origin during the same period, and I might say comparable distances.

Mr. Fort. It might be better to have this before everyone.

Mr. McCollester. I think it would be helpful.

Q. Did you prepare a statement in connection with that check showing the results of it?

A. Yes, sir.

Q. Is this the statement?

A. It is.

Mr. FORT. I offer it in evidence as Exhibit No. 64.

(Exhibit No. 64, Witness Kendall, received in evidence.)

Q. Mr. Kendall, what did you set forth on this Exhibit 64?

A. The elapsed time from date of billing at the point of
1670 origin, which, in this case represents the date of departure of the car, and the date of arrival at destination, showing the days in transit for each of the cars moving via Seatrain which was found to be 14.28 days.

Q. That is 25 cars?

A. 25 cars.

Q. Was there any element of selection in taking that 25 cars, and, if so, what was it?

A. None whatever. They were taken at random.

Q. Now, that is shown at the top of the exhibit, is it not?

A. Yes, sir.

Q. Now, you took rail shipments which you wished to compare with those Seatrain shipments?

A. Yes, sir.

Q. Were you able to find more rail shipments between exactly the same points?

A. No, sir.

Q. But you have shown rail shipments here, and on your exhibit, you show that—you show what the origin is and what the destination is, and what the time is?

A. Yes, sir.

Q. And that you think that using the 25 on the one hand and the 25 on the other—that it is indicative of the comparative time required for this type of movement, using Seatrain as
1671 against all-rail?

A. I think they are reasonably comparable; yes, sir.

Q. They are not 25 all-rail movements, I see. How many are there?

A. 18.

Q. Well, now, Mr. Kendall, what was the average time for such shipments on Seatrain?

A. Average time via Seatrain was 14.28 days, and for all-rail shipments, 6.3 days.

Q. Mr. Kendall, did you also make a corresponding check with respect to shipments moving in the opposite direction?

A. Yes, sir.

Q. And is the result of that check shown on this statement?

A. Yes, sir.

Mr. FORT. I offer that statement as Exhibit No. 65 in evidence.

Examiner HOY. It will be received.

(Exhibit No. 65, Witness Kendall, received in evidence.)

Q. Mr. Kendall, what does that show, very briefly?

A. About 20 cars handled north-bound via Seatrain during the months of December and January 1938 and 1939, from various points of origin in the southeast to various destinations, principally in the New York area, which show an average number of days in transit for these cars of 12.8. Compared
1672 with that are nine instances of all-rail shipments coming a comparable distance, somewhat greater distance, and, as a matter of fact, in most instances, than the average all-rail shipment in this area, with an average time in transit of 5.5 days.

Q. These checks were in the nature of spot checks, you say?

A. Yes, sir; they were just taken at random.

Q. And you do not attempt to draw too fine a line on a check of that kind, I assume?

A. No, sir. I merely present them as being indicative.

Mr. FORT. I think that is all on direct, Mr. Examiner.

Examiner HOY. We will have a five-minute recess.

(Thereupon a five-minute recess was taken.)

Examiner HOY. Proceed with the cross-examination of Mr. Kendall.

Cross-examination by Mr. MCCOLLESTER:

Q. Mr. Kendall, there is one question I want to ask you which I admit is not cross-examination. It would have been cross-examination of Mr. Randall, and I forgot to ask him, but I do not think either you or your counsel will have any objection to the question.

Mr. Randall, when he was on the stand, testified that he thought that if cars were to be interchanged with Seatrain, Seatrain ought to become a party to the Per Diem Rule agreement, and ought to make settlement for per diem directly with
1673 the owning roads.

Mr. FORT. I do not believe, Mr. McCollester, that he went so far as to say they ought to be a party to the agreement, but he did say they should make direct settlement.

Mr. MCCOLLESTER. I so understood him.

Mr. FORT. Well, the record will speak on that.

Mr. MCCOLLESTER. Yes; whatever it is.

Q. You will bear me out on this, will you not, Mr. Kendall: that when Seatrain started its Coastwise service in September 1932—it started in October 1932, but in September 1932, you and Mr.

Brush and I had a talk about the situation, and about how the settlement for per diem would be worked out.

A. I remember that we had a talk; yes, sir.

Q. And in that talk it was recalled that Seatrain, or Overseas, its predecessor, when it began operations in the Cuban trade, had applied for admission to per diem rules agreement, but the A. R. A. had ruled that since it was a water carrier, it could not be a party to the agreement, and that the railroad delivering cars to Seatrain would have to be responsible for the per diem accruing on those cars. You recall that?

A. That was customary under the rules of that period.

Q. And the same situation still existed in September 1932; isn't that correct?

A. That's right.

1674 Q. So that the arrangement which was then worked out in that conference which we had was that the Hoboken Manufacturers Railroad should be responsible to the owning roads for making settlement for per diem on all cars which it received, and which it might deliver to Seatrain, unless those cars were returned to another railroad, party to the per diem rules agreement; is that correct?

A. That is correct.

Q. And that Seatrain should enter into a contract with the Hoboken Manufacturers Railroad similar to the contract which it had with the New Orleans and Lower Coast, to handle the cars in accordance with the car service rules?

A. Well, the effect of it was that.

Q. Well, this is just for information: has there been any change in the per diem rules agreement or in the governing rules of the A. A. R. which would now make possible Seatrains' obligating itself to make direct settlement with the owning roads and releasing the Hoboken and the New Orleans & Lower Coast of their obligation to settle with the owning roads while cars were in the possession of Seatrain?

Mr. FORT. Just a moment, Mr. Kendall. The Commission might, I assume, if the Commission has the power to require railroads to permit Seatrain to use railroad cars, and if the Commission has the right to fix the compensation, also wholly apart

1675 from any of the car service rules as they now stand, make the arbitration that Seatrain should settle direct, and have a direct account on their own line.

Mr. MCCOLLESTER. Well, possibly that might be done, but I am asking the witness whether, under car service rules, as they now stand, the Hoboken and the Lower Coast can be relieved from their responsibility to the owning roads for the time that cars are in Seatrain's possession?

A. I don't see how they can without some further negotiations, through the Association.

Q. Of course, that would require some kind of modification of the existing agreement governing settlement for per diem generally?

A. That's right, in the car service and per diem agreement.

Q. Now, I notice that in Rule 19 of the per diem rules from which you read, one of the plenary powers of the Car Service Division is H; to make recommendation to the Board of Directors that in their opinion a change in the per diem rate is necessary or desirable.

That is one——

A. That is one of the provisions; yes, sir.

Q. One of the plenary powers of the Car Service Division of which you are chairman?

A. Yes, sir.

Q. Has any recommendation been made or is such recommendation pending at the present time?

1676 A. No, sir—pardon me, there has been one change made since the car service division was organized, and given this power, and that was in connection with the establishment of the average per diem plan for application to boxcars for a two-and-a-half-year period.

Q. And that has since been canceled, has it?

A. Yes, sir.

Q. But there has been no recommendation for a change in the going per diem rate of $1.00 a car?

A. No, sir.

Q. And your division has made no recommendation to the Board of Directors for a different per diem rate in connection with cars interchanged with Seatrain?

A. No, sir.

Q. With reference to your Exhibit No. 61, and your testimony pointing to the small proportion of empty cars handled by Seatrain as compared with rail movements it is possible, is it not, that the fact that Seatrain has handled so few empty cars is due to the fact that on cars returned to it empty by its connections for such cars it has been able to find loads at the ports?

A. Yes.

Mr. Fort. I am sorry, I did not hear that question. I ask the reporter to——

Examiner Hoy. It is possible.

1677 Mr. Fort. I heard the answer, but I did not hear the question. May I ask the reporter to read it?

Examiner Hoy. Yes.

(The question was repeated by the reporter.)

By Mr. McCollester:

Q. Has your investigation gone to the question of ascertaining where the cars have been returned to Seatrain or the switching line serving it at the ports empty for return movement for which it has found loads at the port?

A. We know that there have been empty cars returned, and as to their disposition we don't know.

Examiner Hoy. What do you mean when you say, "returned"—returned to the switching connections at the ports?

The Witness. Returned to the Hoboken and to the New Orleans and Lower Coast empty by the trunk line connections at the two ports.

Q. If Seatrain can find loads for cars which are returned to it empty, so that they appear upon its record as being handled under load, that is not an undesirable situation from a car service standpoint, is it?

A. Not from a car service; no, sir.

Q. That is really efficient use of cars; is it not?

A. Yes.

Q. You cited seven instances—seven different burdens devolving upon trunk line railroads originating or terminat-
1678 ing traffic which, if I correctly understood your testimony, you said were not assumed by Seatrain on through freight; that is, on freight other than port-to-port traffic; is that correct?

A. That is correct.

Q. And your testimony in that regard was limited to freight moving beyond the ports at one or both ends?

A. That's right.

Q. These same characteristics, or, rather, the freedom from those obligations, is likewise enjoyed by any bridge carrier, is it not?

A. That is true.

Q. And no difference in per diem charge is made to a carrier whose line performs largely a bridge service from the charge made to a carrier whose line is largely a terminal line; isn't that correct?

A. That is true, but there is a further difference there, Mr. McCollester, that the bridge line that you have in mind also has its bridges which it originates and terminates and has the same obligation with respect to business which it handles other than overhead movement.

Q. And the same is true in the case of business of Seatrain originating at a port or terminating at a port?

A. To the extent that that applies.

Q. Yes, sir.

1679 Well, do you know, or don't you know that Seatrain handles a very large volume of traffic which is either

altogether port to port, or originates or terminates at one or the other of the ports, between which it operates?

A. No, I don't know.

Q. You don't know? Now, these obligations incident to terminal operations devolve upon the railroads twofold, do they not, in the case of freight moving via the break-bulk water lines?

Take the example which I cited to Mr. Randall of a shipment from Dallas to Syracuse, New York, moving via break-bulk line. The rail line between Dallas and New Orleans would have all of the obligations, both of an originating and terminal carrier; isn't that so?

A. Yes.

Q. And the rail line between New York and Syracuse would have again all of the obligations of both the originating and terminal carrier?

A. That is generally true.

Q. Whereas, if that same freight moved through via Seatrain, there would be one origin operation, so far as the rail carrier was concerned, at Dallas, and one terminal operation at Syracuse; isn't that correct?

A. That is true, in which the Seatrain does not in any way participate.

1680 Q. Yes, but to that extent the movement of freight which would otherwise move rail and water—the movement of freight via Seatrain relieves the railroads of terminal operation at each end of the water movement?

Mr. ESHELMAN (to the reporter). May I hear that question again?

(The question was repeated by the reporter.)

A. That is not entirely true, because we have shown that there has been, and is, detention on cars moving via Seatrain at both ends of the line.

Q. Well, apart from the detention, there are none of the other seven items to which you have referred?

A. Unless there might be some repair expense, or switching for that account. Some of those items would be eliminated, and some would not. So far as the placing of the empty cars is concerned; yes.

Q. That is eliminated?

A. Yes, sir.

Q. You made reference to a check made for one month in 1936.

Do you know whether that was the check, the result of which was testified to by the witness, McConchie, in Docket No. 25727?

A. Yes, sir.

Q. Now, if I correctly recall the results of that check, it
1681 showed that there were 85 cars whose first movement located via Seatrain was a northbound movement?

A. I have 186, Mr. McCollester.

Q. Well, I do not have the exhibit in front of me, so I am at some disadvantage, but as I recall it, Mr. McConchie had several exhibits, one of which contained a more detailed break-down than the others, and indicated the results of his efforts to find the first movement of any of the cars via Seatrain, and showed that he had found 85 cars whose first northbound movement was via Seatrain.

If it will aid you—have you got those exhibits? That was exhibit 63 in that proceeding.

A. I do not have the exhibits with me at all.

Q. Do you know this: it was developed by that test that a very substantial proportion of those cars whose first movement via Seatrain was a northbound movement, were cars belonging to Southern Railroads, which had somehow or other gotten out to the West by some route other than Seatrain?

A. I think what you have in mind is a part of that check showed there were 186 northbound cars moved by Seatrain, delivered to the Hoboken, which were subsequently delivered to the Erie connection.

Q. Well, all I can do at the present moment, without the exhibit, is to read to you from my brief discussing it, and I
1682 will ask you, if you have the data there, you may check this, if it is going into the record here; if you haven't, we will have to get at it in some other way.

"It appears from Exhibit No. 63 and 41 out of 85 cars that moved northbound via Seatrain actually belonged to eastern and northern railroads.

"Obviously there was no call to return these cars again to Hoboken."

If they were eastern cars, there was no obligation to return those cars back to—return those cars again to New Orleans.

A. How many—pardon me——

Q. 41 out of 85.

A. I think I can locate the 41, but I can't locate the 85.

I think that is substantially correct.

Q. And that of 23 cars whose first movement via Seatrain was southbound, half of them belonged to southern, southwestern, and central western railroads, and had moved east by the rail lines, and not by Seatrain?

A. I haven't that information.

Q. You do not have that?

A. No, sir.

Q. Now, it is a fact, is it not, Mr. Kendall, that under the car service rules, if a Southern Pacific car, we will say, is loaded northbound by Seatrain, for a point on the lines
1683 of some eastern trunk line railroad, that railroad, under the car service rules, has the right to return the car to the Hoboken Manufacturers Railroad, and through it to Seatrain, for return movement to the south?

A. Yes, sir.

Q. And having that right, if they do not see fit to exercise the right to send the cars back to Seatrain for return movement, there isn't anything that Seatrain can do about it, is there?

A. That is correct.

Q. Now, have you from your studies of the situation, observed that, taking the eastern railroads, for example, they have loaded their own cars for movement southbound via Seatrain, and have sent back via rail routes, either under load or empty, cars of southwestern railroads that have moved northbound via Seatrain?

Mr. ESHELMAN. May I not interrupt to ask if counsel is willing to frame the question as to whether they did go, or does he mean the question to say that eastern lines loaded for the purpose of having the car go via Seatrain?

I do not think that is what you meant, and I just wondered if you would be willing to frame it the other way?

Mr. MCCOLLESTER. Well, I think my question is all right.

Examiner HOY. Read the question.

1684 (Thereupon the reporter repeated the question.)

Mr. ESHELMAN. The question is, would you be willing to substitute Hoboken—via Hoboken?

Mr. MCCOLLESTER. No, I will not substitute, because the billings all show movement via Seatrain.

Mr. ESHELMAN. Not all of them.

Mr. MCCOLLESTER. They show—now, the railroads are obligated to issue through bills of ladings.

Mr. ESHELMAN. You are talking at the present time?

Mr. MCCOLLESTER. At the present time.

Mr. ESHELMAN. All right.

A. We haven't made any recent investigation of that, Mr. McCollester, not for a number of years. I wouldn't want to say one way or the other.

Q. Has there been a tendency on the part of the railroads to load their own cars and get rid of foreign cars as quickly as they can? That is, in order to make per diem on their own cars and save per diem on foreign cars?

A. I would hate to make that as any general statement. I don't think that is generally true. There are instances of it which come to our attention.

Q. That is a problem that your organization has to deal with pretty constantly, is it not?

A. Currently.

Q. You testified something to the effect that Seatrain was
1685 relieved of the burden of accumulating the reserve supply of empty cars.

Have you, in your investigation, found out whether or not Seatrain does not actually keep supplies of empties on hand, of cars for which it pays the owning railroad?

A. I wouldn't have any way of knowing.

Q. So that when you state that Seatrain does not have that, or assumes that burden, that is just an assumption on your part?

A. Judging from what we know as to the movement via Seatrain being loaded practically one hundred percent.

Q. But have you observed the detention of cars, accumulation of cars, on the New Orleans & Lower Coast Railroad or at Hoboken for Seatrain movement?

A. You mean railroad-owned cars?

Q. Railroad-owned cars.

A. No, sir.

Mr. FORT. Has anybody?

Mr. MCCOLLESTER. Yes; we have.

Q. In your Exhibit No. 64 and Exhibit 65 you have shown the results or what you described as spot checks. Who actually made these spot checks, Mr. Kendall?

A. To which one are you referring specifically now?

1686 Q. Well, is there a difference between 64 and 65?

A. In this respect: In one case it was one man and in another case it was another.

Q. Well, who were the two, then?

A. One was our district manager at Dallas and the other was our district manager in New York.

Q. Now, were the dates billed the dates on which the cars actually went forward?

A. I believe they were.

Q. I am rather amazed at the movement there, all-rail movement, from Alden, New Jersey, to Dallas, in only three days. Do you suppose that is correct?

A. I don't believe it is.

Mr. FORT. That is on 64?

Mr. MCCOLLESTER. That is on 64.

Mr. FORT. Mr. Kendall, after the hearing will you have that checked, and if you find it is in error——

The WITNESS. I will.

Mr. McCollester. You would not suggest that was typical of an all-rail movement, would you?

The Witness. No; I couldn't do that.

By Mr. McCollester:

Q. Would you suggest that the movement from New Orleans to Jersey City in three days was typical, as shown on exhibit 65?

A. Well, I don't know but what it is, Mr. McCollester. We find a great many instances of cars averaging 400 and 500
1687 miles a day in loaded movements.

Q. There are many more circuitous routes over which cars move between the north and the southwest than those indicated by these two exhibits, are there not?

A. There was no selection made as to the circuit or otherwise of the routes which we examined.

Q. Now, in connection with some of the cars shown on exhibit 64, moving via Seatrain, southbound—take, for example, the car from Lincoln, Maine, to Little Rock, Arkansas, which consumed 14 days in transit: Do you know whether or not that car was stopped at some intermediate rail point en route for completing of loading?

A. No, sir.

Q. That might have been true in the case of that, and in the case of a number of those other cars, to account for the total time in transit between origin and destination; isn't that so?

A. I should be doubtful of that, Mr. McCollester. I do not know why it should have been stopped off for reloading, completing loading.

Q. Do you think that at the present time it would be desirable for Seatrain, if it is to use railroad cars, to acquire a fleet of cars of its own and require the railroads to accept them and pay per diem on them?

Mr. Fort. Mr. Examiner, I object to that question for the same reasons that I objected to a similar question asked of Mr. Randall.

It is a very broad term.

1688 The question is one which might bring misleading answers by reason of cross-interpretation of the word "desirable."

I think that Mr. McCollester should break down whatever he regards as desirable factors in a situation of that kind, and say—would you do this—or would you do that—or would you do something else?

Examiner Hoy. Well, I will rule the same as I did as to the previous question and say that the witness may answer it, and he can make any explanation of his use of the word "desirable" that he may see fit in his answer.

Mr. FORT. You remember the old expression, "everything turns out for the best"—to which they said, "Yes, for somebody," so that question is very much like this.

Mr. MCCOLLESTER. I will ask it from the standpoint of the car supply of the country as a whole and the interests of the railroads.

Mr. FORT. Same objection.

Examiner HOY. You may proceed to answer.

A. I feel this way with respect to that question: It is one which would require a great deal of analysis and thorough knowledge of what the nature of the traffic is on the Seatrain, how much of it is port-to-port, and a number of intangible things that we know nothing whatever about at the present time.

I will say it would be an impracticable question to
1689 answer at the present time with any definiteness.

Q. Well, let me put it this way: That, at least, you would not say, as things are now, or so far as your study has gone, that Seatrain should acquire a fleet of cars and place them in the service of the railroads and itself?

Mr. FORT. Mr. Examiner, I do not want to press a point too far, but suppose the same question were asked—is it desirable for the B. and O. to own cars or not?

There are so many underlying assumptions. Are you assuming that everybody else is going to continue to own them? Are you taking the situation as it is today?

Mr. MCCOLLESTER. That is my question—as it is today.

Mr. FORT. Or as it is tomorrow, or are you looking forwards to a normal expectancy?

You see, there are so many things involved in it that you cannot get an answer.

Take the question, "Is it desirable for the Baltimore and Ohio to own cars?"

Now, you might prove that on some particular day, if all the Baltimore and Ohio ownerships were not there, nevertheless, the other railroads would have enough cars to carry all the business. Therefore, under one theory, you could reach a conclusion that it is desirable that they not own any.

On the other hand, if they did not own any would anybody else own any?

1690 The implications and twists of it are so many that the question should not be answered.

Examiner HOY. The witness has already said that he did not think he could answer the question in a practical way, or words to that effect.

Now, I think he sufficiently answered your question, Mr. McCollester.

Mr. McCollester. Mr. Examiner, I am content to let it rest there. I want to make the point that the contention has been made here by some of the defendant railroads, not by the A. A. R.—it has been made by some of the defendant railroads that the $1.00 per day is based upon reciprocity of car ownership, and it is for that reason not adequate compensation for Seatrain to pay, since Seatrain owns no cars.

I think that Mr. Kendall's answers are sufficient for my purposes on that point, and I hope that it will put an end to such an argument on the part of the railroads.

On the other hand, if the railroads are going to make that argument then I want to go further with Mr. Kendall on the point.

Examiner Hoy. He has said that the question is wholly impracticable for him to give—too impracticable for him to give an answer. That is my understanding in a general way.

The Witness. Yes.

Mr. McCollester. And I assume you know more about
1691 the car service situation of the country than any other living person at the present moment. Will you not admit that, Mr. Kendall?

The Witness. You are too complimentary.

Examiner Hoy. Let us proceed.

Mr. McCollester. That is all I have.

Examiner Hoy. Is that all the cross-examination?

Mr. McCollester. Yes.

Examiner Hoy. Are there any other questions?

(No response.)

Examiner Hoy. Is there anything on redirect, Mr. Fort?

Mr. Fort. I have one or two questions; yes, sir.

Redirect examination by Mr. Fort:

Q. As to exhibits 64 and 65, was there any element of selection in that check which was either designed to or would work to pick fast moving railroad cars and slow moving cars via Seatrain?

A. None whatsoever. In the case of the all-rail shipments we asked our two district managers to whom I referred to give us some representative shipments, without saying anything as to the purpose of the inquiry. It was just random movements from a general territory into this other general territory.

Q. He did not know whether you wanted them fast or slow?

A. No, sir.

Q. Now, Mr. Kendall, you were asked some questions with
1692 respect to so-called bridge-railroad line, overhead railroad line?

A. Yes, sir.

Q. Such a line has an empty car movement, does it not?

A. Yes, sir; very material.

Q. And such a line owns cars which go on other lines, and are loaded on other lines, and unloaded on other lines?

Mr. McCollester. Now, if you are talking about such a line owning cars, I think you have to be more specific. What bridge line owns cars?

Mr. Fort. What bridge line does not own cars?

Mr. McCollester. How about the New York Connecting?

Mr. Fort. Is that the kind of a bridge line you are talking about?

Mr. McCollester. That is a bridge line.

Mr. Fort. I did not know you were talking about——

Mr. McCollester. I am talking about any bridge line.

By Mr. Fort:

Q. Let me put it this way: A bridge line which owns cars—and all bridge lines of any length do own cars, do they not, Mr. Kendall?

A. Yes, sir.

Q. (Continuing.) Would have not only its share of empty haulage on its own cars, what might be called line-haul empty haulage, but would have also that empty haulage on the cars of other carriers, would it not?

A. Yes, sir; it goes even further than that. They are so
1693 situated that they are unable to provide any loading for the empty equipment which is handed to them. They are obliged to handle it empty overhead. That is particularly true of the bridge lines we have here in the eastern territory, with which we are more or less familiar.

Q. Mr. Kendall, will you say that again please, sir?

Examiner Hoy. Let the reporter read it.

(Last answer was read by the reporter.)

Q. And as a rule, bridge lines of any size, also car owners have that reciprocal situation; is that true?

A. Yes, sir.

Mr. McCollester. You see, Mr. Examiner—reciprocity and car ownership.

Mr. Fort. Certainly. I never denied that was a fact to be borne in mind.

Q. Now, as to cars loaded by the Seatrain at New York on the Hoboken, or some other switch line in New York, in such a case there would be the time in connection with loading; that is true, is it not?

A. Yes, sir.

Q. But there would be none of the storage time for overhead storage of reserves, would there?

A. No, sir.

Q. There would be no repair time in such a situation, would there?

1694 A. Very slight, if any.

Q. And many of the elements, without taking the time to go through them, because that can be done on the record—many of the elements or factors, producing lost time incidental to rail or Seatrain movements would not be present even in that restricted type of shipment which originates and is unloaded at the ports; is that true?

A. Yes, sir; that is right.

Q. Mr. Kendall, you were asked a question on cross-examination as the whether the Seatrain—strike that—as to whether or not the fact that Seatrain handled only loaded cars could be accounted for, perhaps, by the fact that when it got a load up to New York or got a load down to New Orleans, it was able to obtain a load in the other direction for the car. Do you recall that question?

A. Yes, sir.

Q. Now, on this test check which you made, did you not find out that the cars that the Seatrain carries loaded in one direction return loaded on the Seatrain, or empty, as far as that is concerned, in only a small part of the cases, and that the general rule is that the car is left there just as if it had gotten there any other way?

A. That is true.

Q. What was that percentage?

Mr. McCollester. I think, Mr. Examiner, that if we are

1695 going into that, we ought to have the details of that check, because in the previous case we had very extensive cross-examination about that check, and I think that it is highly improper and prejudicial to go into it in an off-hand way here, and draw conclusions which we haven't the opportunity of testing on cross-examination, because the basic data is not here.

Examiner Hoy. Why don't you put that check in? You have put the other checks in.

By Mr. Fort:

Q. Have you got it there?

thing in addition to what there was in his testimony [handing to counsel].

(Discussion off the record.)

Q. Mr. Kendall, you testified on direct in respect to this situation, did you not?

A. Yes.

Mr. Fort. I do not believe that on this statement there is anything in addition to what there was in his testimony [handing to Mr. McCollester].

(Discussion off the record.)

By Mr. FORT:

Q. Mr. Kendall, you were asked a question on cross-examination by Mr. McCollester, as I understood it, something to this effect: Is it possible that one reason that Seatrain avoids empty movements is that Seatrain gets a load at the port after carrying a
1696 loaded car from one port to another, then takes a car back loaded—and that you answered that that is possible; is that true?

A. That's right.

Q. Now, I want to ask you what the principal significance of that possibility is. As a matter of fact, does Seatrain carry cars loaded from one port to the other and find a load for them at the second port to take them back to the first port?

Mr. MCCOLLESTER. Well, now, I object to that unless the witness knows. I think your question as framed is a matter not within the witness' knowledge, because it is entirely as to what Seatrain does from one port to another.

Examiner HOY. You can answer the question, if you know, Mr. Kendall. If you have no knowledge, why——

A. We do not have any knowledge except indirectly, and that is to the effect that there is no empty movement back via Seatrain.

Q. You have missed the question, Mr. Kendall. Did you make a check of cars moving on Seatrain during a certain period to find out what percentage or what part of those cars Seatrain brought back loaded?

A. Yes.

Q. What period of time did that check cover?

A. Approximately one month, the month of April, 1936.

Mr. MCCOLLESTER. May I see that paper before you
1697 testify to it? [Witness handing paper to Mr. McCollester.]

(Last two questions and answers repeated by the reporter at this point.)

The WITNESS. May I amplify that?

Examiner HOY. Yes. Amplify your answer; go ahead.

The WITNESS. We found that there were 29 cars moved southbound loaded that were returned loaded via Seatrain. There were 53 cars moved northbound loaded that were returned southbound loaded, or a total of 82 cars, round trip, in both directions, that percentage being 15.2 of the total movement.

By Mr. FORT:

Q. How many loaded movements were there in one direction where the car did not return loaded via Seatrain?

A. 442.

Mr. McCollester. That is combined, in both directions?
The Witness. Both north-bound and south-bound.
Mr. Fort. That concludes the examination.
Examiner Hoy. Is there any re-cross?
Mr. McCollester. Yes.

Re-cross-examination by Mr. McCollester:

Q. Of those 442 cars not returned, Mr. Kendall, have you any information as to how many of them that moved north-bound via Seatrain were northern cars that were home when they reached destination?

1698 A. There were between 20 and 30 of them that were at home, that were subsequently—that were released on the Hoboken.

Q. How many of the 442 were north-bound cars?
A. I don't know—wait a minute. How many of the 442?
Q. 442 is both directions.
A. I am sorry—166.
Q. 166 north-bound.
(Discussion off the record.)
Q. Now, 20 or 30 of them were, you say, at home. That means they were cars of Hoboken Railroads' direct connections?
A. Ownership.
Q. Ownership?
A. Yes, sir.
Q. Do you know how many others were cars belonging to Eastern and northern railroads not direct connections of the Hoboken?
A. 35 or 40.
Examiner Hoy. Well, by counting them, you can give the exact numbers, can you not? That would be better on the record, I think.
The Witness. There were 36 eastern and northern cars, and nine western cars.
Q. Now, as I understand it, this north-bound movement was the first movement of these cars that you were able to locate via Seatrain?

A. I think that is correct.

1699 So that these 36 eastern and northern cars and nine western cars must have gotten out into the territory in which the shipments originated via some other route than Seatrain.

A. The 36; yes.
Q. Now, of course, is my understanding correct that these cars had routing rights back over Seatrain?
A. That is true, under the rules.
Q. Under the rules?
A. Under the exceptions.

Q. Yes. Have you got the car numbers there? [Witness handing paper to Mr. McCollester.]

(Discussion off the record.)

Q. So that, if, for example, there was a D. & H. car which moved north-bound over Seatrain, was made empty on the lines of some northern railroad, under the car-service rules, Seatrain could have been compelled to take that car all the way back to New Orleans, and deliver it to the Railroad at New Orleans from which it got it?

A. Yes, sir.

Q. As a practical matter, do you have any criticism of that car not having returned via Seatrain?

A. It would not have been good car service to have returned it.

Mr. FORT. What car are you talking about?

Mr. MCCOLLESTER. I was talking about a D. & H. car as one of the northern cars, and the same would be true of
1700 those other northern or eastern cars; isn't that so, Mr. Kendall?

The WITNESS. Yes.

By Mr. MCCOLLESTER:

Q. Now, the other cars that were not cars of—that made up that total of 166—did you make any trace to see what became of them?

A. They arrived at Hoboken via the Seatrain.

Q. What other ones do you mean, Mr. McCollester?

(Discussion off the record.)

Q. Do you know what happened to the other 121 out of the 166 north-bound cars?

A. They were handled loaded to the connections of the Hoboken.

Q. Well, now, wait. Maybe we do not understand each other. They came north-bound via Seatrain; is that right?

A. That's right.

Q. And were delivered somewhere in Trunk Line Territory, presumably?

A. Presumably.

Q. And do you know what happened to them after that?

A. No, sir; I know they did not go back by Seatrain.

Q. And you do not know whether the eastern railroads used them for loaded movement west-bound?

A. No, sir.

Q. They could have returned them to Seatrain if they
1701 wanted to?

A. Some of them.

Mr. FORT. Depending on where it went.

The WITNESS. Depending on the ownership.

Mr. FORT. Ownership and the destination of the car.

By Mr. McCOLLESTER:

Q. Now, can you give us the corresponding figures for the south-bound movement? How many of the south-bound cars via Seatrain that did not return via Seatrain belonged to southern or southwestern railroads?

A. I have no information.

Q. If there were any of them that did, it would have been bad car service to send them all the way back over Seatrain, because they had routing rights via Seatrain?

A. That would depend upon the ownership.

Q. Yes; but if they belonged to southwestern railroads, it would have been bad car service?

A. Well, if they were at home on the New Orleans line, New Orleans connection line, they would not have been returned, under the rules.

Q. But supposing they had belonged to a connection of the Missouri Pacific, we will say: Would it have been pretty foolish to bring them all the way back to Hoboken, because they had routing rights back over Seatrain?

A. Well, that again might depend upon the ownership, the location of the line.

1702 Q. And there again, however, if they did not return via Seatrain, it was because the railroads did not see fit to turn them back because Seatrain would have had to take them back if they had been returned to them.

A. True.

Mr. McCOLLESTER. That is all.

(Discussion off the record.)

Mr. McCOLLESTER. Let me ask another question.

By Mr. McCOLLESTER:

Q. Any of those cars that moved south-bound via Seatrain, if they were not at home when they reached their destination via Seatrain, could have been returned to Seatrain by the road serving the destination, could they not?

A. They could.

Q. And if they did not move back via Seatrain, that was not Seatrain's fault, was it?

A. That is true.

Mr. McCOLLESTER. Right. That is all.

Examiner HOY. I do not quite understand just what you mean, Mr. McCollester, by "being returned to Seatrain." They returned to Seatrain's rail connection.

Mr. McCollester. That is right, rail connection, that is right, and ultimately, to Seatrain, because Seatrain, by agreement with the Lower Coast, agrees to abide by the car service rules.

Examiner Hoy. Yes.

1703 Mr. McCollester. And, therefore, any car which under the car service rules it is obligated to take from the Lower Coast, it has to take.

Examiner Hoy. Are there any further questions, Mr. Fort? You are finished, are you not, Mr. McCollester?

Mr. McCollester. That is all.

Redirect examination by Mr. Fort:

Q. Mr. Kendall, with respect to those cars that came up, 166 cars, that came northbound—you referred to 166 cars that came northbound on Seatrain under load in the check of April—what year?

A. 1936.

Q. 1936—that did not move back loaded on the Seatrain?

A. Yes, sir.

Q. Now, do you know what happened to that 166 cars—how many of them were unloaded on Hoboken and how many of them moved in under load, in and under load, without being unloaded on Hoboken?

A. We know that one hundred and fifteen were delivered promptly upon arrival, indicating that they came in under load for movement, for through movement via the Hoboken.

Q. You mean by that: delivered to the road haul carrier out of New York?

A. That is right.

Q. Yes; what about the balance?

1704 A. The balance apparently were released of their load on the Hoboken, and were reloaded by the Hoboken.

Q. How many would that be?

A. Seventy-one. By the way, it was 186 instead of 166. The 166 does not include the cars which made a round trip loaded.

Q. I see. So it is 186, and you had 71, then, that were unloaded on the Hoboken.

A. Yes, sir.

Q. And how do you know they were unloaded on the Hoboken? Do you really conclude that by reason of the lapse of time between when they arrived on the Seatrain and when they were turned over to the road haul lines in New York?

A. That is true. There was a lapse up to 17 days between the arrival of the cars via Seatrain and their delivery to the Erie connection.

Q. Now, where were those 71 cars loaded to?

A. Various points in the east. You mean in the original load?

Q. No; just what you are talking about.

A. From the Hoboken they were loaded to various points by the Erie, Erie connection.

Q. What type of cars were they?

A. Box cars.

Q. Some of them loaded cars?

A. Yes, sir.

Q. During that same time, was the Hoboken turning back
1705 to its New York connections empty cars of the same type?

A. Yes, sir.

Q. So that the fact that these cars moved loaded inbound from New York, the ones that came up via Seatrain, resulted in cars which otherwise would have been loaded on the Hoboken and moved in under load, moving empty instead; is that true?

A. That is correct; yes, sir.

Mr. FORT. I think I am through.

The WITNESS. Pardon me just a minute. You said New York, when you meant New Orleans there just a minute ago.

(Discussion off the record.)

Q. What do you mean by "it should have been New Orleans"?

A. You said moving in from New York.

Q. I mean moving inland from New York.

A. Oh, I did not understand that.

Examiner HOY. He said inland.

Q. Mr. Kendall, when those cars that are moved by Seatrain are unloaded inland here, in the East, either in the case that they move through via Seatrain and rail or in case they were unloaded on the Hoboken and reloaded, as some of these were—when the car gets to that inland point, and is unloaded, it stands in the same position as if it had gotten there all rail, does it not?

A. Exactly.

Mr. FORT. I think that is all, Mr. Examiner.

1706 Examiner HOY. Have you any questions, Mr. McCollester?

Mr. MCCOLLESTER. Yes.

Re-cross-examination by Mr. MCCOLLESTER:

Q. What day was that that these—or days that these cars under load were delivered by the Hoboken to the Erie? Have you got that?

A. Various dates. You mean the cars that were released empty on the Hoboken and then delivered loaded?

Q. The cars you assume were released empty. In other words, the 71 cars that you say you assume were released empty, because

the 71 days elapsed from the day of their arrival until the day of their delivery to the Erie——

A. These deliveries spread over a period from the 9th day of April, until the 15th day of May.

Examiner HOY. That is, the deliveries to the trunk lines.

The WITNESS. Yes, sir.

Q. Are you testifying from a list that you have in front of you?

A. Yes, sir.

Q. May I see it? [Witness handing paper to Mr. McCollester.] (Discussion off the record).

Q. The 71 cars that you have assumed to have been unloaded and reloaded on the Hoboken and delivered to the Erie are the cars as to which you previously testified that 27 were at
1707 home, 36 were cars of eastern and northern railroads, and nine were cars of western railroads; is that right?

A. Eastern, northern, and southern.

Q. One southern, yes; one Seaboard Railroad, is that right?

A. That's right.

Mr. MCCOLLESTER. That is all I have.

Mr. FORT. Now, in order to avoid an over-simplification here, such as Mr. McCollester abhors, I want to ask this question.

By Mr. FORT:

Q. Mr. Kendall, included in this 186 cars, were there also 8 cars which were turned over by the Hoboken to the Erie, that the Erie returned empty to the Hoboken and that the Hoboken did not carry back empty to New Orleans, but loaded on the Hoboken and turned back to the Erie loaded; is that true?

A. That is correct.

Q. How many cars of that kind were there?

A. Eight of which I have record.

Q. Were they cars of western ownership?

A. Four were western ownership, one southern, and three Pocohontas.

Q. They were not cars that were at home around here, were they?

A. None of them.

Q. And so, when those empties, which had come up loaded by Seatrain were turned back to Hoboken, in the manner that
1708 Mr. McCollester has suggested, instead of going back empty on Seatrain Hoboken loaded them from industries on the Hoboken and sent them back over the railroads loaded, did they not?

A. They were loaded by the Hoboken.

Mr. FORT. All right, sir; that is all.

Examiner HOY. Is there any further cross-examination or re-cross?

Mr. MCCOLLESTER. Do you think it would have been good car service to send a C. and O. car down to New Orleans, or Norfolk, and western car down to New Orleans again?

The WITNESS. I have previously answered that question.

Mr. MCCOLLESTER. All right, that is all.

Examiner HOY. Are you finished with this witness?

Mr. FORT. Yes; and as to our case, we have substantially finished with our case. Whether we might have something to say in the morning, or not, I do not know.

Examiner HOY. We will adjourn until ten o'clock tomorrow morning.

(Whereupon at 5:15 o'clock P. M., the hearing adjourned to March 2nd, 1939, at 10:00 P. M., at the same place.)

1710 IN THE MATTER OF DOCKET NOS. 25728 AND 25878

HOTEL NEW YORKER, NEW YORK, N. Y.,
March 2d, 1939, 10:00 o'clock, P. M.

Before Hon. E. J. HOY, Examiner, Interstate Commerce Commision. Hon. M. J. WALSH, Examiner, Interstate Commerce Commission.

Appearances (same as previously noted).

1711-1712 PROCEEDINGS

Examiner HOY. Did you finish your presentation, Mr. Fort?

Mr. FORT. Yes. I have now certain information requested by Mr. McCollester of Mr. Kline with respect to the cars which we designated G. R. cars, and covered in one of Mr. Kline's exhibits. They were Pennsylvania cars, and there were 16,275 of those cars.

Mr. MCCOLLESTER. Will you refer to the exhibit?

Mr. FORT. Exhibit No. 56. As I understood Mr. McCollester's question, it was, in effect, as to whether or not the arch bar truck situation had to do with the time of retirement of those cars which were shown as retired.

Mr. Kline informs me that when the cars were built, they all had arch bar trucks; that there are now in service of those cars that have not been retired, something over 9,000 of them. Of those 9,000, 135 have been equipped with cast steel sign frame trucks, 264 still have the arch bar trucks.

He said the cars that were retired, as shown on his exhibit, were retired by reason of the condition of the cars and not by reason of the arch bar trucks. That would seem to be borne out of the fact that there are still a great many more than half

of them which have not been retired, and the trucks were changed from arch bar to the other type of truck. I think that completes our case.

1713 Examiner HOY. Are there any other defendants who want to——

Mr. HEALY. I just want to make this statement; that the Eastern Lines, neither individually nor collectively, have any testimony to offer. They do, however, desire to adopt as their own standpoint the testimony of the witnesses who have been called by Mr. Fort, subject, of course, to the same reservations which he took at the beginning of the testimony.

Mr. MUCKLEY. I want to make the same sort of a statement for the Texas and New Orleans Railroad and the Southern Pacific Company. I want to say, further, that I talked to Mr. Clark, of the Southern Railway, on the 'phone last night; and he authorized me to make a similar statement for the Southern Railway and the G. M. & N. He asked me to say that Mr. Berger of the L. & M. is also sick, and he couldn't speak for Mr. Berger because that road was individually represented here. However, he asked me, also, to ask you if you would give permission to Mr. Berger to notify the Commission, in writing, as to whether they adopt or do not adopt the testimony.

Examiner HOY. The Examiner will give such permission.

Mr. MCCOLLESTER. I'd like to ask Mr. Healy for what Eastern Roads he is speaking? He used the term "Eastern Roads" generally. There are some Eastern Roads which have consented.

Mr. HEALY. The Eastern Lines who are defendants in

1714 this case.

Mr. MCCOLLESTER. We have some Eastern Roads that have consented to the movement of their cars via Seatrain. Are you speaking for them?

Mr. HEALY. I am speaking for the Eastern Lines which are defendants in this case.

Mr. MCCOLLESTER. They are defendants in this case, too, and will file answers admitting that they are willing to have their cars go via Seatrain.

Mr. HEALY. I am speaking for the Eastern Lines, which are defendants in this case.

Mr. MCCOLLESTER. Will you name the Eastern Lines for whom you speak?

Mr. HEALY. I can't name them all now.

Mr. MCCOLLESTER. Mr. Examiner, I certainly think that the railroads can't go back on their answers in this case. You have the Delaware & Hudson Railroad that has permitted their cars to go by Seatrain and has filed an answer admitting that their cars go by Seatrain.

Examiner HOY. Well, the question here, as I understand, is whether they should permit their cars to go. The Commission has set this down not as to whether cars should be interchanged, but as to the terms and conditions on which the railroads should interchange their cars with Seatrain.

1715 Mr. MCCOLLESTER. On the terms—On conditions which the railroads should be required to interchange their cars. Now, if they have consented, they don't have to be required to; and they are consenting to their cars going on the present terms and conditions.

Mr. FORT. By remaining silent, I don't want it to be taken that anyone has consented to have the cars go under the present conditions. It appears that a good many of the conditions have been subject to dispute.

Mr. MCCOLLESTER. But there is in the record an exhibit recording the consents of the roads that might be considered Eastern Roads. I direct attention to the Lehigh & Hudson River; Lehigh & New England; Delaware & Hudson; Akron, Canton, & Youngstown; Pittsburgh & Shawmett; Pittsburgh, Shawmett & Northern; Wheeling & Lake Erie, all of whom have consented to the movement of their cars, interchange of their cars via Seatrain, for every purpose and at the present basis.

Examiner HOY. Doesn't the record only show that they have consented and filed notice with the American Railway Association that they will consent to have their cars go via Seatrain. without any reference to terms, conditions, rate per diem, or anything.

Mr. MCCOLLESTER. That means, as we construe it, under the present conditions.

Mr. HEALY. Why did you make them defendants?

1716 Mr. MCCOLLESTER. We made them defendants because we were afraid that there would be a lack of defendants.

The A. A. R. rules would have been adopted by vote of the membership of the A. A. R., of which they were members, if we had not.

Mr. FORT. Mr. Examiner, under the A. A. R. rule, the railroad might consent at this time, for a certain period, and withdraw its consent at any time. Now, Mr. McCollester attacked the rule under which you could consent or refuse to consent. It seems to me that all of the Eastern carriers, and all carriers, for that reason, would be involved. Is it your thought that the Commission would make an order that would have no binding effect on these carriers, which had prior to this time consented, so they might refuse to consent even after the Commission's order?

Mr. McCollester. Our complaint is against both the rule and against their refusals under the rule. We object to the rule in permitting anybody to refuse; and we object, also, to the refusals. Now, to the extent that the railroads have consented, that feature of the complaint is not here involved.

Mr. Fort. But the rule to which they are a party would be involved.

Mr. McCollester. The rule which would permit other railroads to refuse their consent.

Mr. Fort. Or permit those railroads——

Mr. McCollester. But so long as they haven't refused,
1717 as to them there is no issue of their refusal, no complaint against it because they haven't refused.

Examiner Hoy. Do I understand from that, Mr. McCollester, that as to railroads that have consented to have their cars interchanged with Seatrain, you are not seeking an order here?

Mr. McCollester. We seek an order as to those railroads, Mr. Examiner. We seek an order condemning the rule for itself. We don't seek an order requiring them to permit an interchange of their cars with Seatrain's, because they have consented.

Examiner Hoy. Of course, the only issue here is itself reopen for further hearing to determine the terms and conditions, including compensation, under which the carriers shall be required to interchange their cars with Seatrain's.

Mr. McCollester. That's right.

Examiner Hoy. The jurisdiction of the committee on the lawfulness of the practice have been determined. We have just got that issue here now, and if carriers who have consented to interchange their cars with Seatrain, then, as I understand it, under this issue you do not ask for an order against those carriers?

Mr. McCollester. That's right; so long as their consent continues, we don't ask for an order.

Examiner Hoy. Against them?

1718 Mr. McCollester. That is right.

Mr. Muckley. May I ask if Mr. McCollester will withdraw his complaint against those carriers? Is that what it amounts to?

Examiner Hoy. Offhand, it would seem to the Examiner that that's what it amounts to. When no relief is sought against the carriers, it is equivalent to withdrawing the complaint against those carriers.

Mr. McCollester. I perhaps haven't made myself clear. We seek relief against every carrier with respect to the maintenance of car service Rule 4 itself. Now, the Commission has made no order as yet with respect to the lawfulness of the car service Rule

4 which would permit refusals. That question remains open as to whether car service Rule 4 itself is unlawful; and on that issue every railroad that is a party to the A. A. R. rules, as I conceive it, is a necessary defendant unless it is prepared to state, or to take action to have Rule 4 rescinded.

But so far as the issue to which this particular hearing is addressed, it is the terms and conditions under which railroads should be required to interchange their cars with Seatrain. On that particular issue, as involved in this hearing, we ask no order requiring those roads that have consented to the interchange of their cars to consent.

Mr. FORT. But do you wish——

1719 MR. MCCOLLESTER. But we want Rule 4 stricken out.

Mr. FORT. Do you wish to leave those roads free to withdraw tomorrow, or the next day?

Mr. MCCOLLESTER. If they withdraw, then we will ask an order against them. But so long as they have consented and they are not coerced by the A. A. R., why we will ask no order against them requiring their cars to be interchanged with Seatrain's, because they have consented.

Mr. MUCKLEY. Well, I suggest that we are trying the issues as they exist today. I don't know that the Commission has any——

Examiner HOY. I don't think it is necessary to extend this any more. Mr. Healy has stated on the record that he is representing all the Eastern lines, defendants in this proceeding; that their [position] is as he states it.

Mr. MCCOLLESTER. Mr. Examiner, I hate to question the authority of counsel in any proceeding, but that's the great difficulty that we are up against here, where you have concerted action of this kind on the part of a group of carriers. A group of them get together and profess to speak for all of them, and one attorney comes and professes to speak for all. Now, we have answers filed here by attorneys who are, because they have signed the answers, the attorneys of record for the several lines; and I submit that

Mr. Healy cannot bind the attorneys of record of those

1720 lines that have consented and filed their answers.

Examiner HOY. Well, I don't think that need be discussed on the record at this time. As you say, the record contains the answers and it also contains Mr. Healy's statement. They are both in the record. I don't think we need discuss what he can do and what he can't do at this time, in view of the answers.

Mr. MCCOLLESTER. I think that a party is entitled do know the authority of opposing counsel who makes a misstatement adopting evidence. Now, unfortunately the Commission's rules don't require verified answers, as they do verified complaints. How-

ever, we all recognize that when it is a question of a complaint, there must be shown to the Commission authority of counsel to represent the complainant by a verification of an officer of the company.

Now, I should like to know what officer of the Delaware & Hudson Railroad, for example, or of the Lehigh & Hudson River Railroad, authorized Mr. Healy to make the statement that he just did here on behalf of the Eastern lines generally? I think we are entitled to know that.

Examiner HOY. Have any of the officers of any of those railroads that Mr. McCollester mentioned authorized you to appear, Mr. Healy?

Mr. HEALY. Yes. There was a committee appointed at a meeting of the Eastern lines, the defendant in this case.
1721 The Committee was appointed to protect the interests of the Eastern lines in this proceeding. I am one of the members of that Committee.

Examiner HOY. In other words, the case was handled in the same manner as hundreds of other cases that come up, where rates or practices of railroads in the particular rate territory are involved?

Mr. HEALY. The same procedure was followed, as Mr. McCollester is well aware of in the handling of these cases.

Mr. MCCOLLESTER. It is one thing, Mr. Examiner, for the railroads to follow the Committee method of procedure when they are dealing with something maintained by the railroads as a group. If counsel is willing to admit that the refusals of the railroads to permit their cars to go by Seatrain is a matter for group determination, binding upon all the members of the group—and that is what we have alleged in our complaint—then I am willing to have him make his statement, because then I think we have a clear violation of Section 7 of the act.

Mr. HEALY. We don't make any such statement at all.

Examiner HOY. Well, he has stated who he is appearing for, the nature of his authority, and how he received his authority to appear for them. I don't know of anything further we can do.

Mr. MCCOLLESTER. I don't know either, Mr. Examiner,
1722 but I make my statement on the record.

Examiner HOY. I suggest that Complainants proceed with their presentation.

Mr. MCCOLLESTER. I call Mr. Mathey.

W. J. MATHEY, being duly sworn, testified as follows:

Direct examination by Mr. MCCOLLESTER:

Q. Mr. Mathey, where do you reside?

A. Clifton, N. J.

Q. Are you an officer of the Hoboken Manufacturers Railroad, Complainant in this proceeding?

A. I am vice president of the Hoboken Manufacturers Railroad Company.

Q. And you are also connected with Seatrain Lines, Inc., Intervenor, in what capacity?

A. I am general Freight Agent of Seatrain Lines.

Q. As vice president of the Hoboken Manufacturers Railroad Company, what are your duties?

A. My duties are largely supervision over traffic matters.

Q. Are you familiar, as part of your duties, with the freight handled by the Hoboken Manufacturers Railroad and interchanged with Seatrain, and the way such freight is packed?

A. I am.

Q. There's been considerable testimony in this proceed-
1723 ing on the subject of corrosion. Has the Hoboken Manufacturers Railroad Company handled and delivered to Seatrain, for movement, any shipments of steel plates? Have there been steel bars and other steel articles?

A. Yes; the Hoboken has delivered to the Seatrain, for transportation, hundreds of cars, if not thousands of cars, of various iron and steel articles, both in box cars, in gondola cars, and on flat cars.

Q. These shipments are made by the steel companies, are they not?

A. They are.

Q. Now, are these shipments packed in any way for protection against corrosion when they move by Seatrain?

A. Absolutely not.

Q. How are they shipped?

A. Well, they are shipped—a good many of them are shipped loose in the car: sheets and bars, rods, pipe—shipped absolutely loose in the car, gondola cars or box cars. In addition, we handle quantities of machinery which are loaded either on open cars or in box cars, which are absolutely, in a good many cases, loose in the cars.

Q. Now, from your relations with shippers, would you say that they are interested in having their freight go through in undamaged condition?

A. Well, if it doesn't; why, we hear from them.

1724 Q. Now, there has also been testimony about the comparative corrosion of gondola cars of the Long Island Railroad and of the Pennsylvania Railroad.

A. Yes.

Q. Have Pennsylvania Railroad gondola cars moved via Seatrain, and have you any record of them?

A. Yes, I had a check made by my office of the business handled for the six months—June 22 to December 14—and I find in that period we handled Pennsylvania Railroad gondola cars in the amount of 47.

Mr. FORT. What period was that?

The WITNESS. June 22 to December 14.

Mr. FORT. What year?

The WITNESS. In 1938.

By Mr. MCCOLLESTER:

Q. In connection with my previous questions about the steel articles and the machinery, you stated that if the shipments didn't arrive in good condition you heard from the shippers?

A. That is right.

Q. Have you had any complaints from shippers about corrosion?

A. No; we may have had one or two on occasions, but they are so small that it is negligible.

Q. And they continue to ship without protection against moisture, or corrosion from other sources?

1725 A. That is correct.

Q. Are you familiar with the tariff provisions of the New York Harbor Lines relating to the holding of freight to be interchanged with freight bulk water carriers?

A. I am.

Q. Will you state—and give the reference to the tariff—what the provisions are as to the holding of such freight?

A. The tariffs of the New York Harbor Lines provide that on coastwise freight it will be held by the railroads free of demurrage or storage for a period of five days, five days after arrival on export traffic, that moving under through export bills of lading. In connection with the so-called agreement lines—and by that I mean steamship companies who have signed an agreement with the railroads—the free time is 15 days. On freight with the nonagreement lines, the free time is ten days.

Q. Will you give the tariff reference to which you have just referred?

A. An example of the tariff provisions are Rules S–10, S–15, and S–20 of the Erie Railroad Tariff, ICC No. 19451.

Q. Is there anything in that tariff, or in any other tariff that you have discovered, providing that if freight is held for the free time period in cars, the car expense for any cars shall be charged to the steamship line?

1726 A. There is not.

Q. Were you formerly with the Erie Railroad?

A. Yes, for 20 years.

Q. Now, have you been generally familiar with the New York Harbor situation and the practices of the carriers in New York Harbor during that time?

A. Yes.

Q. Have there been times when permit systems have been in effect and in which freight has been held by the railroads until permitted by a steamship line?

A. Yes; there have been such times.

Q. And during any of those times has there been any tariff provision, or any provision, for charging the per diem expense of holding cars to the steamship lines?

A. Not to my knowledge.

Q. And you would know if there had been, wouldn't you?

A. I assume I would.

Q. Now, do the trunk lines reaching New York Harbor interchange freight with the Bush Terminal Railroad and the New York Dock Railway going to steamship piers served by those lines?

A. They do.

Q. What are the tariff provisions, if any, with respect to the holding of cars by the trunk lines?

A. The tariff provisions I have cited apply at the railroad holding yards on the Jersey side, and they apply no matter
1727 what point in New York Harbor the cars are finally—to no matter what point in the harbor the cars are finally delivered.

Q. In other words, under those tariff provisions cars may be held at the terminal yards of the trunk lines for the free time period prior to delivery to the Bush Terminal Railway or the New York Dock Railway for movement to ship side?

A. That's right.

Q. Now, in order that there may be no erroneous impression on the record, are there any regular coastwise lines that you know that dock at piers served by the Bush Terminal Railway or the New York Dock Railway?

A. There are not at the present time.

Q. Are there export steamship lines that dock at these piers?

A. Yes; quite a few.

Q. And do occasional vessels in the coastwise trade dock at those piers?

A. Well, it is my information that they do, but I say not any of the regular lines.

Q. Mr. Randall, when he was on the witness stand, in discussing the subject of reclaim—and, Mr. Examiner, of course in offering testimony in rebuttal of Mr. Randall's testimony on the reclaim issue, we are doing so, still reserving our objection on

that issue in this proceeding. Mr. Randall, in his testimony,
1728 referred to switching limits at New York. Are there any switching at New York?

A. No, sir.

Q. He also gave certain testimony to the effect that under the reclaim rules, in his opinion, Seatrains should absorb the per diem expense of cars delivered by it to the Hoboken and moved under switching rates from Hoboken to points in the New York Harbor district; but that if the movement was under road haul rates, that there would be no such absorption because the road haul rates included, presumably, the expense of car hire. To what extent, if any, are there switching rates applicable to movements from Hoboken to points within the New York Metropolitan area?

A. The only switching rates which are applicable would be the switching rates of the Erie to their industries in Weehawken, and likewise a few industries of the West Shore Railroad in Weehawken. Other than that, there are no switching rates applying from Hoboken to any place in the country. I'll make one exception to that. The Erie Railroad does also publish a switching rate from its connection with the Hoboken Manufacturers, on perishable freight, to its cold storage warehouse in Jersey City.

Q. Now, with those exceptions, under what sort of a rate would freight move from the Seatrain pier at Hoboken to a delivery point within the New York Metropolitan area?

A. It would move on the regularly published joint rates
1729 applying from Hoboken to the destination point.

Q. And freight does move on such rates?

A. It does; practically all of our freight moves on such rates.

Q. In your 20 years' experience with the Erie Railroad and in your experience since that time, have you had to do with the making of rates and the defending of rates in proceedings brought by shippers?

A. I have.

Q. And have you also had to do with divisions—the negotiation of divisions and the defending of divisions of joint rates?

A. I have.

Q. Mr. Kendall, when he was on the witness stand yesterday, listed a number of items of railroad service which, as he testified, devolved upon railroads in handling freight, and of which he implied, at least, that Seatrain, as an overhead carrier, was relieved.

Among these items of service which Mr. Kendall mentioned, according to my notes, were the following:

1. The distribution of empty cars.
2. The placement of cars for loading.
3. The conditioning of the cars for loading.

4. The time consumed by the shippers in loading.

5. The classifying of the cars for shippers.

1730 Now, based upon your experience, are these items which are taken into account in the measure of the rates, charged to shippers or the divisions of rates as between carriers?

A. They are.

Q. Have you been in proceedings before the Commission in which either increases in rates or increases in divisions have been sought, based upon these items of expense?

A. Based upon all items of expense that go into the transportation of the freight.

Q. Well, is it then your opinion that these are factors to be taken into account in the rates to be charged for freight rather than in the compensation to be paid to car owners for the use of cars?

A. I think that's absolutely true.

Q. For example, Mr. Mathey, these are items of expense incurred by the carriers performing the service, those particular services, are they not, because they perform the service, and not the car owners.

A. That's correct.

Q. In other words, I might cite an example. Would not the New York Central incur these expenses in handling a Texas & Pacific car?

A. Yes.

Q. And those wouldn't be a cost to the Texas & Pacific?

A. Absolutely not.

1731 Q. Mr. Randall testified yesterday that so far as the per diem and reclaim rules were concerned, there was nothing in those rules to impose upon the Florida East Coast Car Ferry the expense of car hire for the detention of cars awaiting delivery to the car ferry. Have you examined the tariffs of the railroads involved, and is there anything in the published tariffs——

A. There is not.

Q. Which would have that effect?

A. No, sir.

Q. Have you anything further on direct?

A. No; that's all.

Mr. McCOLLESTER. You may be cross-examined.

Cross-examination by Mr. FORT:

Q. Mr. Mathey, you made some reference to movements of iron and steel in open-top cars on Seatrain.

A. That is correct.

Q. Was that scrap iron?

A. No, sir.

Q. What was it?

A. I said it was sheets, beams, rails, pipe, angles, structural steel, tin plate. I might say we have never handled a car of scrap iron that I can recall on Seatrain since we have been in existence.

Q. You say that there were 47 gondola cars of the Pennsylvania that moved in the period that you mentioned. I think
1732 it was June to November?

A. That's correct.

Q. And each one of those cars was on your line six days, wasn't it?

A. If it had gone to New Orleans it was on the Seatrain ship for six days. Some of those went to Cuba.

Q. Some of them went to Cuba?

A. Oh, yes.

Q. Well, it was on how long if it went to Cuba?

A. Well, it would be four days on the Seatrain proper, but I don' know how long they would be in Cuba.

Q. The point I want to make on the record is a simple one. I don't think you will have any disagreement about it. These 47 Pennsylvania cars, taking the time that they were on your line and reducing that to car days, that would be just an insignificant fraction of a fraction of one percent of the gondola car-days on Pennsylvania Railroad's own gondola cars, wouldn't it?

A. It probably would. It's a matter of computation. I concede that.

Q. Now, with respect to this tariff, you referred to certain rules in certain tariffs. I would like to look at the tariff.

A. Certainly [handing tariff to Mr. Fort].

Q. Is that Rule No. 5—10?

1733 A. No; that is S–10.

Q. That's the one which has to do with the coastwise business?

A. That's correct.

Q. That provides, after a certain time in New York, demurrage against shippers, does it?

A. That's correct.

Q. That is with respect to cars that are consigned to shippers in New York?

A. Not necessarily, but that would be the effect of it. It would be against the shippers.

Q. You couldn't charge demurrage against the shipper on a car consigned to a shipper, could you?

A. Well, it is charged against the property, not necessarily the shipper. It may be the consignee. It may be consigned to the steamship company.

Q. I mean that this is a rule which has application with respect to the relations of the railroad with its shippers or consignees, and not with the carrier, as such?

A. That doesn't make any difference. As I see it, it allows the free time on the freight.

Q. But let's find out what the facts are, and then we'll argue later about whether it makes any difference or not.

A. Well, all I can tell you is that the tariff rate allows a certain free time on the freight. The tariff is silent who
1734 pay it.

Q. Now, if a shipment is billed straight through Coastwise and moves straight through, would the shipper get any notice, or anything of the kind, when it reached New York?

A. Unless he asked to have it held, and the billing so indicated.

Q. In other words, if the shipper wanted it held, then this rule would apply?

A. That's correct.

Q. If the shipper didn't want it held it would move on through as indicated in Mr. Randall's statements?

A. If it moved on a through bill of lading; that is correct.

Q. Now, you testified about the switching situation here. Did I understand you to say that on in-bound cars from Hoboken there were only those Erie points in Weehawken, and West Shore points in Weehawken where the movement would be on a switching rate?

A. Yes; that is correct.

Q. What about out-bound movement to Hoboken from local points in New York? Would that be the same situation?

A. Exactly the same.

Q. And in each case Hoboken gets a division of the rate; is that true?

A. No; when they use the switching charges, which apply
1735 only up to Hoboken's connections with the Erie or the West Shore, there is no division. That is not a joint switching rate, and there'd be no division to that rate. What the Hoboken would get would be its charges between Weehawken and the Seatrain connection, which would be a division.

Mr. McCollester. I don't think you understood Mr. Fort's question. The question had to do with the freight moving on road haul rates.

The Witness. No; he said on the switching charges. I understood him.

By Mr. Fort:

Q. On the shipments moving from Hoboken to points in the vicinity of New York and within New York, what kind of rates

would they move on, with the exception of these Erie and West Shore Weehawken points? What other points—or, rather, rates—would they move on other than those?

A. Under joint class or commodity rates, as the case may be.

Q. And as to such rates, the Hoboken would get a division; is that right?

A. That's correct.

Q. And the other line involved would get a division?

A. That is right.

Q. Now, when it's moved to these Weehawken points, what kind of rates would it move under then?

A. Well, that all depends. It may move on a double
1736 combination of the Seatrain rate, plus the rate of the Hoboken manufacturers, plus the switching rate of the Erie or West Shore; or, in a few instances, it would move on a joint rate published by the Seatrain up to Weehawken, in which event the Seatrain would pay the Hoboken its proportion of that particular rate.

Q. I understand that in some cases it moves on a combination; in other cases it might move under a rate on Seatrain that would take it up to the Hoboken, and then a combination of switch rates—Hoboken switch rates and Erie?

A. That is correct, a joint rate up to Weehawken is what I said.

Examiner Hoy. The first was a combination of Seatrain, Hoboken, and the Erie or West Shore.

The Witness. That is correct.

Examiner Hoy. And the second was a joint rate the Seatrain publishes up to Weehawken, and they give the Hoboken a division out of it. That was the way you testified to at first.

The Witness. That is right.

By Mr. Fort:

Q. That is the way he testified to, except that he just reversed the order. Now, going the other way, would you have the same situation from these Weehawken points—as to the rates, I mean?

A. Yes, where the joint rate would be higher than the
1737 joint rate between Hoboken and these points—would be higher than the combination of the switching rates.

Q. Now, as to all other points in New York where you would have no switching rates of any kind, what would the situation be both as to in-bound, to be delivered from the Seatrain, and as to out-bound, to go on the Seatrain?

A. If it went out by rail or came in by rail connections?

Q. No; first take it when it is local.

A. I don't quite get what you mean "when it is local."

Q. When it originates or is to be delivered in the New York district here.

A. Well, that is what I am telling you.

Q. Go ahead.

A. It makes no difference whether it is New York or where it is. It moves on a joint rate applicable between Hoboken and the point of origin or destination—a joint rate.

Q. That takes it right up to Seatrain?

A. The rates of the trunk line railroads apply from the Seatrain interchange to points on their lines.

Q. Now, is the same situation in-bound and out-bound with respect to that?

A. Absolutely.

Q. The Hoboken gets a division in either in-bound or out-bound?

A. They get allowances.

1738 Q. Now, as far as the in-bound shipments are concerned, Hoboken has demanded, or attempted to demand, a reclaim per diem, hasn't it, on shipments moving under those rates?

A. Yes, sir.

Q. Has there been any distinction as to whether or not Hoboken was getting a division of the through rate or whether the movement was on a switching charge published by Hoboken in that connection?

A. No; not to my knowledge.

Q. That is on the theory, Mr. Mathey, that however the rates might be published, it was essentially, as a matter of fact, to switch movement?

A. Yes; that is correct.

Q. It was on that theory?

A. Yes.

Q. If the Hoboken movement is essentially a switch movement in a case of that kind, then the movement of the originating line in New York, or the delivery line in the New York district, however covered by tariff, would or might in certain cases by essentially a switch movement, too; mightn't it?

A. No, sir.

Q. Why not?

A. Because your switch movements are within the limits of your switching district, and I said there is no switching district in New York Harbor.

1739 Q. Well, there is certain switching in New York, isn't there?

A. Not New York City.

Q. Yes.

A. None that I know of, except the New York Central may have one or two rates published in their line in New York. There

are no switching rates in New York. There are no switching rates applying from the Jersey shore to New York.

Q. You are talking about switching rates?

A. Yes, sir.

Q. And there are very few switching rates on the Hoboken, aren't there?

A. Yes; we have it on the Hoboken. It is published between our own local points, or between local deliveries.

Q. I mean when your own haul brings it to Hoboken, generally there isn't a switching rate for the service the Hoboken performs?

A. Yes; there is a switching rate published.

Q. Not applicable in cases of this kind?

A. It would be applicable on the switching rate plus the rate up to Hoboken's interchange with the Erie, made less than the joint through rate.

Q. Instead of saying "applicable," I will say "applied"—not applied?

A. Well, I say it is in a few cases.

1740 Q. Nevertheless, you would regard that service of the Hoboken as essentially a switching service regardless of the form of the rate or division publication, wouldn't you?

A. I would.

Q. Isn't there a similar situation as to other railroads in New York?

A. No, sir; not that I know of not from Hoboken.

Q. Take traffic that Hoboken delivers to Erie and Erie, in turn, delivers to another road or carrier for an out-bound movement?

A. Yes.

Q. Isn't the service which the Erie performs in connection with that switching—what is ordinarily regarded as a switching service, regardless of the character of the publication of the rate?

A. Naturally, but the Erie publishes it as a switching charge. The Erie's service is a distance of 300 or 400 yards in the City of Weehawken. What I am getting at is these other towns. They are separate stations and there are no switching charges published between stations, to my knowledge, in the country—from one station to another.

Q. I don't think there is any difference between us, Mr. Mathey, if I can make myself clear.

A. I think there is.

1741 Q. Take a shipment in-bound from the Pennsylvania Railroad to Seatrain here at New York. How would that shipment move after it got to the Pennsylvania on the Jersey side?

A. Coming from where?

Q. From Philadelphia.

A. It would move over the—under some trackage arrangement, over the West Shore Railroad from Jersey City to Weehawken, where it would be turned over to the Erie for switching to us.

Q. And the Erie would turn it over to you?

A. Over to the Hoboken Manufacturers.

Q. Now, would that involve, in your estimation, a switch movement by the Erie?

A. Oh, yes, surely; that's a switch movement, intermediate switch movement by the Erie.

Q. And it would involve a switching movement by the Hoboken?

A. Yes.

Q. Now, if it were going the other way the same thing would be true, wouldn't it?

A. Surely.

Q. What's the situation with respect to your divisions of the Seatrain on through rates that it publishes with trunk lines? Are they saddled or have they been fixed by the Commission?

A. Well, we are just waiting to have the Commission fix
1742 those divisions. The case has been submitted. I am waiting for an Examiner's report on it—between Seatrain and Trunk Line. That has not been for the reason that there are very few joint rates with the Trunk Line railroads. I thought you talked about the railroads.

Q. There are very few joint rates?

A. That's correct.

Q. The rates are made up, then, as combinations?

A. We publish a system of proportional rates on our coastwise business, to which are added the local or proportional rates of the Trunk Line Railroads.

Q. What percentage of your business would you say moves on that combination through New York?

A. I haven't any idea.

Q. You don't have any idea at all?

A. No, sir.

Q. Would you say it is more than half or less?

Mr. BRUSH. Is there anything in this case about the subject Mr. Fort is trying to inquire about?

Mr. FORT. Mr. McCollester introduced something in this case.

Mr. BRUSH. But did you object to it?

Mr. FORT. No.

Examiner HOY. I think, Judge, it is proper cross-examination.

1743 Mr. LARIMORE. He is attempting to try another case which has already been tried.

Examiner HOY. I think he is within the bounds of the direct. Did you finish, Mr. Fort?

By Mr. FORT:

Q. What position do you have with the Seatrain?

A. General Freight Agent.

Q. And you wouldn't have any idea of the proportion of your business moving through New York through joint rates between Seatrain and railroads, and, on the other hand, which moves on a combination?

A. It would be a guess, and I wouldn't want to hazard a guess.

Q. Would it be a guess if you were just talking about how the majority of it moved?

A. Yes; it would be a guess—without looking over my figures.

Q. I thought you said, in a part of the examination a moment ago that you had very few of the through joint rates in here. Did you say that?

A. Yes; the only joint rates we have—we have some joint rates north-bound from the interior Texas points.

Q. Well, then, wouldn't it necessarily follow from that that the great majority of your business moving through New York wouldn't move on joint rates between Seatrain and the

1744 rail carriers reaching New York; or would it?

A. Well, that all depends upon that period. Some periods, it may; but in general I would concede that the majority of it does not move on joint through rates with the railroads, with the Eastern railroads; which is a subject now before the Commission in another proceeding.

Q. You mean the establishment of joint rates?

A. Exactly.

Q. The question of the divisions of those rates has not yet been put in issue before the Commission, has it?

A. It certainly has.

Mr. ESHELMAN. By the way, I don't want our silence on that to mean that we agree that this is an issue.

By Mr. FORT:

Q. Mr. Mathey, is the same situation to be found with respect to the rates of the carriers reaching and serving New Orleans—that is, the rail carriers? Do you have through joint rates with them?

Mr. MCCOLLESTER. I object to going into the question of Seatrain's rates, and particularly in New Orleans. It is not proper cross-examination. I didn't ask the witness anything about Seatrain's rates.

Mr. FORT. You asked him about divisions of rates.

Mr. MCCOLLESTER. I asked him about divisions of rates in general. That is, not about Seatrain's rates or divisions of Seatrain's rates, but what factors were considered,

1745 whether these particular factors were considered in determining the divisions of rates in general, based upon his railroad experience.

Mr. FORT. Didn't you mean to give that some application to this particular case?

Mr. MCCOLLISTER. No; I didn't mean it.

Mr. FORT. Then I move that it be stricken. Mr. Examiner, as I now understand the position of opposing counsel, it is that while he talked on the record and examined this witness about what factors were taken into account in divisions; he had no thought that it had any application to the facts in this case but that it was just something that was interesting to all here assembled. That being so, I ask that all of that be stricken.

Examiner HOY. I think your understanding is wrong.

Mr. MCCOLLESTER. Of course, counsel is distorting what I said. It is perfectly obvious what the purpose of the examination was, but my questioning did not open up any questioning as to the nature of Seatrain's rates at the present time. I am perfectly willing to state the purpose of that question, which is certainly obvious, that these factors to which I referred in questioning the witness, are not factors to be considered in determining compensation to be paid to car owners by one railroad for the use of the cars of another.

By Mr. FORT:

1746 Q. I ask for an answer to a question which I think is already on the record, as to what the situation is in regard to through rates with the railroads serving New Orleans?

Mr. MCCOLLISTER. I object to that. It is beyond the scope of the examination.

Examiner HOY. What do you mean, "What is the situation?"

Mr. FORT. As to whether or not the business in New Orleans moves on rates; that is, joint rates between the Seatrain and the Trunk Lines serving New Orleans.

Examiner HOY. Is it as to whether the business moves on through rates?

Mr. FORT. Through joint rates.

Examiner HOY. In connection with who?

Mr. FORT. In connection with the Seatrain and the Trunk Line Railroads serving New Orleans.

Mr. LARIMORE. We object to that as just an attempt to try another case.

Examiner HOY. I think it is easy to answer the question. It is a well-known and established fact in the other cases as to how that business moves.

Mr. LARIMORE. Why do you want to try it over again in this case?

Examiner HOY. Answer the question.

1747 Mr. FORT. Are all the records to be regarded in this record just because this is in some other record?

Examiner HOY. I don't see where it has any particular pertinency in the case, either; but go ahead and answer the question. I am permitting him to answer it instead of sustaining the objection.

The WITNESS. The answer is that with some of the railroads it moves on joint rates—the business going beyond New Orleans. In other railroads, it moves on combinations.

By Mr. FORT:

Q. Would the major part of it move on combinations?

Mr. LARIMORE. It's plain what the object of such a cross-examination is.

Examiner HOY. I don't think that's within the bounds of the direct examination.

Mr. FORT. Let me indicate why I ask the question. Mr. McCollester suggested, or implied, in some of his questions that certain factors which have been brought into this record were factors properly to be taken into consideration in a division case rather than in a case having to do with the cost of car hire.

Now, the question is, then, as to this business that we are talking about; what part of it moves on conditions where there are divisions and what part of it moves under conditions where it is a mere combination of rates?

Mr. MCCOLLESTER. Well, I will say this to clarify——

Mr. FORT. It seems to me to be material.

1748 Mr. MCCOLLESTER. I will say that these factors mentioned by Mr. Randall, concerning which I interrogated Mr. Mathey, are, according to our contention, to be taken into account in the measure of the revenue of the railroad performing the service, whether that revenue is derived from combination rates or divisions, or local rates, or divisions of through rates; and is not a factor in the compensation to be derived by the car owner from the use of cars. That is all.

Examiner HOY. I think the question goes beyond the bounds of proper cross-examination.

Mr. FORT. In view of Mr. McCollester's second statement, I will not push the question.

By Mr. FORT:

Q. Now, in connection with certain services to which Mr. McCollester called your attention—I couldn't get notes of them because he talked so fast—but one was switching at the origin point,

I think. Wasn't that one which you mentioned, Mr. McCollester?

Mr. McCollester. I said distribution of empties.

By Mr. Fort:

Q. Now, distribution of empties involves two separate aspects, doesn't it? First, the service involved in switching the cars around, and, second, the matter of car ownership during that period. They are two separate things, aren't they?

A. I don't quite get what you mean.

Q. There are certain services performed in connection
1749 with that factor that he spoke to you on—switching services.

A. In most cases switching service is necessary to place a car. In some cases, it isn't.

Q. Certain operating costs; is that true?

A. Yes.

Q. Then, on the other hand, there is the cost involved in the mere fact that a car is kept or detained for one day, whether it is moving or whether it is on a side track, or wherever it might be?

A. That is part of the expenses which go into making up your rates, which you will be compensated for in the revenue to the road haul carrier.

Mr. Fort. That is your position, I understand. All right; thank you.

Redirect examination by Mr. McCollester:

Q. Now, Mr. Mathey, with respect to Hoboken's position in this matter of reclaim, I think that Counsel's question and your answer leave the implication that Hoboken's position is predicated on the theory that however Hoboken's rates were published, the service was essentially a switching movement. Isn't it rather the fact that whatever the nature of the movement, the Hoboken's allowances have been fixed as not including any expense for car hire?

A. Yes; that's correct.

Q. And hasn't the Hoboken taken the position——

1750 Examiner Hoy. Mr. McCollester, ask him what position the Hoboken's taken; but let him testify.

Mr. McCollester. Counsel hasn't objected.

Examiner Hoy. Well, I know; but then it would be a more satisfactory way to have it on the record.

By Mr. McCollester:

Q. Is Hoboken concerned whether or not it pays for car hire and gets an increased division, or whether it maintains its present division and doesn't pay for car hire?

A. We have no such concern. Our only concern is to get enough revenue to pay us.

Q. Mr. Fort asked you about the movement of a car from the Pennsylvania Railroad to Hoboken, and you stated that that would involve a switching operation by the Erie and a switching operation by the Hoboken. What would you call the movement of the Pennsylvania itself for the trackage rights?

A. It seems to me in that case it is simply an extension of their line down to Weehawken over the West Shore Railroad. That would be my impression.

Q. Now, are the rates that apply from Hoboken to points on the Pennsylvania Railroad, at Jersey City, published either class rates or are they published as switching?

A. Published as class rates or joint commodity rates.

Q. And a shipper having some freight to ship from Hoboken to Jersey City would pay those rates?

1751 A. That's correct.

Q. And those same rates are applicable on any freight that may come off the Seatrain?

A. That is correct.

Q. In going to the same point in Jersey City?

A. That's right.

Q. I neglected to ask you on direct examination whether you have made any examination of your records to find out whether the Trunk Line Railroads have been using their own cars for shipments originating on their lines and moving via Seatrain, and what the results of your examination have been?

A. I have, Mr. McCollester. We took the last three months of 1938 to find out the cases where freight, loaded on the Pennsylvania Railroad and going via Seatrain, was loaded in a Pennsylvania car, and similarly with some of the other roads. In this period the Lehigh Valley loaded 2 of its cars; the New York Central, 5; the C. & O., 1; the Lackawanna, 1; the Central of New Jersey, 1; the B. & O., 6; the New Haven, 13.

Q. In each instance they are the cars of the originating carrier?

A. Yes, sir. The Pennsylvania loaded 26; the Main Central 7, and the Erie 4.

Mr. McCollester. That is all.

Re-cross examination by Mr. Fort:

Q. That was during the last three months of 1938?

1752 A. Yes, sir.

Q. Now, during that three months' period, how many shipments that moved over Seatrain originated on these railroads which you have enumerated?

A. I don't recall the total number of shipments.

Q. Take the Lehigh Valley. In that three months how many shipments originating there went via Seatrain?

A. I don't know.

Q. Do you know that for the Pennsylvania?

A. All I know of the Pennsylvania—I think there were two cars other than Pennsylvania cars originated at the Pennsylvania and delivered to us.

Q. The Pennsylvania only delivered 28 cars to you during that entire three months' period?

A. Oh, no; I didn't say that. This is on coastwise business that I am talking about here.

Q. Well, I mean on coastwise business?

A. No.

Q. How many cars did Pennsylvania deliver to you on shipments that originated on the Pennsylvania, for movement by Seatrain, in the three months?

A. I haven't got those figures in that shape.

Q. For any of those lines?

A. No, sir.

1753 Mr. ESHELMAN. Will you accept my statement for it that it Pennsylvania does not have trackage rights over the West Shore?

The WITNESS. Well, I don't know what your arrangement is over there; but if it is a trackage right or what it is, I know what you pay them.

Examiner HOY. Are there any further questions of this witness?

Mr. FORT. Not from me.

Examiner HOY. You are excused, Mr. Mathey.

(Witness excused.)

Examiner HOY. We will take a five-minute recess.

(At this time a recess was taken.)

1754 AFTER RECESS

Examiner HOY. Call your next witness, Mr. McCollester.

Mr. MCCOLLESTER. Mr. Examiner, before I call the witness, I think, in order that the record may be up to date, we ought to have the present record clear as to permissions for the movement of cars under car service rule 4. The old record contains exhibits 9, 10, and 11.

Exhibit 9 is the original list of steamship, ferry, and barge lines and statements of permissions and refusals.

Exhibits 10 and 11 are supplements 1 and 2 to the original list, making some changes therein, in which some railroads have given their consent, or modified their previous consent.

It is my information that there have been three more supplements, that the latest supplement is No. 5, but, this is not a matter

within your knowledge, it is within the knowledge of the A. A. R. and therefore I would ask that they file for the record the latest supplements, so that the record can be complete on this subject and up to date.

According to my information, all we need supplements 3, 4 and 5 to special car orders No. 30.

Mr. FORT. In answer to what Mr. McCollester has said, I am willing to state for the record that I am informed by Mr. Campbell, and we are willing to let it go in the record, subject to cor-
1755 rection—if it should need any—that in supplement No. 3 of December 11th——

Mr. MCCOLLESTER. December 11th, what year?

Mr. FORT. December 11, 1933—the Denver & Salt Lake Railway Company added its permission to have it cars go by Seatrain.

Mr. MCCOLLESTER. In other words, it changed from Group D to Group A?

Mr. FORT. Well, I don't know anything about the groups, that is just what I have felt.

Examiner HOY. The difference between D and A, being some cars are permitted to go in Cuban service, but not all water, or vice versa.

Mr. MCCOLLESTER. Exhibit 9, Mr. Examiner, divides the permission itself into four groups; A is permission to be delivered to all water lines, including Seatrain's, without restriction; B permits delivery to all water lines except Seatrain, and permits no delivery to Seatrain; C, as to Seatrain, permits movement between New Orleans and Havana and between New York and Havana; and D permits movement between New Orleans and Havana only.

Mr. FORT. Well, I wish—may I make a statement? By supplement No. 3 to special car service—special car order No. 30—the supplement being dated December 11, 1933, the Denver & Salt Lake Railway Company granted permission to its cars to be delivered without restriction.

1756 By supplement No. 4, to the same special car order, No. 30, this supplement being dated March 13, 1914——

Examiner HOY. 1914?

Mr. FORT. 1934—the Manufacturers Railway Company granted permission for its cars to be delivered without restriction.

By supplement No. 5, to the same special car order, No. 30—and this supplement was dated April 26, 1934—the Louisiana & Arkansas Railway Company and Louisiana, Arkansas & Texas Railway Company, granted permission for their cars to be delivered without restrictions.

Mr. Campbell tells me that since that time, and recently, the Rock Island Railroad has also indicated its willingness to have its cars delivered without restriction. There has not been a supple-

ment issued as yet covering the Rock Island, it just hasn't gotten around that far, is that right?

Mr. CAMPBELL. Yes.

Mr. MCCOLLESTER. I think there is one more addition to what you have said, Mr. Fort, in connection with supplement No. 4. According to my information, by supplement No. 4, the Nashville & Chattanooga—the Nashville, Chattanooga and St. Louis Railway Company, which had formerly denied permission for movement by Seatrain at all, granted permission for movement via Seatrain between New Orleans and Havana; in other words, trans-
1757 ferred itself from Group B to Group D.

Mr. FORT. Mr. Campbell states that is correct.

Before you call the next witness, it might be well to clarify the record, too.

Mr. Campbell, will you wait just a moment? You asked Mr. Campbell, off the record this morning, with respect to cars' detention, which he showed on his Exhibit 56, wasn't it?

Mr. MCCOLLESTER. Exhibit 63.

Mr. FORT. In a discussion off the record this morning, Mr. McCollester asked Mr. Kendall how the amount of detention shown on Mr. Kendall's Exhibit 63, which deals with detention of cars in connection with break bulk carriers at New York, how that detention was calculated.

Mr. Kandell now states that the detention shows per diem days and that six-tenths is six-tenths of a per diem day, and nine-tenths is nine-tenths of a per diem day—per diem day, of course, is counted by twelve o'clock midnight, if a car is at a certain place after twelve o'clock midnight, that is one day.

Mr. MCCOLLESTER. And will you, can you state for the record, Mr. Kendall again, at what point in the movement of the car is the detention term computed?

Mr. KENDALL. From the arrival in the float yard to the release of the car.

1758 Mr. FORT. I think that clears it up.

Examiner HOY. Now, are we ready to call the next witness?

Mr. MCCOLLESTER. Yes, I will call Mr. MacGowan.

A. R. MACGOWAN was sworn and testified as follows:

Direct examination by Mr. MCCOLLESTER:

Q. Will you state your full name, please?

A. A. R. MacGowan.

Q. Where do you reside?

A. New York City.

Q. What is your connection with the Hoboken Manufacturers Railroad?

A. Superintendent.

Q. How long have you held that position?

A. Since the spring of 1931.

Q. Will you briefly outline your experience?

A. Beginning in 1899, in the accounting, engineering, construction and operating departments of different railroads, with eight years as superitendent of transportation of the Hudson Coal Company at Scranton.

Q. In your position as superintendent of the Hoboken Manufacturers Railroad, are you familiar with the handling of cars by the Hoboken and the interchange of cars between the Hoboken and the vessels of Seatrain Lines?

1759 A. I am.

Q. In the first place, let me ask you, has the Hoboken Manufacturers Railroad collected from Seatrain per diem for the detention in Seatrain's possession, or in the possession of Cuban Railroads, on all cars delivered to Seatrain by the Hoboken, and has it made payment, actually made payment of the per diem so received, together with per diem accruing on the Hoboken Manufacturers Railroad, to all car owners, other than those New York Harbor lines with whom there has been this reclaim controversy referred to in the record here?

A. It has.

Q. And, has that per diem been paid on the basis of a dollar a day?

A. It has.

Q. And has it been accepted without protest by all owning railroads to whom it has been paid?

A. It has.

Q. There has been considerable testimony offered by the defendant here on the subject of corrosion. Do you in the course of your duties observe the handling of cars from Seatrain ships to the trestle alongside the ship and observe the condition of those cars?

A. I probably see personally a majority of the cars as they are taken from the Seatrain ship.

1760 Q. Now, where would you look on those cars for evidence of corrosion or what is commonly termed rust?

A. Depending on how it occurs, if it occurs from moisture, such as rain or very damp air, or heavy fog, I would look at the tread of the wheel in the first place, to see the first effects of the rust.

Q. Why is that?

A. It is usually the first part of a car that will rust in a rain or in a very heavy fog.

Q. And, is that based upon your experience with cars in railroad freight yards?

A. It is.

Q. And, have you observed rust on wheels of cars in railroad freight yards after rain or heavy fog?

A. I have; I have seen on a siding in the interior of the country a car that had been on the siding two days and the tread of the wheel was covered with a red rust.

Q. The tread of the wheel, of course, is not protected by paint or galvanizing?

A. No; in its normal state, it is practically a polished surface.

Q. Therefore, it would be the most susceptible to rust?

A. In my opinion; yes.

Q. In your opinion. Now, what have you observed with respect to the treads of wheels of cars as they come out of Seatrain

1761 ships?

A. Very little rust. A number of voyages, on a number of voyages, there would be none. On other voyages, where the ships had rough weather, there would be approximately about 30 percent of the cars that would show some indication of rust on the treads of the wheels.

Q. Would you say that that rust was greater or less than you observed on cars in rain or fog in railroad freight yards?

A. I would say after a car had been on a siding in the interior of the country during a rain storm and it had dried and the weather had cleared up, and the wheels had dried, the rust, in my opinion, will be about similar to a car standing two days on such a siding, and much less than a car that I have seen on different sidings, had been there about two weeks' time without moving.

Mr. McCollester. Will you read the answer again?

(Answer read.)

Examiner Hoy. That doesn't mean much to me, that answer.

By Mr. McCollester:

Q. The majority of cars coming off Seatrain service, what is the condition of the tread of the wheels on those cars?

A. On a majority of the wheels, there is no indication of rust on the tread of the wheels whatsoever.

Q. Or the treads shiny?

A. Yes.

1762 Q. Now, has it been in instances where the ships have encountered heavy weather, that you have observed some rust on the wheels?

A. Yes.

Q. And on what proportion of the cars in those instances have you observed rust?

A. It would be approximately 30 cars out of a hundred.

Q. Now, the extent of the rust that you have observed in those instances would be comparable with that on a car remaining about two days in rainy weather on a side track?

A. On a siding after it had cleared up.

Q. Comparison has been made by the defendants, rather, by the intervenor, of corrosion conditions on steel gondola cars of the Pennsylvania Railroad and steel gondola cars of the Long Island Railroad, the latter being continuously in service on the Long Island Railroad.

Mr. HEALY. May I have that question, please?

Mr. MCCOLLESTER. It isn't a question yet, but you can hear what I have said. Do you want to hear it?

Mr. HEALY. If I may.

(Question read.)

By Mr. MCCOLLESTER:

Q. Are there, from your experience, are cars from your experience continuously in service via Seatrain, as they have been testified to be on the Long Island Railroad?

1763 A. No.

Q. What would you testify to as to the frequency of movement of such cars, particular cars via Seatrain?

A. We do not keep a check of all cars, but we have a number of occasions when it has been necessary to set the—it has been necessary to check the home route on a car, with the exception of M. P. and T. P. cars that have been making two or three round trips between New York and Havana in Seatrain service, it is very seldom that we have ever found that the car has been on Seatrain more than twice in a year, and that is the exception.

Q. Those cars, would you say, had been on Seatrain not more than once in a year?

A. No; I mean a round trip by that.

Q. A round trip?

A. A round-trip car.

Examiner HOY. More than one round trip?

By Mr. MCCOLLESTER:

Q. More than one round trip?

A. More than two round trips in a year.

Examiner HOY. More than two?

The WITNESS. More than two round trips in a year. It is very seldom we find more than one, in checking the movement.

By Mr. MCCOLLESTER:

Q. Would you say the majority of instances were two round trips, or one round trip?

1764 A. No; I would say less than one round trip in the year, in the big majority of cases.

Q. The suggestion has been made on the record here that Seatrain does not have to assume, or does not assume, expense for the holding or storage of cars for waiting loads for movement via Seatrain, which expense devolves upon originating rail carriers. What is the fact, so far as Seatrain's operations from Hoboken are concerned?

A. Seatrain maintains a supply of empty cars at Hoboken for its business. At the present time it has approximately 60 boxcars at Hoboken empty.

Q. And, is Seatrain paying the expense of loading those cars at Hoboken?

A. It does.

Q. It has been suggested also that Seatrain does not, as do the railroads, handle empty cars in connection with its operations. I want to ask you first——

Mr. McCollester. Strike that, please.

By Mr. McCollester:

Q. Reference in that connection has been made to an exhibit identified by Mr. Brush, in another proceeding, showing the number of empties handled between Hoboken and New Orleans. Does the through movement of empties between Hoboken and New Orleans reflect fully and fairly the return movement of empties via Seatrain?

A. I would say no.

1765 Q. Why?

A. The Seatrain Line bills all empties out of Hoboken returning on home route to New Orleans, to Havana, my understanding being for two reasons: First, that the car may be retired in Cuba for loading of their freight to be forwarded to New Orleans; second, that the space taken by one of the empty cars on the ship may be retired at Havana to take a load from Havana to New Orleans, in which case the car would be taken off at Havana and held until there was available space on a later ship.

Q. In other words, the empty car would be taken off?

A. The empty car would be taken off and replaced by a load.

Q. And that loading at Havana would be at the expense of Seatrain?

A. At the expense of Seatrain.

Q. So that, in considering the return movement of empties via Seatrain it is necessary to consider not only the empties that move through, between, or are billed through, between Hoboken and New Orleans, and those that move from Hoboken and Havana; is that right?

A. In my opinion, yes; you would have to consider it to be right.

Q. Is that like a railroad working an empty car back from the direction of home, in the hope of picking up a load somewhere along the line?

1766 A. It is very frequently done in good operating.

Q. And that is the same idea, so far as Seatrain?

A. Same idea, so far as I can see in Seatrain.

Examiner HOY. Is the same thing done in the opposite direction?

The WITNESS. Yes.

By Mr. McCOLLESTER:

Q. Does the Seatrain, in connection with the return of cars, have a considerable amount of business originating locally at Hoboken, which is loaded into cars being moved home?

A. There is.

Q. So that the Hoboken may receive from its trunk line connections, a car returned to it, which has moved north by Seatrain, may receive that car empty and then pick up a load for it at Hoboken, for the return movement via Seatrain?

A. They frequently do.

Q. As showing the empty and loaded movement of cars via Seatrain and the handling of cars by the railroads for movement via Seatrain, have you prepared a statement, the first, a statement with the caption, "Statement of cars forwarded on Seatrain vessels from Hoboken, N. J., for months of January, April, July, and October 1938"?

A. I have.

Q. Is that statement the one that you have before you?

A. It is.

1767 Q. Was that prepared from records of the Hoboken end of Seatrain?

A. It was prepared from the interchange sheets of cars interchanged from the Hoboken Manufacturers Railway to Seatrain Lines, Inc., for the four months mentioned.

Q. And, is it correct to the best of your knowledge?

A. It is.

Mr. McCOLLESTER. We haven't got too many of these, but I hope we have enough. May this be marked, Mr. Examiner?

Examiner HOY. It will be marked Exhibit No. 66 for identification.

(Exhibit 66, witness MacGowan, marked for identification.)

By Mr. McCOLLESTER:

Q. Referring to Exhibit marked 66 for identification, Mr. MacGowan, I want to ask you a few questions about the way the

exhibit has been made up. Looking at the first line of figures at the top, what does the letter L indicate?

A. Load.

Q. And the letter E?

A. Empty.

Q. Do those figures in the first three, I guess it is the three lines of figures at the top, embrace all cars forwarded on Seatrain vessels from Hoboken during the month selected?

A. It does.

Q. Were those months selected as giving a fair picture,
1768 considering seasonal changes?

A. That was the intention of picking them.

Q. In the left-hand column of explanatory matter, there are terms, "Group A, B, C, and D"—what are those?

A. The groups shown in special car order No. 30.

Q. For example, Group A are the permitted cars?

A. Unrestricted cars.

Q. Unrestricted cars? And, the Group B are cars that the railroad have refused permission for movement via Seatrain for any purpose?

A. That is correct.

Examiner HOY. When you refer to Order 30, you refer to Order 30's supplements only?

The WITNESS. Supplements 1 and 2 in effect, so far as we know, at the present time, down to supplement No. 5.

Examiner HOY. Including Supplement 5?

The WITNESS. Including Supplement 5.

Examiner HOY. It includes all these supplements?

The WITNESS. It includes all these supplements.

By Mr. MCCOLLESTER:

Q. Does it include the Rock Island?

A. It does not, the Rock Island is in Group C, if I remember—I will check it in just a second. The Rock Island is in Group D.

Q. In the lower section of that exhibit, at the left, the heading reads: "Details of nonpermitted cars." That
1769 should read "Nonpermitted cars;" is that right?

A. That is right.

Mr. MCCOLLESTER. May that correction be made, Mr. Examiner?

Examiner HOY. Yes.

By Mr. MCCOLLESTER:

Q. Now, you have subdivided, have you not, Mr. MacGowan, the loaded cars between those originating on the trunk lines and those originating on the Hoboken Manufacturers Railroad?

A. I might say that it may not be originating on the trunk lines, it was trunk lines deliveries to the Hoboken Manufacturers Railway for forwarding via Seatrain.

Q. Or, it may have originated beyond the trunk lines?

A. It may have originated beyond the trunk lines.

Q. Well, now, just to take an example, if we look at the top section under Group B, it would appear that 66 nonpermitted cars—not permitted for any purpose—have been received from the trunk lines, and for movement via Seatrain, is that correct?

A. That is correct.

Q. That is for movement to Havana and 169 of such cars for movement to New Orleans?

A. That is correct?

Q. In the month of January 1938?

A. In the month of January 1938.

1770 Q. And, if we look at the last group of columns, we find that in the former period there were received from the trunk line railroads for movement via Seatrain to Havana, 324 nonpermitted cars, and for movement to New Orleans, 547 cars that they have said that they would not permit to be moved via Seatrain, is that correct?

A. That is correct.

Q. Now, have you in the lower part of the exhibit analyzed further the movement of the nonpermitted cars to show whether they were moving away from the—from home, that is, from the owning railroad, or in the direction of home, or on a home route?

A. I have.

Q. What is, for the record, what is the definition of a home route for car service purposes?

A. Home route is known as a service route, the reverse of the last loaded movement of the car, so as to return it to its owner, that it may follow the route back to its owner which it travelled in the load away from the owner.

Q. Well, then, should we draw the inference from this exhibit, looking at the month of January, that of the 66 nonpermitted cars received from the trunk lines for movement via Seatrain, every one of them was moving away from home, that is, so far as Seatrain is concerned, in original movement?

1771 A. That is correct.

Q. And, correspondingly, for the total of four months, of the cars to Havana, every one of the 324 nonpermitted cars was moving away from home, that was an initial movement via Seatrain?

A. Yes.

Q. And 545 of those, of the 547, going to New Orleans?

A. Correct.

Q. Now, you have also shown on this exhibit, have you not, the two instances in which the Hoboken Manufacturers Railroad has used nonpermitted cars loading via Seatrain?

A. I have.

Q. Is it the general practice of the Hoboken to use only permitted cars?

A. It is. I might state further, Mr. McCollester, that the star shown on cars loaded locally of nonpermitted cars, that the last line shows, for instance, for the four months of the sixteen group B cars loaded locally for Seatrain, six were received from the trunk lines under load with Seatrain freight in it being either a trailer to a full car, and the car only partially loaded, or a ten or twelve thousand pounds of an l. c. l. shipment that was thoroughly braced in the car, in which case the car was taken to the freight station, filled out with local l. c. l. going via Seatrain, and forwarded.

1772 And, in such cases, these cars had been classified as a car loaded locally.

Q. Now, on the question of the movement of empties, is it the correct inference, from this exhibit, looking at the top portion of the exhibit, that during the four months selected, Seatrain carried out of Hoboken 229 empty cars?

A. 229 empty cars, that is correct.

Mr. FORT. What is that figure?

Mr. MCCOLLESTER. That is the total of 214.

The WITNESS. Those two empties up there.

By Mr. MCCOLLESTER:

Q. And, of the 214 cars, empty cars—of the 214 out of the 229 empty cars that went to Havana, that movement of those empty cars to Havana was in accordance with the practice that you previously testified to?

A. Yes; they were all, they all returned on home route to New Orleans, the home route being New Orleans.

Q. Well, now, have you further analysis of this exhibit for the record?

A. I have taken the four months' period, there were a total of 676 loaded cars, loaded railroad-owned cars forwarded on Seatrain, of which 162 were loaded locally at Hoboken in cars carrying home record rights to New Orleans and, there were 112 home route cars through New Orleans, sent forward, making a total of 274 cars that were return cars on Seatrain.

Taking the 274 as a return movement, it figures out ap-

1773 proximately 40 percent of the cars forwarded during these four months to Havana, were cars being returned on home route. Similarly, in New Orleans, there were 815 railroad-owned

cars forwarded in the four months to New Orleans, of which 201 were returned to New Orleans on home route loaded locally, together with one empty that was billed through direct to New Orleans, making a total of 202, or, just under 25 percent of the total cars, were cars being returned to New Orleans on home route.

Q. Is that all you have on this exhibit?

A. That is all.

Q. Now, have you prepared a similar exhibit, somewhat similar exhibit, dealing with the cars handled by the, by Seatrain northbound from New Orleans to Hoboken?

A. I have, for the same months.

Q. And, is that the exhibit you have before you?

A. That is the exhibit.

Q. And, is the information shown on there taken from the records of Seatrain and of Hoboken, and is it corerct?

A. There are no records of Hoboken included in this statement. It was made from a list of cars forwarded by the auditor of the Seatrain lines from New Orleans, and it is my understanding the car numbers of cars interchanged for these months for
1774 the New Orleans & Lower Coast to Seatrain Lines. This information was taken from our office and was broken down as to the groups of cars, the classification of the groups of cars, of the cars forwarded and put in this form.

Mr. McCollester. May this exhibit be marked, Mr. Examiner?

Examiner Hoy. It will be marked Exhibit No. 67.

(Exhibit 67, Witness MacGowan, was marked for identification.)

By Mr. McCollester:

Q. Now, on the subject of empty movement, are we to deduce from this exhibit 67, for identification, that Seatrain handled from New Orleans in the four months 148 empty cars to Havana and 22 through to Hoboken, or a total of 170 empty cars?

A. Correct.

Q. You have similarly analyzed here, have you not, the non-permitted cars to show whether they were moving on home route in the direction of home, or away from home?

A. Yes.

Mr. McCollester. Here again, Mr. Examiner, the caption of the lower portion of the exhibit should read, "Details of Non-Permitted cars," rather than nonepermitted cars. May that correction be made?

Examiner Hoy. Yes.

Mr. Fort. Strike out the "e" and insert a hyphen.

Mr. McCollester. Right.

1775 By Mr. McCOLLESTER:

Q. Now, have you any analysis further of this exhibit, Mr. MacGowan?

A. No; this was just made up from the figures supplied.

Mr. McCOLLESTER. We offer Exhibits 66 and 67 in evidence.

Examiner HOY. The exhibits will be received.

Mr. FORT. No objection, subject to the understanding that they are subject to a motion on cross-examination, subject to motion to strike.

(Exhibits 66 and 67, Witness MacGowan, received in evidence.)

By Mr. McCOLLESTER:

Q. Have you made an examination of your records for any period to determine the number of Pennsylvania Railroad cars moving from points on the Pennsylvania Railroad under load, for movement via Seatrain on billing showing movement via Seatrain?

A. I did.

Q. Have you the waybills which you examined in front of you?

A. I have.

Q. Now, will you state what you found, the number of cars of that character which you found and for wheat period you dealt with?

A. I just took the two months. For the months of December, 1938, we received from the Pennsylvania Railroad in railroad-owned cars——

Q. As in Pennsylvania Railroad—excuse me.

1776. A. In railroad-owned cars, a total of 63 cars to move via Seatrain. The details of the ownership, those moving on a through bill of lading, with Pennsylvania—were Pennsylvania Railroad cars 17, B. & O., 1; Big Four, 2; Erie, one; Michigan Central, 1; and, coming into Hoboken billed to Hoboken but showing on the waybill a notation that it was to be forwarded on Seatrain, three Pennsylvania Railroad cars—that is a total of 25 going to New Orleans——

Mr. FORT. Is that——

A. (Continuing.) On the Cuban business.

Mr. FORT. That is a total of 25?

The WITNESS. That is a total of 25, going to New Orleans, that will add up to 25.

Mr. FORT. Is that 25 more, in addition to the 63?

The WITNESS. No; I am giving the details of the 63 now, that is including in the 63.

Mr. FORT. Oh, I see.

A. (Continuing.) To Havana on through bills of lading, was one Pennsylvania car, one New York Central car. Billed locally

to Hoboken, with notations that the car was to be forwarded in export business via Seatrain, were 34 Pennsylvania Railroad cars, two B. & O. cars, giving a total of 38 to Havana, the 38 and 25 bringing the total of 63.

Q. Now——

A. Now, of the——

1777 Q. Go ahead.

A. In this month, there were——

Mr. FORT. What month is this?

The WITNESS. This is December still.

Examiner HOY. December 1938.

A. (Continuing.) There were seven of these cars which did not originate on the Pennsylvania. On the Maryland and Pennsylvaia, one B. & O., one Big Four, one Penn., one Erie, one Michigan Central went to New Orleans, the balance of the New Orleans cars originated on the Pennsylvania Railroad. On the foreign business, there were two Pennsylvania Railroad cars originated on the Toleda Terminal Railroad, the balance of the cars originated on the Pennsylvania Railroad.

Q. Now, have you another month?

A. Now, I have another month of January, 1939. We received a total—this I haven't gotten broken down between the two ports, the way I had the other one. We received a total of 71 loaded railroad cars from the Pennsylvania Railroad, to be forwarded via Seatrain. The ownership of these 71 being, Pennsylvania Railroad 59, B. & O. four; New York Central, three; D. L. & W., two; Erie, one; Reading, one; Lehigh Valley, one. The four B. & O. cars originated on the Maryland and Pennsylvania. Three

New York Central cars originated on the Maryland and

1778 Pennsylvania. The one Reading car originated on the Penn., Reading Seashore Lines. The balance of the cars originated on the Pennsylvania Railroad.

Q. Have you anything further that you want to say on direct examination?

A. Nothing further I want to say.

Mr. MCCOLLESTER. You may cross-examine.

Examiner HOY. We will adjourn until 1:30.

(Whereupon, an adjournment was taken until 1:30 p. m.)

AFTERNOON SESSION

Examiner HOY. The hearing will please come to order.

You have a few more questions?

Mr. MCCOLLESTER. I have a little more direct examination.

By Mr. MCCOLLESTER:

Q. Mr. MacGowan, Mr. Kendall identified yesterday Exhibit 63, showing average detention at New York on cars loaded with

coastwise traffic interchanged with the break bulk lines and it was stated this morning that the time shown on that exhibit was computed on a per diem basis, but beginning with the arrival of the cars at what Mr. Kendall referred to as the float yard, or the lighterage yard. Before cars reach the float yard, or the lighterage yard, is it necessary for the trunk line railroads
1779 to classify the cars between freight for local rail delivery on the Jersey Shore and freight to be handled in lighterage, or float service?

A. The cars necessarily would have to be broken up, unless they came in with a solid train of lighterage freight, which, with my knowledge with the railroads in this vicinity, never happens.

Q. Now, so far as the Hoboken Railroad is concerned, it has both freight for Seatrain and freight for local deliveries, including deliveries to steamship, other steamship lines, whose piers are served by the Hoboken, is that correct?

A. That is correct.

Q. And, are cars for Seatrain delivered to the Hoboken in drags with cars of local freight and freight for other steamship lines?

A. Cars are all mixed up as to classification, or destination, final destination.

Q. So that, after the receipt of the cars by the Hoboken, it is necessary for the Hoboken to classify the cars—to classify out the Seatrain cars from the other cars, is that correct?

A. That is correct.

Q. Such records as you have kept as to the detention of cars on your rails count the detention as beginning when?

A. 12:00—12:01 a. m., the day following the delivery of
1780 the car.

Q. By the trunk lines to the Hoboken?

A. By the trunk lines to the Hoboken.

Q. So—well, is it correct to say, therefore, that any detention figures you have covered the time involved in classifying out the Seatrain freight and the freight for the local delivery or other steamship delivery?

A. It does.

Q. And therefore, those detention figures would not be comparable with those given by Witness Kendall and shown in Exhibit 63?

A. In my opinion, no; from the explanation given by Mr. Kendall, I do not think they compare.

Q. Now, if you haven't any records of detention which would by comparable, can you state from your experience and from your personal observation what would be your best estimate of the

time elapsing between the time that the cars are made in the same condition by the Hoboken as they are upon arrival at a lighterage or car float pier and the time those cars are delivered to Seatrain?

Mr. Fort. Mr. Examiner, I would like to have the basis for an estimate before any estimate is put in the record.

Mr. McCollester. He is superintendent of the railroad, I think that ought to be sufficient.

Mr. Fort. Well, that is not an estimate, that is an
1781 opinion.

A. Yes.

Mr. McCollester. Well, what is an estimate but an opinion?

The Witness. *It would be impossible to give a close estimate* from your general knowledge of switching operations. I would guess probably an average of a little under a day in per diem time.

Examiner Hoy. You are referring now to the movement from the Erie interchange to the classification yard on the Hoboken?

The Witness. Now, as I understood Mr. McCollester's question, it was how long—did I misunderstand it?

By Mr. McCollister:

Q. My question, Mr. Examiner, can be read if you want it, but it was from the time the cars have been classified by the Hoboken and put in the same condition as to readiness for delivery that cars are when they arrive at the lighterage or float piers, which is the same when Mr. Kendall's computation began, until delivery to Seatrain.

Examiner Hoy. In other words, you would eliminate the time that they received them after the Erie interchange until they finished classifying them on the Hoboken.

Mr. McCollester. That is right, because there must be classification between Seatrain cars and local freight and
1782 freight for other steamship lines, just as there must be similar classifications some time in the case of freight handled by the trunk lines, between lighterage freight and freight for local delivery on the trunk lines.

By Mr. McCollester:

Q. Now, Mr. MacGowan, from your experience operating a railroad in the New York Harbor area—

In connection with freight interchanged with steamship lines—with the break bulk steamship lines over the so-called lighterage piers, there is thereafter a lighterage movement, is there not.

A. There is, in a barge.

Q. And, is a lighter railroad equipment, just as much as a car?

A. In my opinion, yes; it takes the place of a car.

Q. And therefore, the movement to or from ship side of break bulk freight involves not only detention of car, but involves lighter time; does it not?

A. It necessarily must.

Q. And that is railroad equipment?

A. Yes, sir.

Q. Now, in the case of Seatrain, the only railroad equipment time involved is that of movement of the car right alongside the Seatrain ship; is that right?

A. That is all; it is all in the railroad car.

Mr. McCollester. That is all. Now, you may cross-
1783 examine.

Cross-examination by Mr. Fort:

Q. Mr. MacGowan, looking at your Exhibit 67, including coastwise and foreign business, can you make a calculation from this exhibit as to percentage of empty car mileage to total car mileage involved in your entire operations?

A. No, sir.

Q. You can do it from those figures, can't you?

A. You would have to know the distance from Havana, distance from New Orleans, of which I have a very general idea. I don't know what the actual distance is.

Mr. McCollester. You would also have to know whether the cars went out of here empty to Havana, moved empty from Havana to New Orleans or moved under load to New Orleans?

The Witness. I would.

By Mr. Fort:

Q. Is the distance from New York to Havana 1,366 miles?

A. That I cant' say, it has always been my understanding it was approximately 1,100 miles. Now, whether that is right or not, I don't know.

Q. Do you know the distance from New Orleans—do you know the distance from New York to New Orleans?

A. I have understood, in round figures, approximately 1,800 dollars, I don't——

1784 Examiner Hoy. Is that $1,800?

The Witness. 1,800 miles; I don't know as that is correct.

By Mr. Fort:

Q. You are talking about what kind of miles, nautical miles or statute miles?

A. All I ever heard was miles, I don't know which it is.

Mr. McCollester. He doesn't know.

Mr. FORT. I hope you will be kind enough to let me ask the witness.

Mr. MCCOLLESTER. If you have the figures Mr. Brush has given in other cases and will state them I will accept them. I haven't got them here.

Mr. FORT. All right, I want to get the basis for the calculations on the record; it is quite important. Mr. Brush testified in Docket 25727 the distance from New York to Havana is 1,366 miles; distance from New York to New Orleans 2,060 miles; the distance from New Orleans to New York 2,074 miles, and the distance from New Orleans, between New Orleans and Havana, 693 miles.

Mr. MCCOLLESTER. Mr. Brush's figures and Mr. Saunders disagree. Now, which are right, I don't know.

Mr. FORT. Mr. McCollester, we have a letter here from G. S. Bryan, Captain, U. S. Navy Hydrographer, dated January 20, 1939, addressed to Henry Saunders, 644 Transportation Building, showing these distances—I would like to read
1785 them and you might be willing to let them go in the record.

From New York to Havana, 1,186 miles; from Havana to New York, 1,199 miles; from Havana, between Havana and New Orleans, 602 miles.

Mr. MCCOLLESTER. Why is the distance different in one direction or another?

Mr. FORT. Going out of the Gulf Stream. Those figures go in the record?

Mr. MCCOLLESTER. I don't stipulate they are correct, but you can use them for the purposes of your questions. Of course, I don't stipulate they are correct.

Mr. FORT. We will be permitted to put on a witness in order to put in those figures later, Mr. Examiner?

Examiner HOY. Yes. Are those nautical miles or statute miles?

Mr. FORT. Nautical miles.

Mr. MCCOLLESTER. Mr. Fort, you don't need to put on a witness to testify, that is what some officer in the Hydrographic Bureau wrote you; I will agree that he wrote that to somebody or other.

Mr. FORT. Saunders.

Mr. MCCOLLESTER. I will agree he wrote to Mr. Saunders.

Mr. FORT. I have some other man, if you want to prove miles.

Mr. MCCOLLESTER. I don't want to prove miles, you are
1786 doing it.

Mr. FORT. You are trying to keep it from being proved.

Examiner HOY. I think the mileage you just read is sufficient for the purpose of your question, whether they are the exact mileage or not, the record does have the exact mileage in it.

Mr. FORT. This record?

Mr. MCCOLLESTER. I think not this record.

Examiner HOY. I think not in this record—yes; I will withdraw that.

Mr. FORT. No.

Mr. MCCOLLESTER. I will stipulate that, Mr. Examiner, counsel can make any computations he wants based on these mileages, if I may be permitted to, in brief, if necessary, meet those computations by similar computations based upon the mileages testified to by Mr. Brush in Docket 25727.

Mr. FORT. Yes; whether it is a half mile, more or less, it makes no difference in our figures, our calculations.

Examiner HOY. You may stipulate that.

Mr. FORT. Yes.

Examiner HOY. All right, the record shows it.

Mr. FORT. Then it is stipulated we may use the figures?

Mr. MCCOLLESTER. For the purposes of your questions here.

Examiner HOY. For the purposes of your questions here.

1787 Mr. FORT. Yes; and for purposes of computation?

Examiner HOY. Yes.

Mr. FORT. In the record?

Mr. MCCOLLESTER. But, if I find that there is a great difference produced by the use of Mr. Brush's—of the mileages testified to by Mr. Brusch, I don't agree that your mileages are correct, that is my only point and I want the right to make computations using Mr. Brush's mileages. There may be no great difference, I don't know.

Mr. FORT. You are willing to have them in evidence and you can say, if you want an argument, the evidence shows on one hand this much and on the other hand that much.

Mr. MCCOLLESTER. That is it.

Mr. FORT. I just want to say something, that it isn't a bit of difference whether it is more or less.

Mr. MCCOLLESTER. Well, I want to have understood is that I am not agreeing these are necessarily correct, and I may make computations using Mr. Brush's mileages.

Mr. ESHELMAN. And that we may make computations using his mileages.

Mr. MCCOLLESTER. Oh, yes.

Examiner HOY. Oh, yes; all parties, and all parties may, if they desire, use the mileages that Mr. Fort is going to use there.

By Mr. FORT:

1788 Q. Mr. MacGowan, did you make any effort to calculate from this exhibit, taking into account not only your coastwise business, but also your foreign business, how the empty mileage compared with the total mileage of the cars?

A. I did not figure mileage in any shape or form.

Q. In your—in connection with your study, did it occur to you that, did it come to you, as it might well have, that less than 5 percent of the total mileage was empty mileage?

A. No; I was dealing in cars solely.

Q. You weren't interested in the other feature?

A. I wasn't interested in mileage at all, I was interested in interchange cars.

Q. Now, when you consider only the coastwise business, that percentage of empty mileage would be very much less than when you consider both your foreign business and your coastwise, wouldn't it?

A. I didn't get the question.

Q. You have most of your empty mileage in connection with your foreign business to Cuba?

A. Yes.

Mr. McCollester. Just a minute on that.

Mr. Fort. Let the witness answer, please, Mr. McCollester. I let you examine the witness, I let you cross-examine my witnesses, now let me cross-examine this witness.

1789 Mr. McCollester. Yes, Mr. Fort; but I don't want the record to be confused on this point. I will have to ask what you mean by the Cuban empty mileages, foreign empty mileages?

Mr. Fort. I mean the empty mileage to or from New Orleans to Cuba and to or from New Orleans and Cuba, and to and from the New York—to and from New York and Cuba.

Mr. McCollester. Well, my point is that it has been explained in other cases, which you fortunately have not been a party to, that it is impossible to allocate this empty mileage to any particular traffic.

Mr. Fort. Well, I don't agree with that. You can contend that, if you want to.

Mr. McCollester. Well, it has been so testified.

Examiner Hoy. Well——

Mr. Fort. Mr. Examiner, I don't seem to be going along at all, probably it is my fault, also the fault of other people. I would like to go ahead and cross-examine this witness.

Examiner Hoy. Well, proceed in cross-examining. Have you got an unanswered question?

The Witness. Yes; I think he has.

(Question and answer read, as follows:

"Q. You have most of your empty mileage in connection with your foreign business to Cuba?

1790 "A. Yes."

The Witness. The statement so shows, there is more empty mileage or more empty cars sent to Cuba than there is to New Orleans.

Mr. McCollester. Mr. Examiner, my objection was to the form of the question in connection with your foreign business. If counsel had asked him if there was more empty mileage of cars going to Cuba, I would have no objection to it, but it is his words in connection with your foreign business, that I object to.

Mr. Fort. Well, I think——

Mr. McCollester. Tending to confuse the record.

Examiner Hoy. I think—let's proceed with Mr. Fort's cross-examining and then you may make notes of these various points, Mr. McCollester, and on redirect, why, you can clear them up if you think the record isn't in satisfactory shape.

Mr. Fort. In the event of a conflict between the witness' testimony and Mr. McCollester's testimony, I guess the witness would govern.

Examiner Hoy. Mr. McCollester isn't testifying.

By Mr. Fort:

Q. Now, with respect to your coastwise business, and shown here as coastwise business, when was the percentage of empty movement as you can develop from these two exhibits, 66 and 67?

1791 Mr. McCollester. Now, I object to the form of the question, Mr. Examiner. Opposing counsel objected to some of my questions as not being clear. I object to the form of the question, because it gets into that much argued point in the other proceeding as to whether certain empty mileage is to be attributed to handling of coastwise traffic, or to handling Cuban traffic.

Now, the exhibits have not attributed the empty mileage to any particular traffic. The exhibits have simply shown that the empty cars were going to Havana and those going through to New Orleans.

Now, whether, when they got to Havana, they were used for Cuban business, does not appear. Therefore, when counsel says "in connection with the foreign business," I think that he is confusing the witness.

Mr. Fort. Well, Mr. McCollester, I attempt to make no advantage of terminology. I will ask the question this way:

By Mr. Fort:

Q. From this exhibit, taking your business from New York to New Orleans and from New Orleans to New York, and your empty movement in that business, and your loaded movement in that business, what was the ratio of the empty to the total movement?

Mr. McCollester. Now, I again object, Mr. Examiner, as referring to the empty movement in the business from New Orleans

to New York, because the movement from New York to Ha-
1792 vana of empty cars may have been in the business of move-
ment between New York and New Orleans.

Examiner HOY. Mr. Fort, wouldn't this satisfy you—what is the ratio of the empty car movement between New York and New Orleans as shown by your exhibit, with relation to the empty car movement between New York and Havana, to the total car movement as shown by the exhibit? Now, that, as I understand, you have no objection to, Mr. McCollester.

Mr. MCCOLLESTER. I have no objection to that, Mr. Examiner.

Mr. FORT. That is the question I wish to ask, although I will be glad to have that one answered.

By Mr. FORT:

Q. Do you show on this exhibit the number of loaded and empty cars from New York to New Orleans?

A. Moving, billed direct between those two points, yes.

Q. That is what I mean.

A. Yes.

Q. And do you show the number of empty cars from New York to New Orleans on this exhibit?

A. On this exhibit; yes, sir.

Q. And, do you show the same information in the adverse direction?

A. Yes.

Q. What?

A. Yes, that is, in the reverse direction from New Or-
1793 leans, you mean, sir?

Examiner HOY. Yes, to New York?

The WITNESS. To New York; yes.

By Mr. FORT:

Q. And, can you calculate from the exhibit, the percentage of empties to total cars moving either from New York to New Orleans or from New Orleans to New York?

A. I can.

Q. As shown on the exhibit?

A. I can.

Q. Now, what does that come to?

A. From New York to New Orleans it is about 1.8 percent. From New Orleans to New York, it is about 2.3 percent.

Q. Now, does that include private cars?

A. That includes all.

Q. What percentage of those empties are private cars as distinguished from railroad-owned cars?

A. It would be 1 1/14ths.

Q. Which direction, both directions?

A. No; from New York to New Orleans?

Q. Take the other direction.

A. And, in the other direction, it would be just a shade over half, 50 percent.

Q. In numbers?

A. In numbers.

Q. Yes; in numbers, what it would be, not in 50 percent?

1794 A. It would be 7/15ths.

Q. How many cars, railroad cars, and how many cars were private cars?

A. Oh, there were seven railroad cars and 15 private cars.

Q. So, altogether there were eight empty railroad cars?

A. Correct.

Q. That moved between New York and New Orleans, and between New Orleans and New York?

A. Right.

Q. Now, how many loaded cars were there during the same period?

A. 1,741.

Mr. McCollester. Now, may I be sure that I understand the question? You are asking him about the cars that moved through——

Mr. Fort. Absolutely.

Mr. McCollester. From New York to New Orleans?

Examiner Hoy. Yes.

Mr. McCollester. And, you are not including the cars that may have gone from New York to Havana empty and then have have gone on from Havana to New Orleans, and then still have been empty?

Mr. Fort. I am not including any quotation "may" at all, I am including actual information shown on the exhibit.

Mr. McCollester. Well, the figures you are asking about

1795 are those few cars that were billed directly through empty from New York to New Orleans; is that right?

Mr. Fort. The question shows that very clearly.

Mr. McCollester. All right.

Mr. Fort. Mr. Examiner, these interruptions are not justified; it isn't fair to me.

Examiner Hoy. All right, proceed, Mr. Fort.

By Mr. Fort:

Q. Now, with respect to these cars that you show as moving empty from New York to Havana, is that shown on your first exhibit 66?

A. Yes, sir.

Q. And how many cars are shown there as having moved empty to Havana from New York?

A. 214.

Q. 214?

A. Yes.

Q. And of those, do you know how many were private cars and how many railroad cars?

A. 102 were private cars, 112 were railroad-owned cars.

Q. 112 railroad-owned cars moved empty from New York to Havana?

A. They got to Havana; they were taken off the Seatrain?

Q. After they got to Havana, they were taken off the Seatrain?

A. That I don't know, in some cases, I do know of a few
1796 cases they were not taken off, they were sent on through.

Q. But, in the majority of cases, they were taken off?

A. That would be my general understanding, I have no knowledge of——

Mr. McCollester. Do you know anything about it?

The Witness. Of what takes place at Havana?

By Mr. Fort:

Q. Well, why do you show it going to Havana?

A. It was billed that way from Hoboken.

Q. Now, do you know that any of those cars moved from Havana without being taken off Seatrain at New Orleans?

A. I don't know, because I have no knowledge beyond Hoboken.

Q. So, you have no reason whatever to think they were, do you?

Examiner Hoy. He has no knowledge, he has answered.

Mr. Fort. All right, let us get along, I can finish this examination quickly, if you will answer.

By Mr. Fort:

Q. After those cars got to Havana, do you know what happened to them at all?

A. Absolutely no.

Q. Do you know whether they were loaded into New Orleans at Havana?

Mr. McCollester. He said he doesn't know what happened to them at all.

Mr. Fort. I know, but I want——

Mr. McCollester. I object to anything further.

A. I have known of a few odd cases——

1797 Mr. Fort. He seems to be a little——

A. (Continuing). Of where the car was returned to Hoboken under load, T. P. or M. P. CARS, the rest of them, I know absolutely nothing about, until they reached New Orleans,

when our records cleared up to the per diem, we receive a copy of the interchange from the Seatrain to the—the New Orleans & Lower Coast for the purpose of clearing our records per diem when the cars are received by mother subscribing railroads.

Q. Then, am I right, Mr. MacGowan, in stating some of those cars moved from New Orleans to Havana, returned—I mean, from New York to Havana, returned from Havana to New York under load?

A. In the case of the T. P. and M. P. cars.

Q. Now, you show in your exhibit 67 empties moving from New Orleans to Havana, do you not?

A. Yes, sir.

Q. And, have you divided that between railroad cars and private cars?

A. I have, sir.

Q. And, that is shown on the exhibit?

A. That is shown on the exhibit.

Q. And, do you know as to those cars, after they got to Havana, what happened to them?

A. No, sir.

1798 Q. Do you know whether they went back to New Orleans under load or not?

A. I do not. Those cars are not carried in our per diem record until they arrive at Hoboken, so we have absolutely no record of any kind at Hoboken of them.

Q. Mr. MacGowan, you see the Seatrain come into Hoboken, don't you?

A. Yes, sir.

Q. Do you see them all come in?

A. Well, I may miss one or two in a year.

Q. But, as a general proposition, you see them all?

As. As a general proposition I see them all.

Q. And, in what—what is the occasion for your seeing them come in, in other words, what do you do when they come in?

A. We arrange our crews to take the cars from the cradle and handle them from then on, in accordance with the instructions.

Q. You are down there to see that they are handled from the cradle on to the——

A. From the cradle on into the yards and, from the switching movement from there on.

Q. And, where are you as a physical matter, with respect to the cradle, your own position generally?

A. Very often, on the dock, I also go aboard the ships, out of the matter of curiosity, or, in seeing what is in there and what is on.

1799 Q. Yes.

A. I am frequently aboard the ship.

Q. And, do you make, as those cars go off the cradle, have you made it a point to look at them to see whether or not you noticed any rust on the wheels?

A. I look at a car and from my general observation, I form a general idea. I never made any check as to the number that would show rust and the number that did not show rust.

Q. But, as you are seeing them carried off the cradle, so you can handle them on your line ——

A. Yes.

Q. You have generally looked at them, is that so?

A. Yes; generally looked at them, you can see a wheel, you are looking at a car right in front of you, you can see the wheel.

Q. The car is right in front of you on the cradle?

A. Yes.

Q. And that is the type of observation you had in mind when you were talking about the corrosion on the wheel?

A. Also that and what I have seen inside the ships before the car moved.

Q. Do you ordinarily go in the hold to examine the cars on the ship?

A. Not to examine them; I go down just simply to take a general look around; I don't examine the cars.

1800 Q. You don't examine them?

A. Not in detail, any more than just to go around and take a general look around, very often when a cradle is working, I will go on an empty cradle and go down in, may stand there, watch them put two or three cars on the cradle, then I will get on the cradle and come out with it.

Q. What was your point of observation when you spoke of seeing rust on some of these wheels?

A. Coming off the cradle and in the ship.

Q. Some of your——

A. Some in the ship and some on the cradle.

Q. Some in the ship and some on the cradle?

A. Yes.

Q. You are stating, then, what you have seen in both those positions in making up your mind?

A. In forming a general opinion.

Q. Yes.

A. That is all it was.

Q. Now, Mr. MacGowan, in respect to the 60 cars you have stored now on the Hoboken, is Seatrain bearing the expense of car ownership of those cars now, or is Hoboken?

A. The Seatrain is.

Q. Seatrain is?
A. The Seatrain is.
Q. Have you a list of those cars?
1801 A. A list of them here?
Q. Yes.
A. No; I have not.
Q. Do you know what the ownership of those cars is?
A. They are largely T. P.-M. P., and when I say T. P. or M. P. I mean the Gulf Lines, T. T. & N. O.—probably——
Mr. HEALY. T. T. & N. O.?
The WITNESS. N. O. T. & M., I should have said.
Mr. HEALY. I thought so.
A. (Continuing.) N. O. T. M., and probably a Southern Pacific, too, among them, maybe A. W. F. S. There are all cars that belong to ownership down in the vicinity of New Orleans.

By Mr. FORT:

Q. Now, are those cars under per diem?
A. Are they under per diem, sir?
Q. Yes.
A. Yes, sir.
Q. Do you know about that?
A. Yes.
Q. You are certain about that?
A. Yes; I know that they are on our per diem sheets and that we are paying per diem on them and that we are reclaiming against Seatrain for the entire time the cars are there.
Q. Now, how did those cars get there, Mr. MacGowan?
A. Some of them were made empty on our line, some of them came back from the trunk line connections empty.
1802 Q. Are those cars, those 60 cars you refer to, or any part of them, or a majority of them held under some special contract, rather than the ordinary per diem rules?
A. No, sir.
Examiner HOY. In referring, Mr. MacGowan, to the 60 cars, should I understand that that is a fixed number?
The WITNESS. No, sir.
Examiner HOY. It varies?
The WITNESS. Fluctuates very much.
Examiner HOY. It fluctuates?
The WITNESS. Fluctuates very much.
Examiner HOY. And the car themselves fluctuate?
The WITNESS. Fluctuate.
Examiner HOY. That is, you are not holding the same 60 cars?
The WITNESS. No, no.

Examiner HOY. Or the same 58 cars all the time?

The WITNESS. No; there may be a few of them that you hang over, Mr. Examiner.

Examiner HOY. Yes.

The WITNESS. But, I hope by Saturday morning that we will be down to what I consider a normal supply, which is about twenty cars.

By Mr. FORT:

Q. This 60 is an abnormal storage?

A. It is a little more than our average.

1803 Q. Normally about 20?

A. Normally about 20, that is what we kind of figure on—what we try to keep there in reserve.

Q. In a report called Investigation of Seatrain Lines, Inc., by the Interstate Commerce Commission, 206 I. C. C. 228—328 at page 332, the Commission said: "That Seatrain depends in part for cars upon contract with two rail carriers last mentioned." Do you know what the—do you know what contract the Commissioners refer to there?

A. I do not.

Q. Has there been any change in that situation so far as you know?

A. I know nothing whatsoever about it.

Q. Yes. Now, you say about 20 cars under storage would be normal there?

A. For a Thursday morning.

Q. Yes. Well, what would be normal for ordinary times?

A. For Seatrain business?

Q. The cars under storage there for Seatrain, yes. Seatrain cars.

A. For Seatrain business, the average loading on a normal week of cars going via Seatrain will run in the neighborhood of 25 to 30 cars.

Q. And, what are those cars held there for, what is the

1804 purpose of holding them?

A. Purpose?

Q. What kind of business are they used on?

A. What kind of business?

Q. Yes.

A. A general loading to specify, for instance, there is merchandise, there is some plaster, some waste paper, sometimes some machinery.

Q. They are not held there for any special type of loading?

A. No, sir; whatever comes along.

Q. Are they held there for loading that originates on the Hoboken or the use of other kind of loading

A. I don't quite understand that question.

Q. Are those cars that you say are held there in storage, held there for the purpose of taking care of business which originates on the Hoboken to go by Seatrain

A. Yes.

Q. What

A. Yes.

Q. That is what I understand.

Mr. McCOLLESTER. Perhaps Mr. Fort doesn't understand what is shown in the original record here has been shown in other cases, that Seatrain maintains a terminal at Hoboken, uses the Hoboken Manufacturers freight station as its freight station.

1805 By Mr. FORT:

Q. These cars—are these cars used only in coastwise, or are they used both in coastwise and Cuban business?

A. Both.

Q. Both? When cars of the Seatrain, these 20 cars that you speak of, are on the Seatrain, do you settle for those cars with the owning railroads or does Seatrain settle direct?

A. We settle with the owning railroads, as long as they are in our possession.

Q. You mean, as long as they are on the Hoboken Railway?

A. Hoboken, on Hoboken, or unless, after delivery, and so on, until they are interchanged with another subscribing railroad.

Q. That is true of this 20 under storage?

A. Yes, sir.

Q. As well as the cars generally?

A. Yes, sir.

Q. Now, you read into the record, Mr. MacGowan, and perhaps it is complete in the record, but I couldn't follow it as well as I would have liked. Two months' loading on the two months' delivery of the Pennsylvania Railroad cars loaded to Seatrain, did you not?

A. Yes, sir.

Q. And, the first one was December 1938?

A. Yes, sir.

1806 Q. You said that there were 63 Pennsylvania cars that were given to Seatrain, is that right?

A. I will get my figures so I can get—so I can check them, sir. The month of December, there was a total of 63 cars, sir.

Q. A total of 63 Pennsylvania cars?

A. No; railroad-owned cars received from the Pennsylvania Railroad.

Q. Yes.

A. Moving via Seatrain.

Q. Now, how many of those 63 were loaded on the Pennsylvania Railroad?

A. 56.

Q. And how many of them were Pennsylvania Railroad cars?

A. Of that?

Q. Of that 58—of that 56?

A. May I ask you your question, the question again?

Q. I have 56 cars that originated on the Pennsylvania, and returned over to Seatrain during that month. How many of them were loaded in Pennsylvania Railroad cars?

A. 50.

Q. 50 of the 56?

A. Yes, sir.

Examiner HOY. 50?

The WITNESS. 50.

1807 Examiner HOY. I figure 51.

Mr. MCCOLLESTER. I figured it at 51, too.

The WITNESS. 51.

Examiner HOY. You said 17 and 34, the last time.

The WITNESS. 17 and 34 is right.

Examiner HOY. That is 51 cars?

The WITNESS. Well, there was one of those that was not loaded on the Pennsylvania, it was loaded on the—it wasn't loaded direct on the Pennsylvania, although it was on Pennsylvania billing.

By Mr. ESHELMAN:

Q. Mr. MacGowan, are those Pennsylvania Railroad cars loaded on the Pennsylvania, which are included in your statement and to which you referred, and in so far as those showed through billing via Seatrain, were not those in all instances cars which moved after the through route order of the Commission took effect?

A. I do not know the date that order took effect. These are the——

Q. I think it was April 15th.

Examiner HOY. Well, these cars moved in December 1938.

The WITNESS. They moved in December 1938.

By Mr. ESHELMAN:

Q. Oh, I see.

A. Moved in December 1938.

Q. I didn't hear you say that.

A. I just took two months.

1808 Mr. McCOLLESTER. We agree the Pennsylvania Railroad didn't issue through bills of lading until it had to.

Mr. ESHELMAN. That is what I wanted to get at, thank you.

Mr. FORT. That is all.

Mr. McCOLLESTER. That is all, Mr. MacGowan, unless you have some questions.

Examiner HOY. No; that is all. You are excused, Mr. McGowan.

(Witness excused.)

Mr. McCOLLESTER. I will call Mr. Taylor, Mr. Examiner.

S. O. TAYLOR was sworn and testified as follows:

Direct examination by Mr. McCOLLESTER:

Q. What is your full name, Mr. Taylor?

A. S. O. Taylor.

Q. Where do you reside, sir?

A. St. Louis, Mo.

Q. By what company are you employed?

A. By the New Orleans & Lower Coast Railroad and the Missouri Pacific Railroad.

Q. In what capacity are you employed by those companies?

A. Master Car Builder.

Q. How long have you been engaged in railroad mechanical work?

A. Approximately 30 years.

1809 Q. What?

A. Approximately 30 years.

Q. Have you had service at any time with the American Railway Association?

A. I have.

Q. In what capacity?

A. Three years as chief mechanical inspector.

Q. Now, based upon your experience with the New Orleans & Lower Coast and with the Missouri Pacific, have you secured information and, if so, what is it, as to how the damage occurring in the handling of the equipment in railroad trains in terminals compares with the damage to equipment incurred while being handled movement via Seatrain?

A. I have. Our investigation developed there was considerably more equipment damaged in road haul movement than while being handled by Seatrain. At one of our principal points, of a total of 23,211 cars handled, it was necessary to shop 1,910 for various defects, or slightly over 8 percent.

During 1938, of 7,045 cars received from the Seatrain 47 defective cars were shopped on a percentage of .006 for the total cars handled. A previous check of 17,743 cars received from overseas and Seatrain were made and it was found that 177 defective cars were shopped, or less than one percent, of those handled.

The majority of the damage to the cars occurring on the
1810 Seatrain would be considered handling line responsibility as defined by A. R. R. Interchange rule. The cost of such repairs is chargeable to the Seatrain and not to the car owner. The majority of repairs necessary on account of handling cars in train movement, or at a terminal point, would be considered owner's responsibility as defined by the A. R. R. interchange rule. The car owner is responsible for such repairs, with the exception of damaged cars by wrecks, derailments, side swipe, and collision.

Q. Now, based upon your experience, what would you say is the principal cause of deterioration and depreciation of equipment handled in road haul or terminal switch movement?

A. We estimate that 90 percent of the rough handling occurs to cars in terminals, since the greater portion of terminal work by yard crews consists of classification of switching of cars while breaking up, or making up trains and transfers.

The damage to equipment while being handled in such movement consists of very severe shocks to the entire underframe and superstructure, loosening rivets, breaking and damaging couplers, coupler parts, draft gears, roofs, train lines, and air brake parts.

There is also considerable wear and tear on wheels, journal
boxes, journal bearings, wedges, etc. There is likewise con-
1811 siderable wear and tear on equipment while being handled in train movement. This wear developing on wheels, journal boxes and all parts, and to all details of the foundation, brake rigging arrangement, due to the continuous application of air brakes and starting and stopping of trains.

Further damage also occurs to the car body super-structure draft gears, couplers, etc., in the application of air brakes to long freight trains, there being considerable slack in starting trains and bunching slack in stopping trains. Furthermore, there is considerable wear and tear due to vibration of cars, caused by track conditions or when moving over rails, joints, frogs, and switches at high speed, at which freight trains are being moved at the present time. There is considerable deterioration to paint and metal parts, on account of weather conditions, such as heat, snow, sleet, smoke, etc.

None of these deteriorating conditions exist while handling cars on the Seatrain, as they are stationary, tied securely to the rails, make no movement whatever, and the majority of the equipment is under cover at all times.

Q. What is the average cost per day to maintain the average freight car on your route?

A. 27½ cents per day.

Q. And would you say a large or a small portion of that 27½ cents a day is the cost incident to the character of
1812 damage that you have just described, which does not occur when a car is in service via Seatrain?

A. I would say a large percent.

Q. Is avoided in the movement via Seatrain?

A. Yes.

Q. Now, there has been testimony here on the subject of corrosion, based upon your experience as a mechanical man and assuming that a car, that most cars don't move via Seatrain more than 12 days in a year, that is, one round voyage, or some maybe 24 days in a year, two round voyages, would you say that if there were any corrosion due to the sea air, it would be so appreciable that it could be measured in cents per day?

A. I think it would be insignificant in that case.

Q. If there were such corrosion, how would it compare with possible corrosion due to the sweating of cars, or to the character of ladings in cars?

A. Well, we have some ladings that are very much inclined to corrode the car, such as sulphur, salt, some classes of coal, in fact all kinds of coal has some sulphur, but in some territories it has more than others.

Q. Now, is there a variation in coal from different territories in its corroding effect on the car?

A. Well, yes, there are; that is, take it together with the climate, atmospheric conditions. As an example, I inspected some
1813 cars, all steel, general service gondola cars on the Denver & Rio Grande Railway, which operates in that territory practically all the time, which were built over 20 years ago and they still have the original steel in good shape. That same class of car on the Missouri Pacific, handling our coal in that climate, will rust out in from eight to ten years.

Q. That is due presumably to the difference in the character of the coal?

A. Character of the coal, so I understand, and the atmospheric conditions.

Q. Now, if you know, if the car is of foreign lines used in the handling of that coal, is there any difference in per diem or any different charge made for the car, depending upon the territory in which it moves, or the character of coal it handles?

A. Not that I know of.

Q. You never heard of such a thing, did you?

A. No.

Q. Did you hear the testimony of the Witness Klein?

A. I did; yes, sir.

Q. I show you Exhibit 54, identified by the Witness Kline. He testified, according to my recollection, and according to the exhibit, that the items of repairs shown on that exhibit are not avoided due to the cars not moving. Now, do you agree with him as to all of those items?

1814 A. That is, not entirely.

Q. As to which ones do you disagree with him?

A. I don't agree with him in the items of angle cocks, pipe work, brake beams, lining and flooring. I don't know what his miscellaneous covers.

Q. Well, then, if I correctly understand you, it is your opinion, based upon your experience, that those five items that you have described are items as to which repairs are made necessary by the movement of the cars and are avoided if the cars don't move?

A. By the movement or the use of the cars loading.

Q. Yes. Now, Mr. Klein also identified Exhibits 51 and 52, which were—51 was an estimate of class repairs to two types of Pennsylvania Railroad cars and 52 was an exhibit in which he selected certain of those items of class repairs, which he said were attributable, or the expense of which he said was attributable to corrosion. Now, as to body steel parts, which is the largest single item, $179.97, Witness Klein testified that class repairs of that character were in their entirety due to corrosion and not to the movement of the car or to its use in train service. Do you agree with that opinion?

A. Well, I, of course, don't know what Mr. Klein based his figures on, but, for general repairs, why, I would say that

1815 I wouldn't agree with him.

Q. For example, are there repairs to side and end sheets involved in the class repairs?

A. There are.

Q. Brought about by other conditions and by corrosion?

A. They are.

Q. Well, what conditions——

A. Such as these——

Q. Those?

A. Being bent and broken by lading and side swiping, loose rivets, due to impact, vibration.

Q. Are those just caused by shifting of loads in the impacts of cars in yard movement?

A. They are.

Q. Would that likewise be true of steel plates and steel side sheets?

A. It would, yes.

Q. Now, those impacts in switching and yard operations, are, of course, avoided during the days that cars are on Seatrain ships, that is right, isn't it?

A. Yes.

Q. Is there anything you further want to say on direct?

A. I think not.

Mr. McCollester. That is all. Do you want to ask him?

Examiner Hoy. Mr. Ware?

1816 Mr. Ware. Yes.

Examiner Hoy. This is further direct testimony?

Mr. Ware. Beg pardon?

Examiner Hoy. This is further direct?

Mr. Ware. Yes.

By Mr. Ware:

Q. Mr. Taylor, were you present Tuesday when I asked Witness Klein to give me the car numbers and the dates when the cars shown on his Exhibit 56, as being retired in the years 1935 and 1937, were set aside, awaiting decision as to whether they would either be repaired or retired?

A. I was.

Q. Now, if a similar exhibit were offered in behalf of the Missouri Pacific Railroad, could you give me that information?

A. Yes, sir.

Q. Do you keep a record which shows that?

A. I keep a record from the time the car is bad-ordered until it is finally dismantled.

Q. Now, is it customary for railroads to keep such records?

A. It is generally; yes, sir.

Q. Did the coordinator, either in 1933 or 1934, request some such information from the Class I Railroads?

A. The coordinator some time ago, I forget, four or five years ago, did get a statement from all railroads showing
1817 the cars by classes and series and their program for dismantling and repairing such equipment.

Q. Now, you say that information was furnished by classes and series?

A. Classes of cars and series, numbers.

Q. Now, how are the individual cars which make up a class or a series, identified, if they are identified at all?

A. Well, generally a lot of cars are purchased; built, a thousand or two thousand, and they are assigned a series of numbers, say from 1 to 999, and they are identified by the individual car numbers.

Q. Identified by individual car numbers?

A. Yes.

Mr. Ware. That is all.

Examiner HOY. Is that all the direct? We will take a five-minute recess.

(Thereupon, a short recess was taken.)

AFTER RECESS

Examiner HOY. Proceed with the cross-examination, Mr. Fort.

Mr. FORT. Mr. Eshelman wishes to cross-examine the witness.

Cross-examination by Mr. ESHELMAN:

1818 Q. Mr. Taylor, I take it that when you refer to it being customary for railroads to keep car records by car numbers and classes of cars, as to when they are put aside for bad order, that you didn't mean to say that that is necessarily the common practice of all railroads in the United States, did you?

A. Well, it is generally the custom of all railroads that I have come in contact with and been on.

Q. You heard Mr. Klein's testimony to the effect that the Pennsylvania did not keep such records, you heard that testimony?

A. I did.

Q. Are you meaning by your testimony at all to imply that that is not correct, so far as the Pennsylvania is concerned?

A. I am not testifying for the Pennsylvania, what the Pennsylvania does, I said railroads generally, there may be some exceptions to that, Pennsylvania may be one of them.

Q. Now, do you retire your cars by——

Mr. FORT. Well, with the testimony so restricted, I move that it be stricken, because it evidently has no bearing whatever on this case, if the witness meant to carry no implication with it.

Mr. MCCOLLESTER. Well, you argue that it does carry an implication, I don't mind you saying so.

The WITNESS. I didn't get your last question.

Mr. ESHELMAN. How long are you going to continue this

1819 hearing?

Examiner HOY. I think we will finish today.

Mr. ESHELMAN. I have got to get Mr. Klein here in two hours; three hours, we will need proof on that.

Examiner HOY. Mr. Klein has testified that the Pennsylvania keeps no record.

Mr. ESHELMAN. I think this remark of counsel over here is certainly uncalled for.

By Mr. ESHELMAN:

Q. Mr. Taylor——

Examiner HOY. Of course, you could have Mr. Klein possibly testify as to what his understanding of the general practice on railroads throughout the country is.

Mr. FORT. What difference does it make?

Examiner HOY. I don't know.

By Mr. ESHELMAN:

Q. Mr. Taylor, do you retire your cars by classes?

A. To a certain extent, but we do not retire any car as a class, we retire the individual unit by a number.

Q. Has that always been your practice?

A. Always.

Q. Did you not have a practice for some time of pretty much retiring by classes?

A. No; we never retire a car by just as a class, we have it inspected, the individual car inspected and first it is the general car inspector who passes on it, and then I pass on it.

1820 Q. Apparently, that is one thing we have in common with you, then. So far as the data which was furnished to the coordinator, I take it from what you said that it did not include the question of what the cars—of what cars by classes had been set aside for class repairs, did it?

A. Oh, yes; it did.

Q. By classes?

A. I omitted that, it did by classes; yes.

Q. Do you know whether the Pennsylvania furnished such figures?

A. I don't know, I presume they did, all railroads were asked to furnish them.

Q. Now, as of what period, do you remember?

A. I don't remember the period, but the statistics to show what the railroads were going to retire, how many cars they had in bad order at that particular time and how many were coming due for general repairs over a certain period of time and how many they intended to retire called for that, and I couldn't give you the data or what period it covers.

Q. In the matter of reporting car service statistics or information, all of the railroads of the country were on a uniform basis, that would be the only instance as to matters furnished to the coordinator—if, in the matter of reporting data concerning car service to the coordinator, all railroads of the country reported on a uniform basis, that would be the only piece of informa-

1821 tion that was sent to the coordinator on a uniform basis, would it not?

A. I couldn't say as to that. I didn't see all the reports the coordinator received.

Mr. FORT. Mr. Examiner, in view of the witness' testimony that he doesn't know what records the Pennsylvania keeps or doesn't

keep, and he doesn't mean to make any implications from his testimony, I ask that that part of his testimony dealing with what other railroads do, can have no possible bearing on this question and it be stricken from the record.

Mr. McCollester. Mr. Examiner, it isn't for the witness to draw the argument or the implications, it is for counsel, and we will draw whatever the testimony warrants.

Examiner Hoy. The testimony is a matter of record and the weight that shall be given to it can be argued by the various parties.

Mr. Fort. My point was directed to the fact that it seems to be immaterial to any issue here.

Examiner Hoy. Well, the motion, if it be a motion to strike, will be denied.

Mr. Fort. Well, Mr. MacGowan will stay in the room. I have some further questions to ask him based on some information I obtained after he left the stand.

Mr. McCollester. He is here.

Mr. Eshelman. Mr. Examiner, I would like to say on the
1822 record, it seems to me a little bit out of line to wait until the witness has gone and he was here, this thing could have been developed on direct, apparently the witness was here in the room, counsel was here, Mr. Klein on the stand, it looks to me, like, let us say, hitting below the belt.

Mr. McCollester. We did try, we asked him everything we could think of on cross-examination.

Examiner Hoy. Proceed with the cross-examination.

Mr. Fort. May I go ahead?

Examiner Hoy. Yes.

Cross-examination by Mr. Fort:

Q. Mr. Taylor, look at Mr. Klein's exhibit 54, please.

A. Which one is that, I don't have the numbers.

Mr. McCollester. I will get it for him.

By Mr. Fort:

Q. Do angle cocks suffer damage by reason of corrosion, Mr. Taylor?

A. Why, very slightly; if they are properly coated, painted.

Q. What are they made of?

A. They are made of malleable iron.

Q. And how long do they ordinarily last?

A. Well, they last indefinitely; I couldn't tell you.

Q. What?

A. How long? Indefinitely.

Q. Indefinitely, you mean they receive very little——
1823 A. Corrosion.

Q. Repair requirements of any kind?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. What are the repair requirements, would you say?

A. Why, sometimes is it necessary to grind, regrind the valve portion of the stem.

Q. Yes, and what is that occasioned by?

A. Wear.

Q. What?

A. Wear.

Q. Wear? What happens when the car is finally repair with respect to the angle cocks?

A. We reclaim them and use them on new cars or repairs to other cars that are damaged.

Q. Just as you do all other parts of a car?

A. Well, not all other carts; no.

Q. Other parts that can be reclaimed?

A. Yes.

Q. Well, take the pipe work, is there corrosion in connection with pipes on the freight car?

A. Very little.

Q. Is there any corrosion of any kind on any part of a freight car?

1824 A. Oh, yes.

Q. Will you indicate what it is?

A. Yes.

Q. Don't forget, I mean, I want you to cover it comprehensively.

A. Well, there is corrosion to some extent on all metal parts of cars that are exposed to the elements, and not coated particularly, wheels, treads, they will become corroded, but it doesn't necessarily mean that they will become affected to the extent that they have to be renewed.

Q. Go ahead, what else becomes corroded?

A. Well, I said all metal parts that were not covered by some protective coating.

Q. Is the retirement of a car in your opinion ordinarily when the car is retired, by reason of the fact that its life is gone, is it retired ordinarily because of corrosion of under frame, say, the center sill and other important heavy parts of the car?

A. Due to corrosion, and loose rivets and worn parts, such as couplers.

Q. You could replace couplers, couldn't you?

A. Oh, yes; we can replace the whole car, the underframe.

Q. Well——

A. But, generally speaking, the cars are dismantled, due to obsolescence in either the class of car, the capacity of the
1825 car, or the design.

Q. Now, would you say that there is no corrosion at all on the freight beams?

A. No corrosion to the extent that it would ever have to be renewed in the life of the car, they are renewed on account of wear.

Q. Well——

A. Or being broken.

Q. This one quarter that is referred to on the exhibit, brake beams, one quarter only, do you see that?

A. Yes.

Q. You testified in answer to direct examination by Mr. McCollester, did you have in mind that one quarter only, but, did you think the entire cost of the brake beams was in the statement?

A. Well, I took it that the quarter was included, only.

Q. And you disagree with that quarter, do you?

A. Yes.

Q. Now, what figure would you put it at?

A. Due to corrosion?

Q. Yes.

A. I wouldn't put any, it would be so small, I couldn't figure what it would be.

Q. So you think that all expense in connection with brake beams would be avoided if cars were not in service, is that
1826 correct?

A. How is that?

Q. All expense in connection with brake beams, would be avoided if cars were not in service?

A. If the car was properly painted; yes.

Q. I am not talking about "if," I am talking about cars as they are on an average in the practical use.

A. Do you——

Q. Taking the cars of the country as a whole—if he is not prepared to speak of the cars of the country as a whole, his testimony is directed to it.

A. I don't quite understand your question.

Q. How is this exhibit 54 that you have testified to on direct, what do you understand that to show—you disagreed with it—I want you to explain it.

A. I understand it to mean that these running repairs are not avoided due to cars not moving, as it says.

Q. And you think that they would be avoided, is that so?

A. I said certain items, not all of them.

Q. Yes. Now, that is what I am getting at, do you think the entire cost with respect to running repairs on angle cocks would be avoided, instead of would not be avoided?

A. If they are standing still; yes.

Q. The entire cost?

A. Yes, sir.

1827 Q. Now, when you get to your pipe work, you think the entire cost of running repairs on the pipe work would be avoided, is that right?

A. Yes.

Q. Now, as to brake beams, you think the entire cost of that would be avoided?

A. Correct.

Q. Now, as to your lining and flooring, you think the entire cost of that would be avoided?

A. Right.

Q. On Seatrain?

A. Anywhere.

Q. Now, that is in spite of the fact that there is a load on, in the car?

A. That is right.

Q. Nevertheless, you don't think it would have any effect whatever on the lining or the flooring?

A. No.

Q. And you don't think the running of the time would have any effect on the lining or the flooring?

A. That could not.

Q. And, you don't think the lading could have any effect on the lining or flooring, is that correct, I want to know?

A. I didn't say anything about the lading.

Q. Well, there is lading in there, isn't there?

1828 A. There is lading in there.

Q. Yes.

A. It wouldn't have any effect on the running repairs to the flooring, the lining.

Q. It wouldn't have any?

A. No; not while the car is standing still.

Mr. McCollester. In other words, the floor would remain in the same condition in which it was at the beginning of the voyage, if the car is standing still, is that what you mean?

The Witness. Correct.

Examiner Hoy. Isn't there a question there as to just what is a running repair?

Mr. Fort. Are you through, Mr. McCollester?

Mr. McCollester. Oh, thank you, yes; the courtesy is appreciated.

By Mr. FORT:

Q. You have been on these Seatrains, of course, haven't you, Mr. Taylor?

A. Naturally.

Q. And as I understood the testimony, they are so braced as to make them as nearly as possible a part of the structure of the ship?

A. That's right.

Q. As the ship rolls, the car rolls, is that true?

A. I imagine they do, I didn't go to sea in it, I saw them in the port.

1829 Q. Well, there would—that would be bound to be so, as a matter of fact, wouldn't it?

A. Yes.

Q. And lading would be thrown to the side of the car?

A. It depends on the lading, depends on whether or not it is braced or not.

Q. You say salt has some corrosive effect?

A. It does.

Q. Do you know whether any salt moves by Seatrain?

A. I am not qualified to answer that question.

Mr. MCCOLLESTER. We admit it does.

Mr. FORT. I am talking about bulk salt.

The WITNESS. I wouldn't know.

Mr. MCCOLLESTER. It also moves all-rail.

Mr. FORT. Thank you for it—I mean, you are welcome.

By Mr. FORT:

Q. Mr. Taylor, you testified about some examination you made, I couldn't follow your testimony very well, but you said that 8 percent of cars in connection with some test required running repairs of some type; is that true?

A. That is right.

Q. Now, what test was that?

A. That was a check of cars received on road haul, one of our principal terminals.

Q. At what time?

1830 A. At what point?

Q. At what time?

A. The first 15 days of February 1939.

Q. And what point?

A. Dupo, Illinois.

Q. How many cars were there?

A. There were 23,211.

Q. And they would be delivered to your line?

A. Yes, sir.

Q. Then, you said 8 percent of them needed some kind of repair?

A. 1,910, or slightly over 8 percent; yes, sir.

Q. Now, what kind of running repairs were they?

A. All kinds.

Q. You said they were mostly running repairs that were the responsibility of whom?

A. Of the owner.

Q. Of the owner?

A. Yes, sir.

Q. Now, what distinguishes owner's responsibility from some of the line's responsibility?

A. That is set out in A. A. R. interchange rule, which says that the handling will be responsible for repairs, damage caused by wrecks, derailments, side swipe, collision.

Q. And owners are responsible for other types?

1831 A. Practically all; yes.

Q. And these are almost altogether owner's responsibility?

A. Right.

Q. So, it wasn't rough handling or anything of that kind by the line that had the car, but it was something the owner was responsible for; is that true?

A. Well, if it wouldn't be considered rough handling, it is generally service, general use.

Q. Yes. Now, as to Seatrain, you said you entered two separate tests, didn't you, of cars coming off Seatrain?

A. Yes.

Q. And a certain number of running repairs had to be made on those cars, you said?

A. Correct.

Q. And you said that was mostly of the character that Seatrain was responsible for, didn't you?

A. Correct.

Q. Is that because the damage that occurred from Seatrain, occurred in such a way that Seatrain was responsible for it?

A. In most cases.

Q. As distinguished from these other running repairs which were really owner's responsibility rather than handling responsibility?

A. Right.

Q. Now, you were talking wholly about running repairs, weren't you?

1832 A. Not altogether.

Q. What?

A. I was talking about all repairs.

Q. All repairs?

A. Regardless of what class of repair, that is, the total number of cars defective and shopped, regardless of the class of repairs.

Q. Were they off-line cars or your own cars?

A. All kinds of cars.

Q. All kinds of cars?

A. All kinds.

Q. There were certain classes of repairs you don't make on off-line cars, is that not so?

A. No, sir.

Q. What?

A. Only general repairs, we don't make general repairs.

Q. That is what I mean. Then, that doesn't include what you would call general repairs, does it?

A. We may do it to off-line cars, repairs to make them safe and interchangeable.

Q. Yes.

A. And make them suitable for loading.

Q. Well, now, any deterioration, if there were any such thing due to corrosive influence on a car moving on Seatrain, no matter how severe it might be for the time it was on Seatrain
1833 would not be that character of damage, assuming that it would be now, that would require repair at the time the car was taken off the train, would it?

A. No.

Q. Now, with respect to Mr. Klein's exhibit 52—do you know that one by number?

A. I think I have it here, yes; I have it.

Q. Where he shows a large heading, body steel parts and roof—I didn't understand your testimony as a denial that there is corrosion with respect to those parts, did I? You don't deny that there is corrosion on the body steel parts and roof, do you?

A. No; I don't deny it.

Q. No. Now, did you hear Mr. Klein's testimony?

A. I did.

Q. Did you hear him say that with respect to the money that entered into those figures, that there was none to take care of straightening bent ends and things of that kind, because that would be done currently and this was, this was this periodic shopping to take care of corrosion, did you hear him testify to that?

A. I heard him say that; yes.

Q. What?

A. I heard him say that.

Q. So, no matter whether there should at times be neces-
1834 sary such repairs as you called attention to, to these parts,

by reason of being bent and so on, the testimony in this case that these amounts shown here were corrosion?

A. That is what his testimony showed; yes.

Mr. McCollester. On that last point, I don't think the Witness Klein testified to the definite fact that these expenditures were due to corrosion. As I recall his testimony, it was that in his opinion, he would attribute this proportion of the expense to corrosion.

Mr. Fort. 100 percent.

Mr. McCollester. Whether it was a hundred percent is a matter of opinion, rather than an actual fact, on his part.

Examiner Hoy. Well, Mr. Klein's testimony is in the record.

Mr. McCollester. It speaks for itself; yes, sir.

Mr. Fort. Yes.

Examiner Hoy. I don't believe we need to discuss what he did say.

Mr. Fort. I don't mean to argue, this witness subscribes to his testimony.

Mr. McCollester. That is right.

By Mr. Fort:

Q. Mr. Taylor, are the brakes set all on these cars when they are on Seatrain?

A. I couldn't say in all cases.

1835 Q. You don't know whether they are set at all or not, do you?

A. I don't know whether they are all set, or any of them, as a matter of fact.

Q. So, with respect to your opinion in connection with brake beams, in connection with this brake beams in Exhibit 54, you spoke without knowledge on that point. You spoke without knowledge on that point?

A. About what?

Q. As to whether brakes are set or not?

A. I said that I didn't know whether all the brakes are set or not.

Q. Well, do you know whether any of them are set?

A. Nom I have seen some brakes set on there, but I haven't seer them all.

Q. You don't know to what extent they are set or not, do you?

A. No, I don't; that is right.

Q. Would it make any difference in your answer, according to whether they were all set or weren't all set?

A. None whatever.

Q. What is the occasion of setting the hand brakes, if they are set?

A. Well, they naturally set them to keep them from moving.
Q. Yes.
A. However, that is otherwise provided for in that they are tied down.

1836 Q. Well, then, you differ not only with Mr. Klein's testimony—you differ not only with Mr. Klein, but with the operating people who think it is necessary to set these hand brakes, if they do think so; is that true?

A. Well, I don't know what Mr. Klein thinks.
Q. I am not talking about Mr. Klein.
Mr. McCollester. What operating people are you talking about?
Mr. Fort. I am talking about the Seatrain people.
A. I don't know what the Seatrain people think.
Q. I know you don't, but I say——
A. I am telling you what I think.
Q. You think it is not necessary to set the brakes, is that it?
A. I don't think it is absolutely necessary, no, and even if it were, it wouldn't have any effect on the maintenance cost.
Q. It wouldn't have any effect on the maintenance cost?
A. No.
Mr. Fort. All right, that is all, thank you.
Examiner Hoy. Any further questions on cross-examination? Any redirect?
Mr. McCollester. That is all.
Examiner Hoy. You are excused.
The Witness. Thank you.
(Witness excused.)

1837 Mr. McCollester. Do you want to ask Mr. MacGowan a question?
Mr. Fort. Yes, I do.
Examiner Hoy. Do you want to ask Mr. MacGowan some questions?
Mr. Fort. I would like to ask Mr. MacGowan just one question.
Mr. McCollester. He is right here.
Examiner Hoy. Just one question?
Mr. Fort. It may be more than one.
Examiner Hoy. Well, you better come around, Mr. MacGowan.

A. R. MacGowan recalled, testified further as follows:

Cross-examination (continued) by Mr. Fort:

Q. Mr. MacGowan, I asked you about those cars stored. I asked you about those cars stored on the Hoboken, you said normally there were about 20 or 25 and I asked you whether they were on a per diem or under some special contract. I show you

a copy of a contract which, I understand, was introduced in Docket 25546, as Exhibit 141, I ask you if you——

Mr. McCollester. May I see that, please?

Examiner Hoy. What is the docket number?

Mr. Fort. 25546 and 25565, apparently they were joint
1838 cases.

By Mr. Fort:

Q. I show you the exhibit marked 141 in the docket, to which I call your attention, which purports to be a contract between the Missouri Pacific and Seatrain Lines, and ask you if you know anything about it.

Mr. Larimore. What is the date of that, Mr. Fort?

The Witness. October 6, 1932.

Mr. Larrimore. October 6, 1932? I object unless you can prove that contract is in effect now.

Mr. Fort. That is what I am asking the witness.

The Witness. This is the first time I ever saw or heard of the contract.

By Mr. Fort:

Q. I see. And, you never saw or heard that supplement to the contract?

A. No, sir.

Mr. Fort. Will you state whether or not the contract referred to is still in effect?

Mr. McCollester. The contract referred to is not in effect.

Mr. Fort. Can you also state when it ceased to be in effect?

Mr. McCollester. No; not the year.

Mr. Fort. Is there any contract which covers the same grounds that you know of?

Mr. McCollester. Not so far as I know.

1839 Mr. Fort. Is there any contract, any special contract with respect to Missouri Pacific cars or any other cars moved by Seatrain?

Mr. McCollester. Not that I know of.

Mr. Fort. Are those cars on the same per diem arrangement?

Mr. McCollester. So far as I know, yes, railroad cars.

Mr. Fort. Could you undertake, Mr. McCollester, is your statement now made in the record now correct, to see if the record is correct in that respect?

Mr. McCollester. Well, so far as the testimony of the witness MacGowan is concerned, I think there is no need of looking into it. There is no contract in effect that would in any way alter his testimony at the Hoboken, Pennsylvania, per diem on all cars on his rails and reimbursed by Seatrain, as he testified, for full time.

Mr. FORT. Well, is there any contract that would call for the reimbursement of the Seatrain?

Mr. MCCOLLESTER. There is not.

Examiner HOY. You are excused, Mr. MacGowan.

(Witness excused.)

J. S. SMITH was sworn and testified as follows:

Direct examination by Mr. WARE:

Are you employed by the New Orleans & Lower
1840 Coast Railroad?

A. Yes, sir.

Q. In what capacity?

A. I am assistant general freight agent.

Q. How long have you been employed by the New Orleans & Lower Coast, either in your present capacity or some other capacity?

A. Since about 1928.

Q. Are you also employed by the Missouri Pacific Railroad?

A. Yes, sir.

Q. And in what capacity?

A. Assistant general freight agent.

Q. And how long have you been employed by the Missouri Pacific Railroad, Mr. Smith?

A. For about 14 or 15 years.

Q. Now, as assistant general freight agent for the New Orleans & Lower Coast and the Missouri Pacific Railroad, what are your duties, generally speaking?

A. Supervision over coastwise export, import traffic generally, particularly rates and——

Q. Mr. Smith, I call your attention to Exhibit 58, offered by Witness Randall, which is item 122 of supplement 20, to New Orleans Lower Coast tariff 3–A, and ask you if you are the authority of that rule?

A. I am.

Q. And can you tell me why that rule was published?

1841 A. Yes, sir. My testimony is directed and limited to exhibits 58 and 59, the witness Randall; also Exhibit 62, Witness Kendall. Certain dates are important in my presentation, and I ask you to keep them in mind. They are January 1929, when the Seatrain inaugurated its Cuban service to or from Belle Chasse, and October 1932, when they inaugurated coastwise service between Belle Chasse and Hoboken, as contrasted with July 14, 1935, the effective date of item 122 of N. O. & L. C. Railroad Tariff 3–A, I. C. C. No. 18, which item is shown in revised exhibit 58.

It will be noted that the latter item became effective approximately six and half years after the Cuban service, and about two and a half hours after the coastwise service was inaugurated by Seatrain.

North-bound coastwise and export traffic delivered to steamer lines in New Orleans and subports moves one of two ways, either on a port or a through bill of lading. In either event, it was the custom or practice prior to 1929, for the in-bound line haul carrier to hold the cars containing this traffic in their possession at the above ports awaiting acceptance by the steamer line. This still is the custom or practice, there having been no change in the meantime.

As to traffic moving on port bills of lading, all New Orleans line haul carriers authorized seven days' free time at the port, per items 110–B and 115–C of H. & W. P. Ummersen
1842 Junior Tariff 4–N, I. C. C. 237.

Note 1 of those items provides that such free time, "applies only to cars on tracks of the road by which shipment is transported to export and does not apply after such cars are switched to another line."

On all cars held beyond this same limit, awaiting acceptance by steamer lines, a charge of one dollar and ten cents ($1.10), formerly one dollar, prior to March 28, 1938, is provided in item 120–E of the above tariff. No similar free time is authorized at New Orleans and subports, by switching lines as such.

As to coastwise traffic moving on through bills of lading, there is no tariff provision limiting the time that the line haul carrier will hold cars awaiting acceptance by steamer lines. Such cars may be held indefinitely free of charge.

This was likewise the situation as to export traffic moving on through bills of lading until the issuance of H. & F. B. Miller's Tariff 725, I. C. C. 181, which became effective, as I recall, in 1937. Unfortunately, I don't have the original tariff with me; I only have the present tariff. This tariff limited the issuance of through export bills of lading to ten days, prior to due date of ship's arrival at the port, which provisions were—which provision was suspended by the Commission, which subsequently prescribed 15 days, which is the present time limit.

1843 The defect in this tariff is that no penalty or detention charge is provided therein, in event the cars are held beyond the 15-day limit. This tariff also has very limited application, so that on the whole, the recent change therein was an incompleted gesture and is therefore more or less meaningless.

Export cars covered by through bills of lading may still be held at the port indefinitely, free of charge. With inauguration of Cuban service by Seatrain to and from Belle Chasse in January

1929, the Lower Coast established appropriate switching charges between that part of New Orlean*d* and subports, and has continuously since that time handled all Seatrain business as a switching carrier under these switching charges.

These switching charges do not include per diem reclaim. The Lower Coast never has, nor do they now, receive a division of any joint out-bound rate applicable in connection with the Seatrain. The status of the Lower Coast as switching carrier, as well as the Seatrain as a steamship or water carrier, was recognized by all New Orleans line haul carriers in that they complied with their published tariffs and held cars awaiting acceptance by Seatrain.

In the early part of 1935, certain of these carriers that were antagonistic to Seatrain operation, such as the I. C. and the
1844 L. & N., endeavored without any change in the above-mentioned tariff, to evade the free time they authorized therein, by forcing the Lower Coast to perform their obligation for them, and accept these cars immediately upon arrival in New Orleans and hold them at its expense awaiting acceptance by Seatrain.

This we declined to do, since we did not then, nor do we now, authorize the above-mentioned free time. The status of the Lower Coast, as to Seatrain business, is identical, the same as the status of the New Orleans Public Belt Railroad, that as to similar traffic moving via competing break bulk cargo steamer lines. That is, both are switching carriers exclusively.

The New Orleans Public Belt, at that time, and now, publish an item similar to item 122 of New Orleans & Lower Coast tariff 3–A, and to make our position clear, we publish item 122.

There was no change in the method of handling Seatrain traffic after the item was published. The item was not published for the purpose of, nor did it in fact result in an embargo. The purpose or effect of the item was not to force any of—not to force any absorptions on line haul carriers, which they already did not authorize in their tariff, and which they still authorize.

In fact, did it not have this effect as Exhibit 59 shows, the
1845 average detention of Seatrain cars, to 3.3 days, or slightly less than half of the free time authorized by the line haul carrier.

Item 122 did no more, in fact, than to insure that the line haul carriers complied with their published tariff. The New Orleans Public Belt still maintains a similar rule. Perhaps, due to light tonnage, this rule has not been strictly observed, particularly on coastwise traffic, in recent years, as, generally speaking, the cargo lines accept freight upon the arrival at New Orleans. The rule is still in effect, however, and is availed of by the cargo lines, whenever it is to their convenience to do so.

I mean by that, particularly, that one of the cargo lines has marginal tracks on their wharf. On traffic interchanged with the steamer line off marginal tracks, they likely, or perhaps invariably, choose to avail themselves of that rule, and have the in-bound line haul carrier hold the car until the steamer is—until the steamer arrives and is ready to take it.

The fact that Exhibit 62 shows a lower average detention of cargo line cars than the detention of Seatrain Line cars, is beside the point, and has no bearing here, as I see it, as the detention of the Seatrain cars is authorized by the line haul carriers themselves, and is not due to any action of the Lower Coast. That is all I have.

1846 Mr. WARE. Have you anything?

Mr. MCCOLLESTER. No.

Examiner HOY. Is that all, Mr. Ware? Cross-examine.

Mr. FORT. Stand aside.

Examiner HOY. You mean you have no cross-examination?

Mr. FORT. No; not of this witness.

Mr. MCCOLLESTER. May I have a few minutes' recess?

(Thereupon, a short recess was taken.)

(Witness excused.)

Examiner HOY. The next witness.

W. T. LONG, Jr., was sworn and testified as follows:

Direct examination by Mr. THOMPSON:

Q. Will you state your name, residence, and occupation, Mr. Long?

A. W. T. Long, Jr., superintendent of transportation, Texas & Pacific Railway, Dallas, Texas.

Q. How long have you held that position, Mr. Long?

A. Since March 1, 1929.

Q. And will you state briefly the extent of your railroad service and what capacities and with what railroads?

A. About 34 years with the Missouri Pacific in mechanical, accounting, operating departments; a few months with the Cotton Belt Railroad.

1847 Q. That is the Central and Southwestern?

A. In the operating department, and since March 1, 1918, with the Texas & Pacific Railway, as chief clerk to general manager, assistant to general manager, trainmaster, superintendent of transportation.

Q. State in a general way what your duties are as assistant superintendent of transportation with the Texas & Pacific.

A. I have jurisdiction over the furnishing of cars, car supplies, movement of cars, loaded and empty, passenger and freight sched-

ules, also—and car records, car settlements, and have jurisdiction over freight claim loss and damage payments.

Q. Mr. Long, do you personally keep track of the equipment, including freight cars of the Texas & Pacific; condition of them and such as that?

A. Those records are kept in my organization and under my supervision.

Q. Do you also have occasion to keep in touch with the extent of repairs to cars or have access to the records that are kept there?

A. Yes; I must know whether the cars are fit for loading or serviceable.

Q. Do you keep a record which will show what cars are serviceable and what cars have been retired, or ready for retirement, and not fit for service?

1848 A. I have a record of every individual car on our railroad; whether in good order or bad order.

Q. Is it necessary for you to have that information in order to know what costs to use in the operation of railroad and efficient service?

A. Yes; we must know.

Q. Mr. Long, have you made an investigation recently as to the extent of car repairs incurred in connection with Texas & Pacific equipment that is used in the Seatrain service as related to cars or repairs that become necessary in connection with all-rail movements?

A. I have.

Q. Would you state what that experience is. That is, as to the cars used with Seatrain service?

A. We don't find any repairs necessary to our cars, Texas & Pacific cars when coming off the Seatrain.

Q. Now, have you——

A. My last check of cars from Seatrain at New Orleans was for the months of November and December 1938, and January 1st to 12th, inclusive, 1939. During the period the Texas & Pacific received 197 cars——

Q. From the Seatrain?

A. From the Seatrain, and only one of these cars had defects noted, or repairs made, and that was on an empty tank car, FMTX, 1001, received from Seatrain January 1st, had

1849 a defective running board; decayed. Evidently that damage existed when it was loaded on the Seatrain.

During November 1938, 48 Texas & Pacific Railway cars were delivered to Seatrain at New Orleans and these cars delivered by Seatrain to the Hoboken Manufacturers Railroad at New York and at time of this delivery no repairs were made to any of these 48 cars.

Mr. FORT. And when were they delivered, Mr. Long?

The WITNESS. November 1938.

By Mr. THOMPSON:

Q. That is delivered by the Texas & Pacific to Seatrain during that month?

A. Yes.

Q. Now, Mr. Long, do you have in mind instances of, particularly instances of repairs to cars, Texas & Pacific cars, in all-rail service?

A. Yes; I have.

Q. Will you give us a few of them, not necessarily all that you have—just for the benefit of the record?

A. Well, T. & P. 70516, loaded with hides at Paris, Texas, for Somersworth, New Hampshire, routed T. P.-M. P., B. & O., New Haven. On this trip, we were charged by the B. & O. and Lehigh Valley $58.95 for repairs.

Q. When was that movement?

A. April 1938. T. & P. 50835, loaded with hoops at Bunkie, Louisiana to Brooklyn, routed T. P.-M. P., C. & O., G. T.,
1850 D. L. & W., we received $64.61 worth of bills for that trip.

Q. For repairs?

A. Yes.

Q. Now, in that connection, Mr. Long, is it the practice of the railroad on which the damage to the car occurs, to bill the owner of the car for such repairs under such circumstances?

A. Yes; owner's defects.

Q. Proceed.

A. Well, I have several of them. In July, 1938, T. & P. 50748, loaded with lumber, at Palmetto, Louisiana, for Randolph, N. Y., routed T. P.-M. P., A. & S. Nickel Plate, Erie, we received bills for $42.31 repairs. Then, I have some here; here is one October, 1938, T. P. 61668, loaded with moss to Brooklyn, N. Y., $3.79 repairs.

Q. I believe that will be sufficient. It is understood, of course, that that doesn't occur on all shipments, you just——

A. Oh, no.

Q. You just give that as an illustration of just what does occur, is that the idea?

A. These are just taken from records, so far as we could find, loaded on our line to the original territories.

Q. By all rail movement?

1851 A. By all rail.

Q. Now, you have stated that you have supervision over loss and damage, freight claim payments and claims.

A. I do.

Q. Do you have any information as to the relation of the freight claim payments that are made on shipments by Seatrain in contrast with shipments by all rail and by the freight bulk lines, water lines?

A. Yes; I do.

Q. Will you state what that investigation shows?

A. This is for the year 1938, from our claim records. For cars handled by the T. & P. Railway in connection with the Seatrain, a claim for every 39.07 cars handled. For cars handled by the T. & P. Railway, exclusive of Seatrain or steamship company, a claim for every 14.34 cars handled. For cars handled by T. & P. Railway in connection with other steamship companies, a claim filed for every 2.14 cars handled.

Q. Can you think of anything else to add?

A. No.

Mr. THOMPSON. Are there any questions on direct?

Mr. MCCOLLESTER. May I ask a simple question?

By Mr. MCCOLLESTER:

Q. Mr. Long, it is correct, is it not, that since 1929, your road has permitted your cars to be interchanged with the vessels of Seatrain Lines?

1852 A. That is correct.

Q. And have a great number of your cars in that approximately ten years, moved via Seatrain?

A. They have.

Q. On the basis of that experience, have you found any reason to consider the dollar per diem inadequate compensation for the use of your cars when they move by Seatrain?

A. We have not.

Q. Is the going per diem rate of one dollar more remunerative to you in the case of cars going by Seatrain than in the case of cars moving over rail routes?

A. I would say that it is more, by reason of the fact that there are no repairs.

Q. And at the present time, so far as your road is concerned, have you any desire to, or any purpose to secure any—to secure from Seatrain more than a dollar a day for the use of your cars?

A. We are satisfied.

Mr. MCCOLLESTER. That is all.

Examiner HOY. Cross-examine.

Mr. FORT. Just a few questions.

Cross-examination by Mr. FORT:

Q. Mr. Long, has the T. & P. financial interests in Seatrain, Inc.?

Mr. THOMPSON. If you know?

1853 By Mr. FORT:

Q. If you know?

A. All I understand is that they have, that is all I know.

Mr. MCCOLLESTER. It is in the record.

Mr. FORT. It is in the record.

By Mr. FORT:

Q. Do you know what the amount of that financial interest is?

A. I do not.

Q. What type of inspection do you make of cars that come off Seatrain Lines, a yard inspection?

A. A regular mechanical inspection, the same as is made to and from all connections.

Q. And where is that done, Mr. Long?

A. It is done in our yard, in the yard of the T. P. M. P. terminal, Gouldsboro, La.

Q. Now, with respect to certain particular cars you mention, which went by all-rail, when you said $64.16, do you know what the occasion for that bill was?

A. As I recall, wheels had the greater part.

Q. What was the matter with the wheels?

A. Worn out, or—worn out, I can't tell you the particular defects, under the M. B. C. rules, they had to be changed.

Q. Didn't develop on that trip, did it?

A. Apparently it did, or they wouldn't have taken them off.

Q. The damage that was repaired by that expense of $64, wasn't damage that was attributable to that trip, was it, Mr.

1854 Long?

A. I wouldn't say it was, no.

Q. No. And, also, with respect to your $42.13 car, do you remember what the trouble was there?

A. No; only it was owner's defects.

Q. I see. Nothing that the lines were carrying it after it left your line were responsible for?

A. No; it was repairs necessary, made necessary on account of crane handling.

Q. Not any crane handling that brought about the defect, because if it had been the line on which the car was located it would have been responsible, wouldn't it?

A. Under certain conditions, under the rules, yes.

Q. Yes. Now, when you get such a bill as that, of course that is very unusual, isn't it, on a particular trip, I mean?

A. Well, it is liable to happen with any car.

Q. How long was that car off your line that gave you the $64 bill?

A. I don't know.

Q. You don't mean to say that when a car leaves your yard for movement over a foreign line that you are liable to get a bill for $64 for repairs in, you don't mean to say that in the sense that it happens on every car, do you, or every trip?

A. No, I have checked cars that there were no repairs on,

1855 but having——

Q. Isn't——

A. Handled M. C. C. bills and those things, why——

Q. Isn't it extremely rare?

A. You get those bills, they are made up daily.

Q. Isn't it extremely rare?

A. No; wheels are not rare, the application of wheels are not.

Q. How often would you have to supply wheels on a car?

A. I don't know.

Q. Haven't you any idea?

A. No.

Q. As a general average?

A. No.

Q. Would you take it that these particular cars that you have referred to, with particular amounts of bills that you got on them, would throw any light on the average of the general situation at all?

A. As for the general situation, I don't know, but that is the general practice when cars of one railroad are on another railroad, they do receive repairs, when being handled in road haul and yard movement.

Q. There wouldn't be any way Seatrain could repair the car while it was on Seatrain, would there?

A. No, not that I know of, they have no occasion to, so far as our cars are concerned.

1856 Q. Well, take the car that you got of Seatrain that had something the matter with its running board, didn't you say that it was probably that way when it went on Seatrain?

A. It was bound to have been decayed running board.

Q. Now, if that had happened on another railroad line, the railroad line would have fixed that running board, wouldn't they?

A. Somewhere else; yes.

Q. That is the point I mean to make. Now, as to your claims on T. & P. shipments, you say you get on an average of a claim on every 14 cars of T. & P. shipments?

A. That is right.

Q. Do you handle a good many perishables?

A. A great many.

Q. And your claims are high on the perishables and on the ordinary run of freights?

A. I think on the average, yes.

Q. Yes. Now, what type of shipment do you get from Seatrain, what type of commodities?

A. Well, we get paper and machinery and merchandise. I can give you a lot of the commodities I think. Paper, castings, paint, canned goods, castor oil, wire, slate, tractors, scales, stoves, agricultural implements.

Q. Yes. Now, are they shipments of a character which usually have cars in fairly good, in good condition before they are
1857 loaded?

A. A lot of them are, yes; the merchandise.

Q. Call for so-called——

A. Class A car.

Q. Class A car?

A. Yes; a lot of them are Class A cars.

Q. Do you know whether your railroad has any arrangement for furnishing sea line cars for storage purposes?

Examiner Hoy. Seatrain?

By Mr. Fort:

Q. Seatrain, I mean.

A. No; we do not.

Q. You do not? Did you ever have one that you know of?

A. Not to my knowledge; no.

Mr. Fort. That is all, thank you, Mr. Long.

Examiner Hoy. Any redirect?

Mr. Thompson. Just a moment.

Redirect examination by Mr. Thompson:

Q. Mr. Long, regarding these claim payments on Seatrain-ships, can you state whether the type of shipment that you handle in connection with Seatrain is materially different or substantially the same as type of shipment you handle in connection with the other water carriers?

A. Well, we handle merchandise. I think probably merchandise, that is one of the claims, I guess substantially the same, there is no large bulk from the break bulk; about the same, I would say it would run along about the same.

1858 Mr. Thompson. That is all.

Examiner Hoy. Any further questions from the witness? You are excused.

(Witness excused.)

Examiner Hoy. Any further witnesses?

Mr. Fort. I would like to just ask him this question.

Examiner Hoy. Wait a minute.

W. T. LONG, Jr., recalled, testified further as follows:

Recross-examination by Mr. FORT:

Q. When shipments moving via your road into break bulk line, there is no more damage takes place on your line from the same type of commodity than there would take place on your line when it was moving in connection with Seatrain, would there?

A. We think not, no, not on our line.

Q. No, sir.

A. No.

Examiner HOY. Any further witnesses to be heard in this proceeding?

(Witness excused.)

Mr. McCOLLESTER. We have no witnesses, Mr. Examiner. May I just confer with counsel?

(Discussion off the record.)

Mr. McCOLLESTER. Mr. Examiner, at the initial hearing
1859 in this proceeding, in order to conserve the time of all parties and save the record, there were certain stipulations of fact made on page 15 of the record, some of the stipulations spoke as of the date of that hearing, namely, November 2, 1933. I am informed that the conditions stipulated to on page 15 of the record exist as they are described at the present time, and for the complainants that I represent, I am prepared to stipulate that the statements on page 15 of the record are true and correct at the present time and may be so accepted for the purposes of the decision of the case, if opposing counsel are prepared so to stipulate.

Mr. FORT. You mean the first two paragraphs, don't you, Mr. McCollester?

Mr. McCOLLESTER. Down to here, the whole page, 15.

Mr. FORT. Well, I can't stipulate that, because, without a further stipulation, because I understand they are high class box cars.

Mr. McCOLLESTER. I have spoken to him about that, I will put a witness on the stand if I——

Mr. FORT. If you are willing to stipulate something along with it.

Mr. McCOLLESTER. I am prepared to let Mr. Kendall state what that is as to that fact rather than accept that stipulation.
1860 Mr. FORT. You mean, then, stipulate as to the——

Mr. McCOLLESTER. Stipulate as to the first two paragraphs on page 15, and let Mr. Kendall testify as to what the facts are with respect to the subject of the stipulation in the last paragraph.

Mr. FORT. All right, as to the first two paragraphs on page 15, we are willing to stipulate what appears in those paragraphs.

Mr. McCollester. As of the present time?

Mr. Fort. As of the present time. There is reference, however, in those paragraphs, as I understand it, to other water lines or ferry routes or something of that kind. If there is, of course we do not stipulate that there is any other water line or ferry route, or whatever you might call it, that is in any sense comparable with Seatrain operation. You don't want any implication of that kind in the record.

Mr. McCollester. That is, of course, the stipulation won't go any further than the original stipulation in that regard. The record shows a list of a number of water lines that were grouped together by the Association of American Railroads for the purpose of car service Rule 4. Seatrain was one of those, and there are about ten others grouped together for that, for the purposes of the rule by Association of American Railroads, that is shown on Exhibit 9.

Examiner Hoy. Does the complainant in New Orleans
1861 and Lower Coast agree to that stipulation?

Mr. Ware. I don't know what it is all about.

Examiner Hoy. Well, you are a party here, or is it just the complainant?

Mr. McCollester. No, you were a party to the stipulation before, you better come up here and look at it, then.

Mr. Ware. Well, it is all right then if I was a party to be before.

Examiner Hoy. Are the individual defendants represented here agreeing to this stipulation?

Mr. Larimore. I didn't know there were any defendants here.

Examiner Hoy. Represented by individual counsel, is what I mean.

Mr. Muckley. That is all right with me.

Mr. Eshelman. Mr. McCollester, whatever that stipulation contemplated in way of subsequent filed material, it has already been filed in the record, is that correct?

Mr. McCollester. That is right, the copies of the circulars and so forth are in the record as exhibits.

Mr. Eshelman. So that this doesn't contemplate bringing anything else in the record by the way of additional exhibits?

Mr. McCollester. No, that is right. The only addition is the further statement as to the changes in Exhibits 9, 10 and 11, the——

1862 Mr. Eshelman. That has already been made of record here.

Mr. McCollester. That has been made of record here, but I make those statements, because those contents and refusals are referred to in the stipulation.

Mr. ESHELMAN. I take it that except as the record otherwise provides, it is closed up.

Examiner HOY. All right, the record will show the stipulation and the agreement of the various parties to the stipulation——

Mr. FORT. That stipulation does not cover the last paragraph.

Examiner HOY. No. Now, Mr. —— are you going to make a statement?

Mr. MCCOLLESTER. I will ask him, if I may—if I may call Mr. Kendall either as my own witness or on cross-examination, I don't care which.

Examiner HOY. Mr. Kendall is recalled to the stand.

WARREN C. KENDALL, recalled, testified further as follows:

Direct examination by Mr. MCCOLLESTER:

Q. Mr. Kendall, at the original hearing on November 2, 1933, page 15 of the minutes, the parties stipulated as a fact that there was no car shortage at the time car service Rule 4 was
1863 adopted, nor is there a car shortage at the present time.

Now, I take it that so far as the first part of that stipulation goes, that there was no car shortage at the time car service rule was adopted, the original stipulation stands—what is the situation at the present time, with respect to car shortage or otherwise?

A. There is no general car shortage at the present time, there being some two or three hundred thousand car surplus in the country as a whole. There is no occasion, and at certain times, a tightness in the supply of certain class of box cars or possibly certain classes of open top cars for the handling of coal.

These, however, are isolated instances and there is no shortage of any consequence, nothing which interferes with the proper handling of traffic.

Mr. MCCOLLESTER. That is all I have.

Examiner HOY. Any further questions from the witness?

Cross-examination by Mr. FORT:

Q. Mr. Kendall, as to the type of cars which ordinarily move on the Seatrain, is the general surplus of cars representative of what exists with respect to cars of that character?

A. I will say not as a general thing.

Mr. MCCOLLESTER. May I hear the question?

(Question read.)

1864 Redirect examination by Mr. MCCOLLESTER:

Q. Well, now, in what class of cars is there a surplus?

A. The lower class; lower grade of box cars and lower grade of open top cars.

Q. Those move to considerable extent on Seatrain, too, don't they?

A. I don't know.

Q. Do you know what the proportion of high-class and low-class cars is moving via Seatrain?

A. I do not.

Mr. McCollester. That is all.

Re-cross-examination by Mr. Fort:

Q. Wouldn't you have—have you no basis for knowledge of that, Mr. Kendall?

A. Judging only from the commodities which I handled, I would say that the majority are cars carrying, requiring the higher classification, the better type of box car.

Mr. Fort. Mr. Long testified to that.

Redirect examination by Mr. McCollester:

Q. You are assuming general merchandise freight?

A. And higher class of carload traffic, such as paper, for example.

1865 Re-cross-examination by Mr. Fort:

Q. Are the railroads in a situation, Mr. Kendall, where they either have made a program which involves the purchase over the coming year of the immediately coming years, of new box cars, or whether it is generally thought by those people who have to do with that kind of thing, that they will need to purchase new high-grade box cars in coming years?

A. There is a very definite conclusion that they should purchase cars of the higher class.

Q. Beginning when?

A. Beginning immediately.

Q. Beginning immediately?

A. Yes, sir.

Q. So that, in no sense, is there a surplus of high-grade box cars?

A. No, sir.

Q. And, in order to keep the railroads in a position to handle their business effectively, they have got to purchase, beginning immediately, high-grade box cars?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Examiner Hoy. Any further questions from the witness?

Redirect examination by Mr. McCollester:

1866 Q. If the freight that is handled in higher type box cars moved by break bulk route, it requires two of those cars instead of one via Seatrain, is that right?

A. That depends on the types.

Mr. McCollester. All right.

Examiner Hoy. Any further questions?

Mr. Fort. Not on the break bulk line.

Examiner Hoy. Wait a minute, you are getting all this in the record.

Mr. Fort. I want in the record.

Examiner Hoy. Have you any further questions?

Mr. Fort. No, I have nothing further.

Examiner Hoy. Are there any further witnesses to be heard in this proceed? You are excused.

(Witness excused.)

Mr. McCollester. Mr. Examiner, I have one question to bring out, which is not of a witness.

At the hearing on January 25th, in this proceeding, Mr. Pierson, speaking for some or all of the defendants, it is hard to know in this proceeding for whom counsel speak——

Mr. Fort. What page is that?

Mr. McCollester. Page four, it ought not to have been, but it was page 4 of the minutes of the hearing on January 25th.

Examiner Hoy. Well, they have since then renumbered them?

1867 Mr. McCollester. Well, I haven't got that. He testified— that a further——

Mr. Eshelman. You say a person did testify?

Mr. McCollester. No, he stated. I will take that back—further reason for postponement, he was asking for a postponement—is, the Examiner will recall that as the fact, is the fact that the questions here presented will be subject to—will be the subject of consideration by the Board of Directors of the Association of American Railroads on January 27th.

Car service matters under consideration are of broad national interest, etc. Then, he says the action taken by the Association will probably be adopted and followed by all of the car owning lines, and if so, the principal witnesses will be furnished by the Association. The Association witnesses are not in a position to express any views with respect to the issues presented until such time as the Association has considered the matter and acted.

I should have said, in one portion, I tried for brevity to skip, "Mr. Pierson said this also, that the said, the Commission should have before it the results of consideration by the Association of American Railroads," rather than the individual views of a limited number of lines.

Now, partly for that reason, Mr. Examiner, and partly for another reason, I make a request of the Association of Ameri-

1868 can Railroads as intervenor in this proceeding, that there be produced for the record here the minutes, or the original resolution, if any, of the directors adopted at the meeting referred to by Mr. Pierson on January 27, 1939, and as to its relevancy in the proceeding, I make this point, apart from the question previously discussed as to the propriety of the Association being in the proceeding at all.

I have reason to think, but of course cannot state this, that I think the Commission should find out from the production of the original resolution and the minutes, that the action of the directors of the Association will indicate that in appearing here for the purpose, presumably, of advocating some higher compensation, or some particular terms and conditions under which the railroads shall be required to interchange the cars with Seatrain, it is not for the purpose of securing additional compensation for the cars themselves, on the ground that the existing compensation is inadequate, but, is for the purpose of making the operations of Seatrain more burdensome, by imposing additional expense upon it, and that that is sought because the Seatrain is regarded as a competitor and it is desired to make the operations of the competitor more burdensome.

Now, if that should be the fact, I think the Commission should know it, because this is not a rate case, in which admittedly the motives, pursuant to which a particular rate is published, are of no concern, provided the rate is reasonable.

1869 This is a case in which the question is under all of the circumstances, what compensation are car owners entitled to receive for their cars, and if they are seeking, through the means of the Association, higher compensations for Seatrain, not to make them for the benefit of their cars, for the use of their cars, but to make Seatrain a less effective competitor, because of imposing a greater financial burden upon it, then, I think that bears upon the compensation which they are entitled to receive for their car.

Mr. FORT. Mr. Examiner, this same motion has been made two or three times, argued two or three times, there is nothing new in the way it is presented now, because of its possibility as to motive, it couldn't have any bearing on any question before the Commission, which is that of a just and reasonable charge determined by considerations bearing upon that.

Examiner HOY. Well, the Examiner feels the motion is substantially the same or the previous motions that I denied and he will deny this motion for the same reason.

Mr. LARIMORE. I want to make this statement, Mr. Examiner, before you pass on that. Does the Association of American Rail-

roads have—The Association of American Railroads have come in here, has thrown the weight, the great weight of its influence in this case as an association. And I think if that is true,
1870 the case goes beyond an ordinary controversy and I think the motives of the Association, or certain members of the Association, responsible for this resolution, should be before the Commission for the purpose of determining what weight the Commission should give to testimony offered by such association, and I think it is very material that this resolution be furnished in this case.

Now, of course, I have got the resolution and I can furnish it, but I have more regard for the fitness of things, and the Association has told the Missouri Pacific Railway Company and I am not going to produce it for that reason.

Examiner HOY. I don't think we need to prolong the discussion, the Examiner has made his ruling and he is adhering to it.

Mr. MCCOLLESTER. May I have an exception?

Examiner HOY. Have the record note an exception, for Mr. McCollester. Now, there is one other question here and that is, who is entitled to the free copies of the transcript in this proceeding?

Mr. FORT. There is one other question, Mr. Examiner, before that, I think.

Examiner HOY. All right.

Mr. FORT. On page 331 of the report in Docket 25565, the so-called investigation of Seatrain Lines, Inc.——

Mr. WARE. Which volume?

Mr. FORT. 205 I. C. C., the Major devotes several para-
1871 graphs, in fact, about a page and three-quarters, under an appropriate heading, do the interests of applicants in Seatrain—applicants in that case—following the lead, which Mr. McCollester made, I would ask him whether those facts are still true, and if not, what change has been made in those facts.

Mr. LARIMORE. I object to that, because certainly that doesn't determine any per diem, that is just as far off the motive that I tried to get into this case held by the Association.

Mr. MCCOLLESTER. Those facts, Mr. Examiner, were dealt with in the report, because this report was a combination report on the application of Missouri Pacific and Texas Pacific for stock ownership, and this particular complaint proceeding.

Now, this complaint proceeding should never have been combined in that report, and we objected to it at the time. Those facts are not in it, not pertinent to the issues in this proceeding.

Examiner HOY. Weil, otherwise, I take it your answer is you will not stipulate.

Mr. MCCOLLESTER. I will not stipulate.

Mr. FORT. We are going to close the record.

(Discussion off the record.)

Examiner HOY. It is understood that the free copies of
1872 the transcript shall go to Mr. McCollester for the complainant and to Mr. Healy for the defendants.

Now, briefs will be due May 15th and the record is closed.

(Thereupon, at 4:30 o'clock p. m., the hearing closed.)

Exhibit 50

Witness Tassin

1873 Docket Nos. 25728 and 25878

1874 *Car service statistics*

I. CAR SUPPLY IN THE UNITED STATES

[The typical freight car supply of the United States approximates 2,000,000 cars]

Number of years	Millions of cars	Years in which available
6	2.7	1923, 1924, 1925, 1926, 1927, 1928.
5	[1] 2.6	1921, 1922, 1929, 1930, 1931.
1	[2] 2.5	1932.
1	2.4	1933.
1	2.3	1934.
1	2.2	1935.
2	2.1	1936, 1937.

[1] Typical.
[2] Average in aggregate.

II. AVERAGE NUMBER OF FREIGHT CARS ON LINE OF FIRST CLASS RAILROADS DAILY

Number of years	Millions of cars	Years in which on line
8	[1] 2.5	1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930.
4	[2] 2.4	1921, 1922, 1931, 1932.
1	2.3	1933.
1	2.2	1934.
1	2.1	1935.
1	2.0	1936.
1	1.9	1937.

[1] Typical.
[2] Average in aggregate.

1875 III. CAR DEMAND IN THE UNITED STATES

[Typical carloadings in the United States over the past 17 years, figure out 48,000,000 in round numbers, considering good and bad years alike. The period average in the aggregate is 46,000,000 carloads]

Number of years	Millions of carloads	Years in which originated
2	58	1926, 1929.
2	56	1927, 1928.
2	55	1923, 1925.
1	53	1924.
1	50	1930.
	48	Typical carloading—average in aggregate.
1	46	1922.
1	44	1937.
1	42	1936.
1	41	1921.
1	40	1931.
2	35	1934, 1935.
1	32	1933.
1	30	1932.

[Computed on basis of tens of millions carloads, the statistical inference is that 1922, 1924, and 1930 may be safely accepted as fairly normal years, based on past experience over a representative term of good and bad years alike]

Number of years	10 million carloads	Years in which originated
6	6	1923, 1925, 1926, 1927, 1928, 1929.
3	5	1922, 1924, 1930.
6	4	1921, 1931, 1934, 1935, 1936, 1937.
2	3	1932, 1933.

1876 IV. CAR TURN-OVER IN THE UNITED STATES

A. AVERAGE LOADS PER CAR PER YEAR

Number of years	Loads per car	Years in which experienced
1	22	1929.
5	21	1923, 1926, 1927, 1928, 1937.
2	20	1925, 1936.
2	19	1924, 1930.
1	18	1922.
3	15	1921, 1931, 1935.
1[1]	14	1934.
1[2]	13	1933.
1	12	1932.

[1] Typical.
[2] Average in aggregate.

B. AVERAGE DAYS ELAPSED BETWEEN LOADS

Number of years	Car turnover (days)	Years in which experienced
1	30	1932
1	28	1933
1	24	1934
3	23	1921, 1931, 1935
1	[1] 20	1922
2	[2] 19	1924, 1930
2	18	1925, 1936
6	17	1923, 1926, 1927, 1928, 1929, 1937

[1] Average in aggregate.
[2] Typical.

V. AVERAGE HAUL IN THE UNITED STATES

Number of years	100 miles	Years in which experienced
1	3.5	1932
5	3.4	1933, 1934, 1935, 1936, 1937
1	3.3	1931
3	[1] 3.2	1928, 1929, 1930
4	3.1	1922, 1925, 1926, 1927
3	3.0	1921, 1923, 1924

[1] Average in aggregate and typical.

VI. AVERAGE SPEED OF FREIGHT TRAINS IN THE UNITED STATES

Number years	Miles per hour	Years in which experienced
4	22	1934, 1935, 1936, 1937
2	21	1932, 1933
1	20	1931
1	18	1930
	[1] 19	
2	[2] 17	1928, 1929
1	16	1927
2	15	1925, 1926
2	14	1921, 1924
2	[3] 13	1922, 1923

[1] Typical.
[2] Average in aggregate.

VII. AVERAGE HOURS PER AVERAGE HAUL

Number of Years	Road hours per car	Years in which experienced
2	24	1922, 1923
2	22	1921, 1924
3	21	1925, 1926
1	20	1927
2	[1] 19	1928, 1929
	[2] 18	
3	17	1930, 1931, 1932
1	16	1933, 1935, 1936
2	15	1934, 1937

[1] Average in aggregate
[2] Typical
[3] hour hours, of course, are those applicable to the trains in which these cars were hauled.

1879

APPENDIX A

CAR SUPPLY AND DEMAND IN THE UNITED STATES

(1)	(2)	(3)	(4)	(5)	(6)	(7)
1921	2,408,597	1 225,000	2,633,597	1,017,818	24.00	41,374,713
1922	2,382,330	226,604	2,608,940	1,111,822	24.31	45,735,171
1923	2,410,077	1 245,000	2,655,077	1,385,755	25.18	55,113,384
1924	2,443,005	262,725	2,705,730	1,287,413	24.47	52,611,892
1925	2,445,408	269,326	2,714,734	1,351,155	24.55	55,036,864
1926	2,435,269	288,603	2,723,872	1,439,612	24.96	57,676,763
1927	2,409,864	288,446	2,698,310	1,372,547	24.60	55,794,360
1928	2,377,639	288,592	2,666,231	1,371,359	24.31	56,411,312
1929	2,353,918	286,979	2,640,897	1,419,383	24.52	57,886,746
1930	2,352,046	291,341	2,643,350	1,220,134	24.28	50,252,630
1931	2,275,137	282,572	2,557,709	944,846	23.44	40,309,130
1932	2,213,266	323,323	2,536,589	678,854	22.56	30,591,046
1933	2,099,948	311,732	2,411,680	733,391	23.26	31,530,138
1934	1,999,386	306,664	2,306,050	802,276	23.19	34,595,774
1935	1,892,375	295,664	2,188,039	831,656	23.49	35,404,693
1936	1,813,835	287,902	2,101,497	1,011,530	24.32	41,592,516
1937	1,709,896	280,658	2,060,554	1,075,237	24.68	43,567,139
Total	38,111,992	4,770,901	42,882,893	19,050,788	24.28	784,084,502
Average	2,241,882	280,641	2,522,523	1,120,988	24.28	46,175,559

(1) Year.
(2) Freight-train cars in service (excluding caboose cars), classes I, II, III, and switching and terminal companies.
(3) Summary of freight-carrying cars not directly owned or leased by steam railways.
(4) Available car supply in the United States.
(5) Revenue tons originated by classes I, II, and III roads (thousands).
(6) Revenue ton-miles per loaded car-mile.
(7) Estimated car demand in the United States.
1 Estimated.

Source: Statistics of Railways in the United States.

1880

APPENDIX B

(1)	(2)	(3)	(4)	(5)	(6)	(7)
1921	16	23	304.11	38,682,702	536,387	13.87
1922	18	20	307.77	42,188,465	561,219	13.30
1923	21	17	299.94	49,572,219	646,734	13.05
1924	19	19	304.44	43,172,063	605,800	14.03
1925	20	18	308.93	42,578,813	617,967	14.51
1926	21	17	310.81	42,982,187	637,980	14.84
1927	21	17	314.77	39,680,992	615,917	15.52
1928	21	17	318.00	36,783,187	607,842	16.52
1929	22	17	317.17	36,076,297	613,694	17.01
1930	19	19	316.21	29,538,012	539,623	18.27
1931	16	23	329.23	23,508,440	466,038	19.82
1932	12	30	346.63	18,763,587	392,743	20.93
1933	13	28	341.77	18,588,073	395,703	21.29
1934	15	24	336.91	19,471,356	424,140	21.78
1935	16	23	341.05	19,546,070	430,051	22.00
1936	20	18	337.29	22,500,557	486,341	21.61
1937	21	17	337.43	22,844,354	501,067	21.90
Total	18	20	319.25	546,487,464	9,079,876	16.61
Average	18	20	319.25	32,146,321	534,110	16.61

(1) Year.
(2) Average loads per car per year.
(3) Average days elapsed between loads.
(4) Average haul in the United States.
(5) Total freight train hours (excluding train switching).
(6) Total freight train miles (thousands).
(7) Average freight train speed.

Source: Statistics of Railways in the United States.

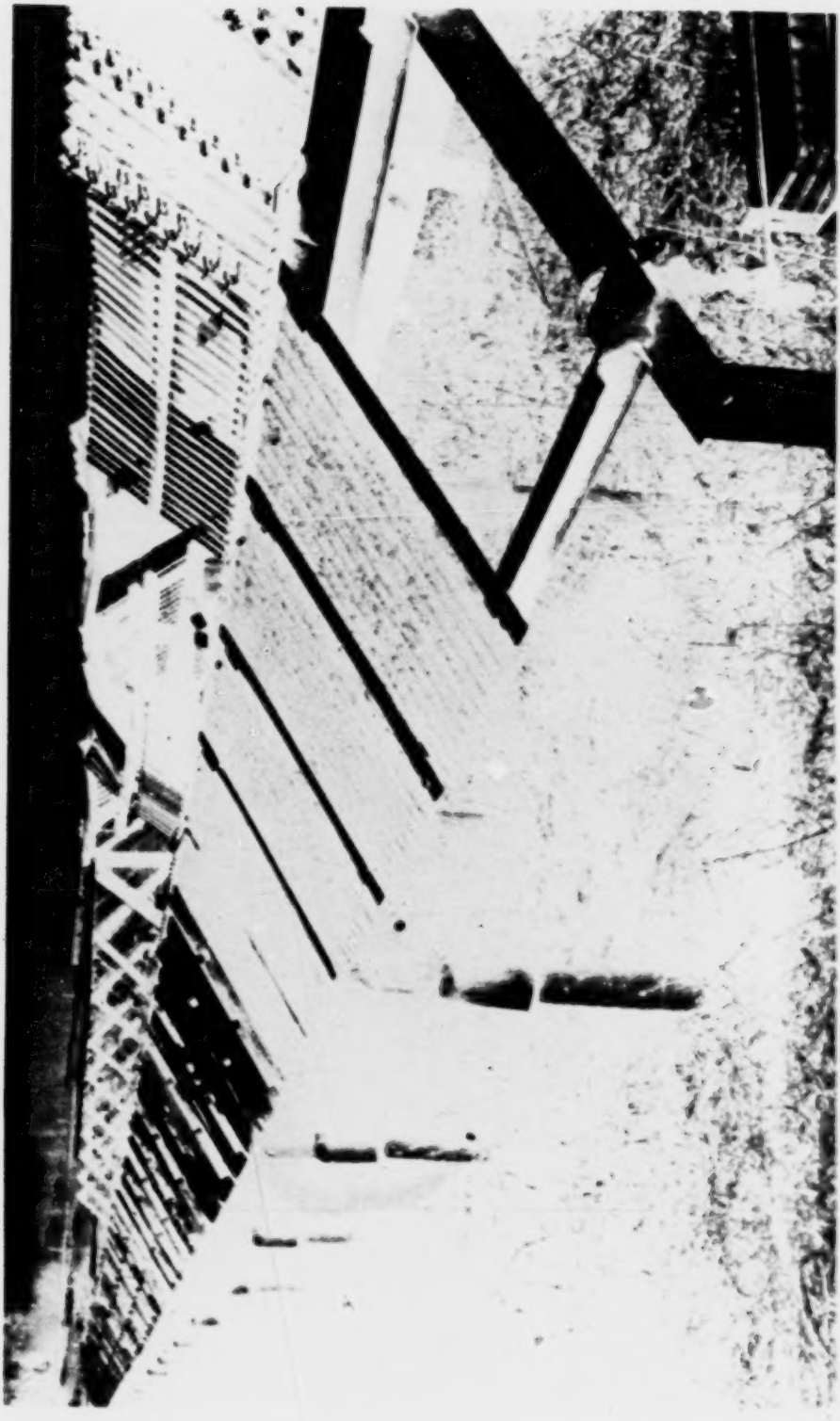
[888] APPENDIX C

A STATISTICAL STUDY, CLASS I RAILROADS IN THE UNITED STATES, AVERAGE NUMBER OF FREIGHT CARS ON LINE DAILY, YEARS 1921 TO 1937, INCLUSIVE

Year	Total	Serviceable	Unserviceable	Percent unserviceable to total
1921	2,422,669	2,103,408	319,261	13.18
1922	2,428,719	2,117,614	311,105	12.81
1923	2,490,942	2,264,324	186,618	7.99
1924	2,509,881	2,310,879	199,002	7.93
1925	2,527,427	2,332,017	195,410	7.73
1926	2,529,782	2,390,381	139,401	5.51
1927	2,509,495	2,361,992	147,503	5.88
1928	2,476,742	2,323,179	153,563	6.20
1929	2,465,625	2,318,262	147,363	5.98
1930	2,466,614	2,314,193	152,421	6.18
1931	2,437,139	2,244,409	192,730	7.91
1932	2,362,417	2,111,993	250,424	10.60
1933	2,273,744	1,951,645	322,099	14.17
1934	2,159,105	1,844,361	314,744	14.58
1935	2,054,957	1,767,094	287,863	14.01
1936	1,983,959	1,712,124	251,835	12.82
1937	1,929,761	1,735,250	194,511	10.08
Total	39,978,978	36,203,125	3,775,853	9.44
Average	2,351,705	2,129,596	222,109	9.44

Source: Compilations by Interstate Commerce Commission from "OS" forms.

1882 *Exhibit 49*



1883

Exhibit 51

Witness Kleine

Estimate of repairs to freight cars

		X25 (all-steel) class repairs		X26 (composite) class repairs	
		First 8 years	Second 8 years	First 8 years	Second 8 years
Body—Steel parts: Steel plates, steel side and end sheets, roof, running board saddle, hand hold, ladder treads, side post patches, corner posts and strips, roof butt strips, carlines, hand hold base, bolts and rivets	Material	$92 60	$140 30	$54 96	$140 94
	Labor	83 30	142 80	15 30	27 20
	Overhead	31 15	54 55	2 24	10 77
	Store expense	3 12	10 19	5 80	11 08
		179 97	346 84	78 97	190 08
Underframes, etc.: Body bolsters, side sill splices, door posts, end sills, striking plates, end sill patches, push pole pockets, door track castings, side sill angles, roof angles and painting	Material	26 19	47 27	20 32	38 27
	Labor	31 40	47 67	28 67	37 47
	Overhead	11 74	13 98	5 07	13 98
	Store expense	1 30	3 29	1 94	2 37
		70 63	102 01	56 00	92 09
Wood work: Flooring, lining, wood posts, grain strips, siding	Material	52 80	98 75	127 84	122 02
	Labor	14 35	45 20	26 60	20 86
	Overhead	5 36	5 70	4 72	8 76
	Store expense	1 94	6 76	6 92	11 36
		54 45	96 41	164 14	163 00
Truck repairs	Material	24 67	14 50	14 50	14 50
	Labor	6 03	5 16	5 16	5 16
	Overhead	1 71	91	91	91
	Store expense	1 68	1 86	1 86	1 46
		34 87	22 03	22 03	22 03
Air brakes, etc.	Material	3 10	148 32	10 42	149 32
	Labor	2 70	10 62	3 20	10 62
	Overhead	1 01	5 46	57	5 96
	Store expense	16	7 53	2 11	7 53
		6 97	173 43	16 30	173 43
Couplers: Coupler yokes, check castings, draft gears and keys, etc.	Material	6 10	60 41	2 15	42 54
	Labor	2 80	11 10	10 00	9 25
	Overhead	1 08	4 16	1 77	3 45
	Store expense	31	3 63	37	2 98
		10 29	79 28	14 09	58 22
Total		354 28	818 00	351 53	698 85

New AB brakes

1884 *Exhibit 52*

Witness Kleine

Expenditures due to corrosion

	X25 (All-steel) class repairs		X26 (composite) class repairs	
	1st 8 yrs.	2d 8 yrs.	1st 8 yrs.	2d 8 yrs.
Body—Steel parts and roof	$179.97	$340.84	$78.97	$160.97
Under frame	17.66	25.50	14.00	25.02
Wood work necessary due to steel corrosion	36.30	62.94	54.71	54.33
Total	233.93	435.28	147.68	237.35
Cost per day	.0801	.149	.0506	.083
Average for all-steel car		.115		
Average for composite car			.0606	

BOX CARS

	Class I roads 12/31/37	P. R. R. 12/31/38
Number all-steel cars	207,678	57,322
Number composite steel and wood cars	487,937	17,188
Weighted average cost of repairs due to corrosion	.0806	.107

Phila. 2/25/39.

1885 *Exhibit 53*

Witness Kleine

Running repairs avoided, due to cars not moving

	Percent	Cost per day
Brakes—Inoperative	0.52	$0.0086
Brake shoe keys	.16	.0025
Brake shoes	7.70	.0120
Truck springs	1.7	.0027
Spring shims	.8	.0013
Journal boxes	1.4	.0224
Brake beams (¾ only)	2.7	.0042
Journal box lids	.8	.0013
Journal bearings	3.7	.0592
Wheels and axles	23.2	.0371
Journal wedges	.05	.0008
Couplers	7.1	.0136
Coupler parts	1.6	.0026
Coupler yokes	.8	.0013
Coupler rivets	.8	.0013
Draft gear comp	5.2	.0832
Draft gear parts	2.0	.0032
Safety appliances (½ only)	1.35	.0216
	61.58	.9849

1886

Exhibit 54

Witness Kleine

Running repairs not avoided, due to cars not moving

	Percent	Cost per dia
Air hose	3.6	$0.00576
Angle cocks	.7	.00112
Pipe work	1.5	.00243
Air brakes—Over date	9.8	.01568
Cotters	.3	.00048
Brake beams ($\frac{1}{4}$ only)	.80	.00144
Repacking Journal boxes:		
12 months	1.0	.00160
15 months	4.9	.00784
Safety appliances ($\frac{1}{2}$ only)	1.35	.00216
Lining	1.2	.00192
Flooring	.9	.00144
Running board	2.7	.00432
Reweighing:		
Over 24 months	1.6	.00256
Over 30 months	1.6	.00256
Dead lever guide	.01	.00002
Miscellaneous	6.36	.01017
	38.42	.06151

1887

Exhibit 55

Witness Kleine

History of L. I. R. R. class GRD gondola cars built and retired

Year	Number of cars built	Number of cars retired	Age when retired (years)
1907	64		
1909	20		
1910	100		
1914		1	4.0
1915		12	7.8
1921		1	16.0
1923		5	14.8
1924		4	15.8
1925		3	16.3
1926		4	19.2
1927		3	19.0
1928		60	20.1
1929		18	20.2
1930		28	21.7
1931		10	22.9
1932		6	23.5
1933		3	20.0
1934		15	20.9
1935			
1936		6	20.7
1938		1	28.0
Total	184	180	
Average age of cars retired			20.4

1888

Exhibit 56

Witness Kleine

History of P. R. R. class OR gondola cars built and retired

Year	Number of cars built	Number of cars retired	Age when retired (years)
1902	7,046		
1903	4,467		
1904	227	1	2
1905	4,150	1	1
1906	135		
1907		1	1
1908			
1909	100	1	6
1910		4	7
1911		2	6
1912			
1913		6	6
1914		3	10
1915			
1916		7	12
1917	70	5	14
1918	80	11	13
1919		9	16
1920		10	17
1921		4	17
1922		8	19
1923		7	20
1924		10	19
1925		3	23
1926		6	23
1927		3	24
1928		6	23
1929		10	25
1930		9	25
1931		29	27
1932		15	29
1933		15	30
1934		43	30
1935		1,643	32
1936		397	32
1937		4,342	34
1938		47	34
Total	16,275	6,858	
Average age of cars retired			33

Phila., 2/25/39 301 CT

1889

Exhibit 57

Circular No. D.H—499

ASSOCIATION OF AMERICAN RAILROADS

OPERATIONS AND MAINTENANCE DEPARTMENT

Transportation Division

Code of Car Service Rules—Code of Per Diem Rules

Regulations Governing Placing and Handling of Embargoes

In Effect January 1, 1937

(Supersedes Circular DH-452 and Supplements thereto)

CAR SERVICE AND PER DIEM AGREEMENT

The subscribing railroad company promises and agrees with each railroad company severally which subscribes and files a counterpart hereof with the Secretary of the Transportation Division, Association of American Railroads, that the subscriber will abide by and enforce the rules prescribed for the handling of and settlement for freight cars and included in the Codes of Car Service and Per Diem Rules, promulgated by the Association.

Further, That the subscribing railroad company agrees to the creation of a Car Service Division with plenary powers, as provided in Per Diem Rule 19, and which Division shall be established and maintained at Washington, and shall co-operate with the Interstate Commerce Commission in all car service matters on and between all railroads; and generally to act for the subscriber as its Agent in all such car service matters as fully and as effectually as could the subscriber.

Further, That the said Car Service Division is hereby designated and appointed as the agent of the subscribing railroad company, upon which service of all orders and directions with respect to car service, in accordance with the provisions as to car service of the Act to Regulate Commerce in force at the time, may be made by the Interstate Commerce Commission for and in the subscriber's behalf; a duplicate original of this agreement being filed by the subscriber with the Interstate Commerce Commission to evidence such designation.

This agreement to continue until withdrawn by three months' previous notice in writing to the Secretary of the Transportation Division of the Association.

DEFINITIONS

Home Car.—A car on the road to which it belongs.

Foreign Car.—A car on a road to which it does not belong.

Private Car.—A car having other than railroad ownership.

Home.—A location where a car is in the hands of its owner.

Home Road.—The road which owns a car, or upon which the home of a private car is located.

Home Junction.—A junction with the home road.

Subscriber.—A road which is a subscriber to the Car Service and Per Diem Agreement.

Non-Subscriber.—A road which is not a subscriber to the Car Service and Per Diem Agreement.

CODE OF SERVICE RULES

Rule 1

Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable.

Rule 2

Foreign cars at home on a direct connection must be forwarded to the home road loaded or empty.

If empty at junction with the home road and loading at that point via the home road is not available, they must, subject to Rule 6, be delivered to it at that junction, unless an exception to the requirement be agreed to by roads involved. When holding road has no physical connection with the home road and is obliged to use an intermediate road or roads, to place the car on home rails under the provisions of this paragraph and the car has record rights to such intermediate road or roads, it may be so delivered.

If empty at other than junction points with the home road, cars under this rule may be—

(a) Loaded via any route so that the home road will participate in the freight rate, or

(b) Moved locally in the direction of the home road, or

(c) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road, if to be loaded for delivery on or movement via the home road, or

(d) Delivered empty to home road at any junction point, subject to Rule 6, or

(e) Delivered empty to road from which originally received under load at the junction where received if such road is also a direct connection of the home road, or

(f) Returned empty to the delivering road when handled in switching service.

INTERPRETATIONS

Question: Under Rule 2 can a car, empty at junction with home road, be loaded via the home road via any junction point?

Answer: Yes. (April 30, 1924.)

Question: Does the word "moved" as used in Rules 2 and 3 mean "loaded or empty"?

Answer: Both. "Loaded or empty." (April 30, 1924.)

1899 Rule 3

Foreign cars at home on other than direct connections must be forwarded to the home road loaded or empty. Under this rule cars may be—

(a) Loaded via any route so that the home road will participate in the freight rate, or

(b) Loaded in the direction of the home road, or

(c) Moved locally in an opposite direction from the home road, or delivered to a short line or a switching road if to be loaded for delivery on or movement via the home road, or to a point in the direction of the home road, beyond the road on which the cars are located, or

(d) Delivered empty to road from which originally received, at the junction where received, if impracticable to dispose of them under paragraph (a), (b), or (c) of this rule.

INTERPRETATION

Question: Does the word "moved" as used in Rules 2 and 3 mean "loaded or empty"?

Answer: Both. "Loaded or empty." (April 30, 1924.)

NOTES TO CAR SERVICE RULES 1, 2, AND 3

(A) Car Service Rules 1, 2, and 3 do not apply to cars reconsigned with original lading under duly filed and published tariffs.

(B) 1. All roads interchanging cars at a common point, or within switching limits over their own lines, or an intermediate line or lines, or a car ferry or float within such limits, shall be considered Direct Connections under Rule 2.

2. This information should be published in The Official Railway Equipment Register, and when the interchange is other than over their own rails, the channel through which the interchange is effected must be shown.

(C) The Board of Directors of the Association of American Railroads shall decide as to roads which may be classified as "short line" roads under these rules.

1899 Rule 4.

Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation, without permission of the owners, filed with the Car Service Division.

Rule 5

Empty cars of indirect ownership (Rule 3) to the road requesting the service, may be short-routed at a reciprocal rate of five cents (5c) per mile, plus bridge and terminal arbitraries, with a minimum of one hundred (100) miles for each road handling the car, the road requesting the service to pay the charges.

NOTE A.—Empty cars, other than those specified in the above rule, may be short routed by mutual arrangement between the interested roads.

NOTE B.—"Empty cars, when short routed in accordance with car service rules, should be moved on empty car waybill, the road arranging for the service to pay the charges through bill and voucher plan. Under no circumstances should revenue waybill be issued with charges for such movement." (A. A. R. Finance and Accounting Department Rule.)

INTERPRETATIONS

Question: Does Rule 5 contemplate that a road performing short haul service at the established per mile rate shall assume per diem while such cars are in its possession?

Answer: Yes. (April 30, 1924.)

Question: Does the loading or use of a car being handled under Rule 5 nullify the right of road performing the service to collect for all or any portion of the service rendered?

Answer: Yes. (October 1, 1925.)

Rule 6.

"If a movement of traffic requires return of empty cars to home road via the junction at which cars were deliverd in interchange under load, the home road may demand return of empty cars at such junction, except that cars offered a home road for repairs, in accordance with Division V—Mechanical (M. C. B.) Rules, must be accepted by owners at any junction point.

NOTE TO RULE 6.—Notice of an intent on the part of any road to invoke the provisions of this rule should be issued by the designated transportation officer to the designated transportation officer of the road to which the notice is addressed, such notice to specify the type of cars and particular junction points involved.

Such notice may not limit acceptance to the individual cars previously delivered, but may require the return of an equivalent number of home cars of the type specified, at junction point where delivered loaded.

1892 #### INTERPRETATIONS

1. The words "Movement of Traffic" in Car Service Rule 6 mean the movement regularly, through any junction point of any kind of traffic in (or on) the same class of car.

2. Car Service Rule 6 gives to a railroad which may deliver regularly, to a connection through any junction, traffic of any kind in (or on) its cars of the same class, the right to require connection participating in the handling of traffic from the junction point, to use that point in interchange for the return of the class of empty

cars engaged in the service, instead of returning them at some other junction less favorable to the receiving (owning) railroad. (April 25, 1923.)

Rule 7

Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanies or preceded by proper data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents and per diem after receipt of the proper data* for forwarding and to insure delivery, and until they have been accepted by its inspector or returned to the delivering road.

*NOTE.—The character of the necessary data will be determined by each receiving road in accordance with the conditions of its service.

INTERPRETATIONS

Question: After a car has been accepted by the inspector of the receiving road, is the delivering road relieved from responsibility for damage to car and contents?

Answer: Yes. (June 20, 1924.)

Question: Where a car has been accepted by the inspector of the receiving road, but is not accompanied or preceded by proper data for forwarding and to insure delivery, is the receiving road relieved from responsibility for damage to the car and contents?

Answer: No; but the rule gives the right to receiving road to refuse to accept in interchange cars which are not accompanied or preceded by proper data for forwarding and to insure delivery, and when such cars are not accepted in interchange they are still in the possession of the delivering road. (June 20, 1924.)

1803 *When a loaded freight car containing a shipment destined to a nonagency station (a station at which there is no freight agent), billed collect or insufficiently prepaid, is offered in interchange, it shall be accepted from the connecting carrier and forwarded to destination. (January 25, 1926.)

*NOTE.—Rules of the Freight Claim Division and of the Finance and Accounting Department make provision for the adjustment of freight charges between the originating and the delivering carrier.

Rule 8

The following rates* for the use of passenger equipment shall be in force unless otherwise arranged between the roads concerned:

*These rates do not apply to cars equipped for other than steam operation.

Section A—Joint Service Rates

These rates are to apply when the owners of the cars participated in the business and not when the cars are hired to other lines:

Type of car	Basis of rate		Rate per mile of actual distance	
	Mechanical designation	Length of car**	Other than electric	Electric lighted
Colonist or emigrant	"PE"	All	$0.05	$0.05½
Passenger	"PA" "PB" "PX"	Under 70 ft	.06½	.07
		70 ft. and over	.08	.08½
Buffet	"DB"			
Buffet-lounge	"DL"			
Cafe	"DC"			
Cafe observation	"DO"			
Combined smoking and baggage (club)	"CS"			
Combined baggage and buffet	"CAD"			
Dining	"DA"	All	.08	.08½
Dining and parlor	"DP"			
Grill room	"DG"			
Lounge	"PL"			
Parlor coach	"PBC"			
Passenger, parlor, or chair car	"PC"			
Sleeping car	"PS"			
Tourist	"PT"			
Combined baggage and passenger	"CA"			
Combined baggage, mail, and passenger	"CO"			
Mail and smoker	"MS"	Under 60 ft	.05	.05½
Postal	"MA"	60 ft. and under 70 ft.	.06½	.07
Baggage and mail	"MB"	70 ft. and over	.08	.08½
Combination baggage, mail and express	"MBE"			
Baggage	"BA"			
Baggage express	"BE"			
Express	"BX"			
Horse or horse and carriage express	"BH"	Under 60 ft	.02½	.03
Milk	"BM" "BMR" "BMT"	60 ft. and under 70 ft.	.03	.03½
		70 ft. and over	.04	.04½
Postal	"MP"			
Postal storage	"MR"			

** See page 979

1894

Section B—Per Diem Rates

These rates are to apply when cars are hired at other than mileage rates and when the owners of the cars do not participate in the business; but are subject, however, to agreement between the parties interested.

Type of car	Basis of rate		Per diem rate	
	Mechanical designation	Length of car**	Other than electric	Electric lighted
Colonist or emigrant	"PE"	All	$ 8.00	$8.50
Passenger	"PA"	Under 70 ft	11.00	11.50
	"PB"	70 ft. and over	13.00	13.50
	"PN"			
Buffet	"DB"			
Buffet-lounge	"DL"			
Cafe	"DC"			
Cafe observation	"DO"			
Combined smoking and baggage (club)	"CS"			
Combined baggage and buffet	"CAD"			
Dining	"DA"	All	13.00	13.50
Dining and parlor	"DP"			
Grill room	"DG"			
Lounge	"PL"			
Parlor coach	"PBC"			
Passenger, parlor, or chair car	"PC"			
Sleeping car	"PS"			
Tourist	"PT"			
Combined baggage and passenger	"CA"			
Combined baggage, mail, and passenger	"CO"			
Mail and smoker	"MS"	Under 60 ft	8.00	8.50
Postal	"MA"	60 ft. and under 70 ft	11.00	11.50
Baggage and mail	"MB"	70 ft. and over	13.00	13.50
Combination baggage, mail, and express	"MBE"			
Baggage	"BA"			
Baggage express	"BE"			
Express	"BX"			
Horse or horse and carriage express	"BH"	Under 60 ft	5.00	5.50
	"BM"	60 ft. and under 70 ft	6.50	7.00
Milk	"BMR"	70 ft. and over	8.00	8.50
	"BMT"			
Postal	"MP"			
Postal storage	"MR"			

**Definition: "Length of Car" shall be the measurement over outside facing of buffer plates, with cars uncoupled.

NOTE.—For cars not specifically referred to in Sections (A) and (B), a charge of five (5) mills per car mile (with a minimum mileage of 100 miles per calendar day), shall be made by the road owning the car, against the road handling the car, for the electric lighting equipment, on railroad-owned passenger cars equipped for either axle generator or straight storage battery service.

Section C

A mileage allowance of two and one-half ($2\frac{1}{2}$) cents per mile will govern in the settlement as between railroads, and also as between the railroads and the Railway Express Agency, Inc., for the use of Passenger Express Refrigerator cars (A. A. R. Mechanical Division designations "BP," "BR" and "BS").

1895

Section D

Settlement for the use of railroad owned passenger train box express cars (A. A. R. Mechanical designation "BX")—listed as such in the Official Railway Equipment Register or other official publication, shall be made as follows: If owner delivers such a car to a connection in freight train service, settlement shall be made at the established per diem rate applicable to freight cars until it is returned to owner. If owner delivers such a car in passenger train service, settlement shall be made by the roads handling it in such service at the applicable rate named in Car Service Rule 8, Section A. If such a car leaves home in passenger train service and it is diverted to freight service by another road, the roads handling such diverted car in freight service shall pay to the owner the per diem rate of $1.00 per day for its use and the road which diverted it shall be responsible to the car owner for the difference between the earnings of the car at the applicable mileage rate named in Car Service Rule 8 and the $1.00 per diem rate for freight cars. The car owner shall ascertain the mileage made in freight service and shall present claim for the amount due under this rule, to the road which diverted the car from passenger to freight service.

Section E

The following amounts will be added to the rates named in Sections A and B for the use of Passenger Equipment when provided with Air Conditioning Apparatus:

To rates per mile named in Section A—

(a) Ice System	$0.00[illegible]
(b) Electro-Mechanical or Steam	.01[illegible]

To per diem charges named in Section B—

(a) Ice System	$1.[illegible]0
(b) Electro-Mechanical or Steam	4.[illegible]0

Note.—"All claims covering errors on omissions in allowances on passenger train cars shall be presented after five months and within eight months from the last day of the month in which the mileage or per diem was earned."

1896

Rule 9

When a per diem rate is charged for the use of passenger equipment as provided for in Rule 8, the total number of hours of all cars of the same class shall be calculated on a basis of 24 hours for each day and the charge made accordingly; any fraction of a day over the aggregate number of days of 24 hours each to be counted as one day; it being understood that the minimum charge shall be one day for each car.

When necessary to haul a car empty over the road owning it, or intermediate roads for delivery to a borrowing road, unless otherwise arranged between the roads concerned, the borrowing road shall pay a reciprocal rate of 10 cents per mile for hauling the car, plus bridge and terminal arbitraries, to the point of connection with the borrowing road and return; the charge for the empty haul to be named to the borrowing road at the time the agreement to loan the car is made.

INTERPRETATIONS

Question: In paying per diem for cars under Rule 9, should the aggregate number of hours of all cars hired to another line from time to time during a current month or any other period for which bill is rendered, be taken and divided by the aggregate number of hours by 24 to find the number of days and fractions thereof for a basis of settlement, or should settlement be made on a basis of each individual car?

Answer: It is not the intention to have charges and settlement made on basis of each individual car, but Rule 8 (B) contemplates an agreement between the parties interested for each transaction, and settlement should be made for each transaction in accordance with Rule 9 unless there is an agreement to the contrary. (October 23, 1901, amended June 20, 1924.)

Question: If out of a lot of passenger equipment loaned, one or more cars are returned in less than 24 hours, should a full day be specially allowed for each car so returned?

Answer: Yes. (October 30, 1907.)

Rule 10

Each railroad shall adopt the "National Car Demurrage Rules" as approved by the Association of American Railroads.

1897

Rule 11

(A)—New Cars—Light-Weighing and Stenciling:

(1) All freight cars must be light-weighed and stenciled when new.

(2) The following provisions must be incorporated in contract covering purchase of new equipment.

(a) The accuracy of scale must be certified by authorized scale inspector appointed by car owner.

(b) Each car must be weighed separately and stenciled at car works under the supervision of owner's inspector.

(B)—Periodic Light-Weighing:

All freight cars, except as otherwise provided in Section (C) must be re-light-weighed and restenciled periodically as follows:

(1)

Type of car	First reweighing at expiration of—	Subsequent reweighing	
		At expiration of—	Permissible after—
Wood	15 mo	30 mo	24 mo
Composite wood and steel underframe	15 mo	30 mo	24 mo
Steel underframe, with wood, steel or composite superstructure frame	15 mo	30 mo	24 mo
All-steel open-top cars, including all-steel flat cars	30 mo	30 mo	24 mo
All-steel house and all-steel stock cars	30 mo	30 mo	24 mo
Refrigerator cars	30 mo	30 mo	24 mo

(2) Tank cars and live poultry cars must be reweighed and re-stenciled only by owners or their authorized representatives:

(a) When car bears no light-weight markings.

(b) When weight is changed 300 lbs. or more by alterations or repairs.

(C)—Other Than Periodic Reweighing and Restenciling:

(1) Freight cars (other than tank and live poultry cars), without light-weight markings should be immediately weighed and stenciled, or when materially changed by repairs or alterations, should be immediately reweighed and restenciled.

(2) When any freight car (except refrigerator, tank and live poultry cars), is reweighed and found to vary 300 pounds or more from the stenciled light-weight, stenciling should be immediately corrected.

1908 (3) When any refrigerator car is reweighed and found to vary 500 pounds or more from the stenciled light-weight, stenciling should be immediately corrected.

(4) Tank cars and live poultry cars must be reweighed and restenciled only as provided in Paragraph (2) of Section (B).

(D)—Preparation for Reweighing:

Before reweighing:

(1) The accuracy of scale must be certified by an authorized scale inspector.

(2) Cars must be dry and free from snow and ice.

(3) Floor and hoppers must be clean.

(4) Brine tanks and ice bunkers of refrigerator cars must be empty.

(5) Temporary fixtures, which affect the weight of car, must be removed.

(E)—Method of Light-Weighing:

Cars must be uncoupled and free at both ends.

(F)—Stenciling:

(1) Should be in accordance with A. A. R. Standards for Marking and Lettering of Cars.

(2) Station symbol and date (month and year), must be stenciled on cars when new and each time reweighed and restenciled. On new cars the word "new" may be substituted for station symbol.

(3) When cars are restenciled after reweighing, all old stenciling to be renewed must be obliterated with quick-drying paint. It will be necessary only to renew all light-weight numerals, station symbol, date (month and year), and load limit numerals except as provided in Paragraph 6, Section (f). The capacity numerals and letters "CAPY." "LD LMT" and "LT WT," when indistinct, must be renewed. Light-weight stenciling on ends of cars is not permitted and when shown must be obliterated.

(4) The light-weight stenciling shall be the multiple of 100 lbs. nearest the scale weight, except that when the scale weight indicates an even 50 lbs. the lower multiple shall be used.

(5) The Load Limit, which is the difference between the light-weight and the maximum weight on rail, as shown in Column A of table in A. A. R. Interchange Rule 86, shall be initially stenciled on all cars (except tank and live poultry cars), by car owner. The "load limit" is the permissible weight of lading, in-

cluding weight of temporary fixtures, also brine and ice in refrigerator cars.

Stenciled load limit must not be less than the nominal capacity.

(6) When account structural limitations or other reasons, car owner has reduced the load limit of a car, a star symbol (*), the size of which shall conform to standard lettering for "LD LMT," shall be placed at immediate left of words "LD LMT," and when thus designated the load limit shall be changed only by car owner.

1899 (7) The Nominal Capacity in multiples of 1,000 pounds, shall be initially stenciled on car by car owner and must not exceed the stenciled load limit.

(8) The Cubic Capacity shall be initially stenciled on cars, by car owner, except that such markings are not required on flat, tank, and live poultry cars.

(G)—Reports:‡

When a car is re-weighed and re-stenciled the owner must be promptly notified of the old and of the new lightweights and load limits, and the place and date reweighing and re-stenciling was performed. The proper officer to whom these reports should be made will be designated in "The Official Railway Equipment Register."

‡NOTE.—A Form "A" is provided for general use and a Form "B" for use at points where so many cars are weighed that it is desirable to provide the weighmaster with an indexed report.

Rule 12

The placing of advertisements or banners of any kind upon any freight or passenger car or locomotive (including permanent stakes which are a part of open-top cars), is prohibited except:

(a) Advertisements or banners may be placed thereon for photographic purposes only, while such equipment is at rest on private tracks, or on service tracks of the railroad and when so placed must be removed prior to movement of the equipment, the placement and removal to be by and at the expense of the shipper or consignee;

(b) Advertisements may be painted upon passenger equipment used in special train movements, the expense of painting and removal to be borne by the user.

This does not prohibit the placing of advertisements or banners on the lading or attaching them to temporary stakes used to secure the lading on open-top cars.

NOTE.—See Mechanical Interchange Rule 36 for car cards.

Rule 13

When private tank cars are unloaded, the owner will issue instructions for empty movement to the agent at point of unloading either direct or through consignee. The agent will bill * each car to final destination showing name of the consignee and full route, using standard form of Revenue Waybill; the word "consignee" in this connection signifies the party to whom the empty tank car is forwarded.

*The word "bill" in this connection covers non-revenue billing, which must be on the standard form of way-bill.

1900 Rule 14

§ Unless otherwise agreed, the cost of transferring the lading of freight cars or rearrangement of lading at junction points shall be settled as follows:

First—The delivering road shall pay cost of transfer or rearrangement—

(a) When transfer is due to defective equipment that is not safe to run according to Division V, Mechanical (M. C. B.) Rules, except where the repairs can be made under load as per Division V, Mechanical (M. C. B.) Rule 2.

(b) When transfer or rearrangement of load is due to contents being improperly loaded or overloaded, according to Division V, Mechanical (M. C. B.) Rules, or the Interstate Commerce Commission Regulations for the Transportation of Explosives and Other Dangerous Articles by Freight and by Express, or when dimensions of the lading of open cars are in excess of the published clearances of any of the roads covered by the routing.

(c) When transfer is due to delivering line not desiring its equipment to go beyond junction points.

(d) ** When cars can not pass the approved clearances of the Association of American Railroads.

Second—The receiving road shall pay cost of transfer or rearrangement—

(e) When cars * cannot pass clearances (except as provided in paragraph (d)) or when cars * and lading exceed load limit * or cannot be moved through on account of any other disability of receiving line.

(f) When receiving road desires transfer to save cost of mileage or Per Diem.

(g) When receiving road refuses to accept cars requiring transfer or adjustment of load under Item (e), the delivering road may effect transfer or adjustment and render bill to receiving road, unless otherwise agreed. Bills for transfer or adjustment under this Item (g) will include Per Diem incident to delay in acceptance and transfer.

(h) Per Diem for time cars are delayed for transfer or adjustment of load, made under this rule, will not be reclaimed or billed for except as provided by Item (g) unless otherwise agreed.

NOTE A.—Charges for actual labor and material, also for use of wrecking outfit, hoist, derrick, traveling crane or similar facilities used in the transfer or adjustment of lading under this Rule, shall be as provided for in Mechanical Division Interchange Rule 2, and interpretations thereto.

NOTE B.—Bills for work performed under this Rule may be declined if not rendered within one year from the date work is completed.

**Resolution adopted November 20, 1912:

Resolved, That Railways must publish third rail clearances in the publication Railway Line Clearances before they can claim the right to charge cost of transfer under Car Service Rule 15 (present Rule 14), First Section, Paragraph (d), to delivering road on cars which can not pass approved third rail clearances of The Association of American Railroads.

*See Mechanical Division Loading Rule 10.

†See Mechanical Interchange Rule 2.

1901 **Rule 15**

Private freight cars must be marked with reporting marks assigned to the owner by the Association of American Railroads and with the number of the car. Mileage settlements must be made with the owner only, in accordance with the provisions of published tariffs.

Rule 16

Empty cars containing refuse must not be offered in interchange.

Rule 17

When trains of one railroad use the tracks of another in avoiding washouts or other obstructions, unless other arrangements exist between the roads concerned, the detour shall be made under the terms of the Detour Contract approved by the Association, which terms are made part of this rule.*

The road for which the train is detoured shall pay the regular per diem (or mileage), to the owners of the cars in the train, including the road owning the track, if any of its cars shall be in the detoured train. All mileage charges shall be at actual distance over the route used.

*NOTE.—When such contracts are entered into they should be executed on behalf of each company party thereto by an executive officer thereof.

1902 CODE OF PER DIEM RULES

Governing Settlements for the Use of Railroad Owned Freight Cars Between All Common Carrier Railroads, Except as Provided for in Appendices "B" and "C"

Rule 1

The rate for the use of freight cars shall be $1.00 per car per day, which shall be paid for every calendar day except as provided

in Appendix "C" and shall be known as the per diem rate; except that when per diem is not reported to car owner within four months from the last day of the month in which it is earned, the rate, except as provided in Appendix "C," shall be increased fifteen (15) cents per car per day for each six months' period or fraction thereof that report of such per diem is thereafter withheld; provided that the aggregate increase in the rate shall not exceed 60 cents per car per day.

NOTE.—Circular 1991, issued May 29, 1920, and 2020, issued August 25, 1920, apply only to standard refrigerator cars under Mechanical Division designations R. A. and R. S., and provide in part as follows:

"* * * Third.—Railroads owning refrigerators may place them under mileage instead of per diem on 30 days' notice to each carrier, and such arrangement must stand at least one year and then can be changed only on 30 days' notice. * * * Railroads deciding to take this action are requested to notify the Secretary, Transportation Division, Chicago, Ill., of the intention to place their refrigerator cars under mileage instead of per diem, or vice versa. On receipt of such advice, it will be transmitted to all carriers interested."

INTERPRETATIONS

1 (c) Question: Per diem is reported in error to the wrong road, and is not reported to the road owning the car in question within four months from the last day of the month in which the per diem is earned. Does the penalty rate apply in this case?

Answer: Yes.

1903 1 (d) Question: Under Per Diem Rules 1 and 11 does the penalty rate apply in the case of per diem earned during the month of January which is reported in the Per Diem Report for April when the April report is dated to indicate it was rendered in accordance with Per Diem Rule 11, but which was actually mailed by the reporting road after the 40 days allowed by Per Diem Rule 11, that is, after June 9th?

Answer: Yes.

Rule 2

Except as provided in Appendix "C."

Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt shall be disregarded, and payment made for day of delivery.

A road receiving and delivering a car on the same date shall not pay the per diem for that day.

Records of receipt and delivery under this rule shall be those obtained from the reports provided for in Rule 9.

Rule 3

Freight cars must be handled as prescribed by Rules 1 to 6, inclusive, of the Code of Car Service Rules of the Association of American Railroads.

Rule 4

Each railroad, including ferry lines, shall be responsible to the car owner for amounts accruing for the use of a car at the established per diem rate, whether such car is in road or switching service.

INTERPRETATIONS

4 (a) Question: Should new or newly acquired cars en route to owner, empty, under revenue billing be exempt from per diem?

Answer: Yes.

4 (b) Question: Should new or newly acquired cars moving direct to owner, loaded, be exempt from per diem?

Answer: No; except when moving under a tariff provisjon which covers a charge for the transportation of the car itself.

1904 4 (c) Question: Must per diem be paid by a road for the "use" of a car, when it is out of repair, unfit for service, or lying idle?

Answer: Yes, except as provided in Rule 8.

4 (d) Question: When foreign railroad owned freight cars are used in the service of circus or carnival companies, should the roads over which they moved make settlement with car owners in accordance with Per Diem Rules?

Answer: Yes.

Rule 5**

(a) An amount for each car in switching service, including a trap or ferry car, may be reclaimed by each individual switching road from the road for which the service was performed. This amount shall be based upon the average number of days, not to exceed five (5), for cars handled in Terminal Switching Service, including trap or ferry cars, except as otherwise provided in paragraph (b), actually required in such switching service to be determined annually, or at such other periods as may be agreed upon by the roads interested, by an examination of the records* of each

*NOTE.—The examination of records, to determine switching reclaim allowances applicable between short line railroads less than one hundred miles in length, and connecting carriers, shall be supervised by the General Committee, Transportation Division, Association of American Railroads, and that Committee may initiate these examinations.

**NOTE.—When checks for the purpose of establishing or revising arbitraries under the provisions of Per Diem Rule 5 involve roads for which no switching is performed or when checks are made under the supervision of the Association of American Railroads, the cost will be prorated among the interested lines on the basis of the number of cars handled in terminal switching service for each line during the year covered by the check, unless otherwise unanimously agreed.

individual switching road, by the roads interested, for each local territory, except that roads in any local territory may agree to the settlement of terminal switching reclaims on the basis of actual time involved in handling the cars during the month for which the reclaim is made, subject to an agreed maximum number of days on any one car, the reclaim on pick-up and diverted cars shall be determined by a plan to be agreed upon by the interested roads, and the total reclaim for any month shall not exceed an average of five (5) days per car.

(b) An amount equal to the actual per diem accruing on each car loaded with live stock handled in switching service (but not including cars loaded with emigrant movables or exhibition live stock, which are subject to Section (a) of this rule) may be reclaimed by each individual switching road from the road for which the service was performed, provided that such reclaim shall not exceed one (1) day on any one car.

(c) Except as provided in paragraph (d), an intermediate switching road may reclaim one (1) day's per diem only from the delivering road on any car on which per diem accrues while in intermediate switching service; however, a car handled in intermediate switching service which is delayed on the intermediate switching road over midnight of the date received on account of being held under Rule 15 is not subject to intermediate reclaim.

A terminal switching road delivering a car to an intermediate switching road for delivery to a carrier road shall pay the reclaim to the intermediate switching road and may reclaim such amount from the carrier road for which the service was performed.

1905 (d) No reclaim shall be allowed for an interterminal switching movement.

(e) Unless otherwise unanimously agreed to by the interested roads, the Code of Switching Reclaim Rules of the Association of American Railroads shall govern in determining switching reclaim allowances.

INTERPRETATIONS

5 (a) Question: Does Rule 5 apply when switching charge is assessed on a ton instead of a car basis?

Answer: Yes.

5 (g) Question: Carrier road "A" delivers a loaded car to road "B" to be switched by the latter to industry on its line for unloading. Before the car is unloaded and without changing the load in any manner, it is ordered to road "C" where it is unloaded at an industry located on road "C" within the same switching limits. Road "B" receives two switching charges for handling the car, and road "C" also receives a switching charge. Is road "B" entitled to a reclaim from road "A" in view of the fact that the tariff does not provide for a switching charge to

or to

was not unloaded? If not, is road "C" entitled to reclaim from road "A"?

Answer: Road "B" is entitled to reclaim from road "A." The movement from road "B" to road "C" comes within the definition of interterminal switching service and no reclaim should be allowed.

5 (h) Question: Carrier road "A" delivers a loaded car to road "B" for switching movement to consignee. Consignee refuses car on account of quality and car is returned to road "A" to await disposition. Shipper orders car to an industry on road "C" within same switching limits, at which point it is unloaded. Is this an intermediate switch and reclaim due road "C," or should road "B" collect reclaim?

Answer: Road "B" is entitled to reclaim from road "A" for the original in-bound movement. The return movement from road "B" to "A" to "C" was interterminal switching and no reclaim should be allowed.

1906 5 (i) Question: Carrier road "A" delivers a loaded car to road "B" for switch movement to consignee. After car is placed for unloading, carrier road "A" instructs road "B" to re-card car to a point beyond the switching limits via road "C." Is road "B" entitled to a reclaim from road "A" on the in-bound movement and another claim from road "C" for the out-bound movement?

Answer: Yes.

5 (j) Question 1: If a check of the records to establish the reclaim allowance under Rule 5 has not been made within a period of one year and one of the interested roads makes a request for such check, is it the intention of the rule that the check shall be made?

Answer: Unless there is an agreement to the contrary, a road may demand a check of the records to determine the arbitrary reclaim under Per Diem Rule 5 when such check has not been made within a period of one year, and the other roads interested at that point are obligated under the rule to participate in such check. The rules provide that the reclaim made by each switching road shall be based on the average time required by such switching road to switch cars for all roads considered as a whole.

Question 2: If one or more of the roads involved does not agree to join in such check, what action is necessary to secure compliance with the rule?

Answer: (a) If a road performing switching service does not agree to have its records checked, the road making the request may give notice that it will not pay reclaims accruing after the date of such notice. The switching road will have no right to present

further reclaims until a check has been made in accordance with the Code of Switching Reclaim Rules and the revised reclaim allowance established, which shall then apply to reclaims presented in accordance with Rule 13 (a).

(b) If a carrier road does not agree to join in a check to establish a revised reclaim allowance, the switching road may give notice that it will check its records in accordance with the Code of Switching Reclaim Rules and thereby establish its revised reclaim allowance. After the date of such notice, the switching road will have the right to present reclaims in accordance with Rule 13 (a) at such established reclaim allowance.

5 (k) Question: Is the intermediate switching road entitled to reclaim when the car is not handled on a switching charge?

Answer: Reclaim may be made on any car, loaded or empty, on which per diem accrues while in intermediate switching service, except on cars handled under Car Service Rule 5, cars on which the intermediate switching road participates in the freight rate and cars in interterminal switching.

1907 5 (l) Question: When is an empty car, moving over an intermediate switching road considered as an inter-terminal switching service?

Answer: An empty car is considered in inter-terminal switching service—

(a) When, after having been received loaded in inter-terminal switching service, and without having been diverted to other service, it is returned to intermediate road for movement to the originating road, to the owner, or to another road under proper authority.

(b) When furnished and used for loading in inter-terminal switching service.

5 (m) Question: A car moving into a junction point over Road "A" is delivered to Road "B" for handling in terminal switching service in connection with stop or milling-in-transit tariff authority, Road "B" not participating in the freight rate, and the shipment is subsequently delivered by Road "B" to Road "C" for outbound road movement. Should Road "A" pay to the terminal switching road the unloading reclaim and Road "C" pay to the terminal switching road the loading reclaim?

Answer: Yes. However, unless otherwise agreed, adjustments should be made whereby the carrier road for which the service was performed as indicated by its tariff will assume the terminal switching reclaim paid by the other carrier road; the method of settlement to be determined by local agreement.

5 (n) Question: When a car stopped in transit under tariff authority is delivered to a switching road to partly unload or to

complete loading, the switching road being allowed two terminal switching charges, i. e., one for the inbound and one for the outbound movement, is the terminal switching road entitled to two terminal switch reclaims?

Answer: Yes.

Question: In case the shipment moves into the "stop-in-transit" point via one road and out via another road, does Interpretation 5 (m) apply?

Answer: Yes.

Rule 6

NOTE.—Rule 6 applies only to cars interchanged within Canada, Cuba or Mexico.

In case a subscriber to the Car Service and Per Diem Agreement delivers a railroad owned freight car to a non-subscriber, it shall be responsible to the owner for the per diem accruing on the car while on such non-subscriber road. The owner will accept settlement for the use of the car only from the delivering subscriber.

1908 INTERPRETATION

6 (a) Question: If a road is suspended or withdraws from the Car Service and Per Diem Agreement effective December 1st, is it responsible to the car owner for per diem accruing on and after December 1st on cars delivered to such road prior to December 1st?

Answer: Yes; the delivering subscriber road is responsible only for per diem on cars delivered on and after the effective date of withdrawal or suspension.

Rule 7

1. When a car has been destroyed and reported under Mechanical Division Interchange Rules, the per diem shall cease from the date of notice to owner.

2. If, upon receipt from owner of valuation statement provided for by Mechanical Division Interchange Rules showing settlement value of destroyed car, the holding road rebuilds the car, per diem on such car shall cease from the date of notice to the owner of its destruction to date valuation statement is mailed by the owning road.

INTERPRETATIONS

7 (a) Question: Should per diem be allowed on freight cars in July that were totally destroyed in June but not reported to car owners until after July 1?

Answer: Yes.

7. (d) Question: Does Section 2 of this rule apply to any car notice is given and begin again on the day following the date on which valuation statement is mailed by the owning line?

Answer: Yes.

7 (c) Question: Must notice to owner, of destruction of car, be made by the Mechanical Department?

Answer: No. Notice by Transportation Department is also valid.

7 (d) Question: Does Section 2 of this rule apply to any car reported under Mechanical Division Interchange Rule 112 for which settlement value of car has been requested of owner and the car is repaired and restored to service by the holding road after settlement value is received?

Answer: Yes.

1909 Rule 8

(a) When a car is detained awaiting the receipt of repair material, which under Mechanical Division Interchange Rules must be obtained from the owner, the per diem shall cease from the date the necessary material is ordered from the owner until the date on which it is shipped in the manner prescribed by Mechanical Division Interchange Rule 122, as evidenced by carrier's shipping receipt.

(b) When a car is reported to its owner under Mechanical Division Interchange Rule 120, per diem shall cease from date of such report.

If owner authorizes the repair of such car, and no repair material is required from owner, per diem shall begin after repairs are completed, but in no case to exceed 60 days from the date such authority is given. If repair material must be obtained from the owner under Mechanical Division Interchange Rules, per diem shall begin after repairs are completed, but in no case to exceed 60 days from date such authority is given, plus the number of days intervening between the date necessary material is ordered and the date on which material is shipped in the manner provided by Mechanical Division Interchange Rule 122, as evidenced by carrier's shipping receipt.

(c) Under paragraphs (a) and (b), if more than one order for material is made, the first order only shall stop the per diem.

In case all or any part of the material is duplicated by car owner on account of the original shipment becoming lost before delivery to the road holding the car, or while in the possession of the express company, per diem shall cease from the date of the original order until the date on which the duplicate shipment is made as evidenced by carrier's shipping receipt.

INTERPRETATIONS

8 (a) Question: When repair material is ordered, should the car number be sent to owner of the car if per diem is to be waived?

Answer: Yes.

8 (b) Question: Should per diem be paid for the day on which material is ordered and begin again on the day following the date on which material is shipped?

Answer: Yes.

8 (c) Question: Material is ordered from owner under Mechanical Division Interchange Rules, but instead of shipping the material requested the owner authorizes the holding road to substitute other material or to weld old parts. Should per diem cease from the date material was ordered until the date on which authority was given to substitute other material or to weld old parts?

Answer: Yes.

1910 Rule 9

(a) The Interchange Reports shall be made for each calendar day on the prescribed form (B–1)†. Columns 2, 3, 4, 5, and 9 shall be filled. They shall close as of midnight and shall include all cars delivered on the date for which made. For days on which no cars are interchanged the reports shall read "No cars interchanged."

(b) Corrections to Interchange Reports shall be made on the prescribed form (Q) immediately upon the discovery of errors in reports which have already been forwarded to Car Service Officers; otherwise corrections to be made on all copies of Interchange Reports before forwarding.

(c) Both Interchange and Correction Reports shall be made in quadruplicate by the use of carbon paper, two copies for each road involved, and shall be numbered consecutively for each connecting line, commencing with the first of each month; a separate series of numbers to be used for each form of report.

(d) The report shall be signed by the proper representative of the delivering road and certified to by the proper representative of the receiving road after checking. The original with one copy shall be returned to the road making the report.

(e) Car Service Rule 7 governs the delivery of cars. The date and time of delivery of cars upon interchange tracks of connecting line shall, prima facie, be the date and time given by the delivering road. In cases where there are different standards of time at a junction, the time of the more easterly reckoning shall govern.

† Resolution adopted May 20, 1914; amended April 8, 1925:

Resolved, That two weights of paper be used for the Interchange Report, Form No. B–1, as follows:

First. That the main report, which is filed intact, be printed on a good quality of bond paper of the basis of 14 lbs. to the ream of 500 sheets of the size, 17 by 28 in.

Second. That the sheets which are to be cut up, be printed on a good quality of bond paper of the basis of 25½ lbs. to the ream of 500 sheets of the size, 17 by 28 in.

† Recommendation approved February 15, 1932:

"With a view to economy, it is recommended by the Committee on Records, and approved by the General Committee, Transportation Division, that a form (B–1) providing spaces for eight (8) cars be adopted for use at interchange stations where but few cars are interchanged, retaining the present form (B–1) which provides spaces for twenty-two (22) cars for use at the large interchange points."

1911

Rule 10

The Junction Report for each day shall be made to car owners on the prescribed form (D) or on the cut-up interchange slips, as promptly as possible after the receipt of the Interchange Report for that day, but not later than the close of the second working day following the receipt of the Interchange Report.

INTERPRETATION

10 (a) Question: Must junction reports be made to car owners daily?

Answer: Yes.

Rule 11

(a) Within forty (40) days after the end of each calendar month, car owners shall be furnished for that month with a Per Diem Report on form (G) showing the number of days, except as provided in Appendix "C," each per diem car has been in possession of the road making the report. Only one report shall be furnished for each month. Except as provided in Appendix "C," a car earning 0 days need not be reported. Errors and omissions must be adjusted in the report for a subsequent month.

A report shall be made on form (H) showing the total mileage and earnings accruing on railroad owned freight refrigerator cars operated on a mileage basis and the total passenger equipment car mileage earnings.

(b) Claims covering errors or omissions in Per Diem Reports shall be presented after five (5) months and within eight (8) months from the last day of the month in which the per diem was earned, but such claims shall not be presented until all amounts previously reported have been properly credited. Per diem al-

lowed in error may be deducted in per diem reports within five (5) months from the last day of the month for which the per diem was reported as having been earned, without requesting authority from car owner, but such deduction shall not be made after that period except by presentation of claim in accordance with this rule.

A claim presented in accordance with this rule, including a claim presented to wrong road, may be continued after the period named even though the claim should eventually rest upon some road other than the one originally addressed, except that the privilege of continuance shall cease when claimant fails to return claim or present it to another road within a period of two (2) months from the last day of the month in which such claim is last received by claimant.

Per diem reported and subsequently deducted in accordance with this rule, cancels such per diem and leaves the owner road in the same position as if the per diem had never been reported.

Claims covering errors or omissions in reports of mileage earnings of railroad owned freight refrigerator cars shall be presented within two (2) years from the last day of the month in which the mileage was earned.

1912 (c) The road receiving a claim shall promptly adjust, or handle as follows, and such claims shall not be transmitted by the road which delivered the car to connecting road until the interchange record has been established:

1. All records shown in a claim for per diem shortage should be verified by claimant before presentation, and when claim is made against a direct connection reference to interchange, sheet and line number should be shown.

2. If complete junction reports have not been received, claim should be filed against the road having apparently failed to furnish a report, and claimant should show in proper column that such information has not been received.

3. If complete junction reports have been received, claim should be filed against the road which apparently owes the per diem, as indicated by the claimant's record.

4. A claim covering On Hand car should show date of preceding junction movement instead of "OH."

5. A road receiving a claim indicating a difference between its records and that quoted by claimant, or road from which claim is received, should verify its records by reference to interchange reports.

6. If a comparison of the records shown in a claim with the verified records of the road receiving same indicates a difference between its record and that of the claimant as to date of Delivery

to connection, claim should be forwarded direct to the claimant and correct information given.

7. If a comparison of the records shown in a claim with the verified records of the road receiving same indicates a difference between its record and that of the claimant as to date of Receipt from connection, its record should be entered and claim forwarded to such connection attached to Transmittal Form N–1, together with such other information as may be necessary to further the prompt handling of the claim. A copy of each Transmittal Form N–1 should be forwarded to the claimant.

8. If a comparison of the records shown in a claim with the verified records of the road receiving same indicates a difference between its record and the record of the road with which the car was interchanged, the claim should be handled to a conclusion by such roads and a copy of each Transmittal Form N–1 forwarded to the claimant.

9. If a comparison of the records shown in a claim with the verified records of the road receiving same indicates that it owes a part of the per diem and it is necessary to forward the claim to connecting line for further handling, the acknowledgment of the indebtedness and the month in which allowance will be made should be shown on the Transmittal Form N–1, and copy sent to claimant.

10. The road to which a per diem claim is addressed must take up all necessary questions relating thereto with its connec-
1913 tions and in case of dispute as to date of interchange, determine the responsibility for the per diem due, the road acknowledging responsibility to advise claimant direct. In case of dispute in date of interchange the receiving road will accept the delivering road's date or furnish proof to the contrary.

11. When a road claims no record the responsibility for establishing the fact of delivery shall rest upon the delivering road.

(d) When per diem has been reported to other than car owner under incorrect initials or number or for the wrong month, which fact is developed in the investigation of a claim, the reporting road shall be responsible to car owner for per diem earned at the increased per diem rate in accordance with Rule 1, and shall have the privilege of continuing such claim for refund of per diem (excluding penalty) from the road to which it was incorrectly reported.

When per diem has been reported to car owner on a car under incorrect initials or number, or for the wrong month, which fact is developed in the investigation of a claim, the reporting road shall have the right to transfer such allowance from the incorrect initials or number to the correct initials or number, or from the wrong month to the correct month, as an offset to the

claim, but will allow to the car owner the penalty rate accruing in accordance with Rule 1, except as provided in Appendix "C."

Rule 12

The settlement of amounts accruing for the use of cars shall be made monthly without regard to reclaims pending.

Rule 13

(a) Terminal and Intermediate Switching Reclaim Statements under Rule 5 shall be prepared separately and presented within three (3) months from the last day of the month in which the per diem accrued, except that supplementary reclaim statements covering errors and/or omissions shall be presented within six (6) months from the last day of the month in which the per diem accrued. Original and supplementary switching reclaim statements shall be allowed as presented within thirty (30) days after receipt.

The road paying a terminal or an intermediate switching reclaim may present a counter reclaim to cover errors or adjustments therein, provided it is presented within three (3) months from the last day of the month in which the reclaim on which counter reclaim is in order, was received.

1914 The privilege of continuance of the counter reclaim shall cease when either road interested fails to return it to the other road within two months from the last day of the month in which it was last received, the delinquent road to be responsible for the unadjusted amount.

NOTE.—Under this rule an intermediate reclaim shall not be supplementary to an original terminal reclaim, nor a terminal reclaim supplementary to an original intermediate reclaim.

(b) Reclaim under Rule 14 shall be presented within six months from the last day of the month in which disposition of car is received by the holding road, except where demurrage adjustment is involved, in which case reclaim shall be presented within six (6) months from the last day of the month in which the demurrage is cancelled or refunded. The road receiving reclaim shall present exceptions to the claimant within four months from the last day of the month in which reclaim was received or allow the amount claimed in the next open Per Diem Report.

The privilege of continuance of reclaim thereafter shall cease when either road interested fails to return it to the other within two months from the last day of the month in which it was last received, the delinquent road to be responsible for the unadjusted amount.

(c) Reclaim under Rule 15 shall be presented within six months from the last day of the month in which cars were delivered by the holding road. The road receiving reclaim shall check and present exceptions to the claimant within four months from the last day of the month in which the reclaim was received and shall allow in the next open Per Diem Report the amount not covered by exceptions.

The privilege of continuance of reclaim thereafter shall cease when either road interested fails to return it to the other within two months from the last day of the month in which it was last received, the delinquent road to be responsible for the unadjusted amount.

(d) The provisions of paragraphs (a), (b), or (c) will not prevent the continuance of any reclaim after the period named if it has been previously opened when the reclaim eventually rests upon some road other than the one originally addressed, except that the reclaim shall be presented to such other road within two months from the last day of the month in which it was last received by claimant. Further handling shall be subject to the provisions of paragraphs (a), (b) and (c).

(e) Reclaims shall be made by the designated officer of the road which pays the per diem to the designated officer of the road from which the allowance is reclaimed, unless specifically agreed by the interested roads to permit the presentation and acceptance of such reclaims by local representatives.

1915 INTERPRETATION

13 (a) Question: Does a blank or "nil" reclaim statement filed by a read with it connection constitute an original switching reclaim?

Answer: No.

Rule 14

Unless otherwise agreed, reclaim for per diem on a car held by reason of a railroad error or shipper's cancellation of order shall be settled as follows, except as provided in Appendix "C":

SECTION 1. On a car held at any point en route to a billed destination, or customs port. (Billed destination or customs port, means any point within the switching limits theeof.)

(a) When a freight car is held at any point en route to billed destination or customs port by reason of a railroad error which prevents proper forwarding or proper tender or delivery, notice to secure disposition of car (see Section 8), shall be sent or given by the holding road prior to midnight of the second day after receipt

of or arrival of car. Upon doing this, the holding road may reclaim against the erring road for an amount at the established per diem rate from receipt of car to and including receipt of proper data. The return of the car to the delivering road prior to midnight of the second day after receipt, instead of holding car and notifying the delivering road, constitutes notice under this rule. If holding road neglects to send or give notice prior to midnight of the second day after receipt of or arrival of car, it will be entitled to reclaim only from the date such notice is sent or given.

(b) If the holding road receives necessary data to enable it to dispose of the car before taking action prescribed in paragraph (a), it is entitled to the same reclaim as though such action had been taken on the date the necessary data is received.

(c) When a loaded car is held en route on order received from another railroad, and such detention is due to railroad error, the holding road will be entitled to reclaim against the erring road, an amount equal to the established per diem rate from the date such car was received at the station where held to and including the date on which disposition is received by the holding road.

NOTE.—Cars delivered contrary to existing embargoes, empty cars delivered for home route in error, empty cars delivered for return loading in error, and cars delivered as empty which contain load or part load are subject to reclaim only when held within the switching limits of station where received.

1916 SECTION 2. On a loaded car held at any point within the switching limits of billed destination or customs port.

(a) When a loaded freight car is held at any point within the switching limits of billed destination or customs port by reason of a railroad error which prevents proper tender or delivery, notice to secure disposition of car (see Section 8), must be sent or given by the holding road prior to midnight of the fifth day after receipt of or arrival of car. Upon doing this, the holding road may reclaim against the erring road for an amount at the established per diem rate from date such car was received at the station where held to and including the date on which disposition is received by the holding road.

(b) If holding road neglects to send or give notice as outlined in paragraph (a), but does send or give notice subsequent to midnight of the fifth day after receipt of or arrival of car, it will be allowed per diem for the first five (5) days, and in addition thereto, per diem for each day from date notice is sent or given to and including the date on which disposition is received.

(c) If the holding road receives necessary data for tender or delivery of car before taking action prescribed in paragraph (a) or (b), it is entitled to the same reclaim as though such action had been taken on the date the necessary data is received.

SECTION 3. Errors involving nonsubscribed railroads in Canada, Cuba and Mexico.

(a) When detention is caused by error of a nonsubscribed, responsibility for per diem involved shall be assumed by the subscriber accepting the car from the nonsubscriber.

The nonsubscriber road shall be responsible to its subscriber connection for the per diem involved.

(b) When a car is held on nonsubscriber railroad because of railroad error on the part of a subscriber the delivering subscriber shall relieve the nonsubscriber of the per diem involved and may reclaim under this rule from the erring road.

NOTE.—Under this section the procedure covering notification, etc., prescribed in Sections 1, 2, and 8 shall govern.

SECTION 4. Errors involving railroads subject to per diem settlement as prescribed in Appendix "B":

(a) When detention is caused by error of such railroad, per diem involved shall be paid by the carrier responsible for the settlement of per diem with the car owner and billed against the erring road.

(b) When a car is held on such railroad because of an error not its own, the carrier responsible for the settlement of per
1917 diem with the car owner shall relieve such railroad of the per diem involved any may reclaim under these rules against the railroad responsible for the per diem.

NOTE.—Under this section the procedure covering notification, etc., prescribed in Sections 1, 2, and 8 shall govern.

SECTION 5. Empty cars rejected by shipper:

When a car is delivered empty to a switching road for return loading and is returned empty by reason of shipper's cancellation of order or rejection by shipper because unsuitable for loading as specified by the switching road, the switching road may reclaim against the road which furnished the car, for an amount at the established per diem rate accruing from receipt of car to its return, but not to exceed three (3) days.

SECTION 6. On a car handled in terminal switching service:

The reclaim accruing under this rule of a car handled in terminal switching service, can only be made for the detention in excess of the reclaim allowable under Per Diem Rule 5.

SECTION 7. On a car held by reason of an improper or improperly applied permit to an embargo:

(a) When a road laying an embargo refuses to accept a car account improper or improperly applied permit to its embargo, it shall notify holding road, stating its exception to the permit, prior to midnight of the second day from date the car is delivered or tendered with necessary data for forwarding. If it neglects to give such notice, it shall be resonsible for per diem for the number of days the car is held.

(b) When such notice of exception is sent or given to the holding road, it shall be sent or given by the holding road to the road to which the shipment originated, or was reconsigned or rebilled, prior to midnight of the second day after notice of exception is received. Upon doing this the holding road may reclaim against the road responsible for detention to the car, account improper or improperly applied permit, an amount at the established per diem rate, from date car is originally tendered, under paragraph (a) of this rule or under Per Diem Rule 15, to and including the date authority for delivery or disposal order is received.

(c) If the road holding car receives notice of exception from the road laying an embargo and neglects to send or give notice of exception to the road on which the shipment originated, or was reconsigned or rebilled, prior to midnight of the second day after notice of exception is received, it will only be entitled to reclaim from the date on which the notice of exception is sent or given to the road on which the shipment originated, or was reconsigned or rebilled.

SECTION 8. Notices:

(a) Under Section 1, 2, 3, or 4 when a notice is sent or given to other than the erring road, or under Section 7 when notice of exception to permit is sent or given by the holding road to 1918 other than the road responsible for detention to the car, and it is necessary for the road receiving the notice to transmit it to the erring road or the road from which the car was received, such notice must be sent or given not later than the next calendar day following its receipt. This procedure must be followed by each road involved until the erring road has been notified. When part of the detention to the car is chargeable to the neglect of a road to so transmit notice, the erring road may reclaim from such road for the number of days in excess of one (1) that the car was delayed due to such negligence.

(b) The notice under Section 1, 2, 3, 4, or 8 (a) of this rule shall be sent or given either by telegraph, by messenger in writing, or by telephone confirmed in writing, the same or following day, either to the agent or proper officer of the delivering or erring road, or may be sent to the agent at station where last reconsigned or rebilled, or if not reconsigned or rebilled, then to the agent at point of origin as indicated by the billing. Such notice must contain sufficient information to enable the erring road or the road to which notice is sent or given to identify the car and furnish disposition.

(c) The notice under Section 7 (a) of this rule shall be sent or given either to the agent or proper officer of the delivering road. The notice under Section 7 (b) shall be sent or given either to the agent of the road at the point where the shipment originated or

was reconsigned or rebilled, or to the proper officer of such road. Notices shall be sent or given either by telegraph, by messenger in writing, or by telephone confirmed in writing, the same or following day.

SECTION 9. General:

Rule 14 applies only to cars of railroad ownership handled on per diem basis including owner's cars on owner's tracks, but it does not apply to cars bunched in transit, cars detained on account of weather interference or cars refused by consignee due to delay or damage in transit.

Rule 15

Except as provided in Appendix "C":

(a) A road failing to receive promptly from a connection cars on which it has laid no embargo, shall be responsible to the connection for the per diem on cars so held for delivery, including the home cars of such connection.

A road failing to receive promptly from a connection empty cars at home on its road, moving home under Car Service Rules, shall be responsible to the connection for double the per diem on such cars held for delivery after the first day for which reclaim is made.

(b) If such failure to receive shall continue for more than three days, the delinquent line shall thereafter in addition be responsible for the per diem on all cars wherever in transit which are thus held back for delivery.

1919 (c) It shall be the duty of the connection intending to reclaim to notify the delinquent line daily, prior to midnight, through the designated representative at the point where cars are offered, of the total number of cars so held for it, and within 48 hours from midnight of the day cars are offered furnish the initials and numbers of the cars.

(d) The reclaim accruing under this rule on a car handled in terminal switching service can only be made for the detention in excess of the reclaim allowable under Per Diem Rule 5.

(e) When the hour at which the receiving road clears the interchange track is so late that the delivering road cannot place on interchange track before midnight, cars which it is holding for delivery, the receiving road shall be responsible for the Per Diem on such cars for the following day, subject to local agreement as to time required to make delivery.

INTERPRETATIONS

15 (a) Question: In case a car held for a certain road is not delivered to that road, can reclaim be made against such road?

Answer: No.

15 (b) Question: Is it necessary to furnish initials and numbers of cars held which have previously been reported by initials and numbers?

Answer: No.

15 (c) Question: When a road cannot accept cars from a connection is it necessary for the connection to notify the delinquent line before midnight each day of the total number of cars held for which reclaim is to be made?

Answer: Yes.

15 (d) Question: When a road has invoked the provisions of Car Service Rule 6 and cars are offered to that road at another junction point, is the holding road entitled to reclaim under Per Diem Rule 16?

Answer: No.

Rule 16

(a) When a road gives notice that for any reason it cannot accept cars in any specified traffic, thereby laying an embargo, it should receive cars already loaded (see Note 1) with such traffic on the date such notice is issued, and cars loaded (see Note 1) within forty-eight (48) hours thereafter. If it does not receive such cars the road holding them may reclaim per diem under Rule 15 from the road laying the embargo for the number of days such cars are held, not exceeding the duration of the embargo. (See Note 2.)

1920 (b) Embargoes must be issued by the embargoing road in accordance with the provisions of the Embargo Regulations* as approved by the Association of American Railroads.

(c) Forty-eight (48) hours after 11:59 p. m. of the date of the embargo a road must not load, or permit to be loaded, cars in such traffic; nor accept orders to divert or reconsign cars already loaded.

(d) An embargo may not be laid on empty cars returning home in accordance with the Car Service Rules.

NOTE 1.—The date of loading, diversion or reconsignment to be determined from the data accompanying the car.

NOTE 2.—For per diem reclaim regulations applying to cars refused account improper or improperly applied permits to embargoes—see Rule 14, Section 7.

Rule 17

To interpret these rules and to settle disputes arising under them an Arbitration Committee of five members shall be appointed by the General Committee, Division II—Transportation. Three members of the Arbitration Committee shall be a quorum.

* See page 48.

In case any question or dispute arises under these rules it may be submitted to the Arbitration Committee through the Secretary of the Association in abstract. The abstracts shall briefly set forth the points at issue and each party's interpretation of the rules upon which its claim is based. The Arbitration Committee shall base its decisions upon the rules and the abstract submitted, and its decisions shall be final. Should one of the parties refuse to furnish the necessary information, the Arbitration Committee shall use its judgment as to whether it can properly decide. All decisions shall be reported to the Association through the General Committee, Division II—Transportation.

In case a question shall arise not covered by the rules the roads disagreeing may by mutual consent submit such questions to the Arbitration Committee.

The General Committee, Division II—Transportation, may appoint a Secretary for the Arbitration Committee, who shall be paid by the Association. The other expenses of the Arbitration Committee shall be divided equally between each of the parties to the dispute and the Association. The minimum charge to each road shall be $10, payable in advance. The expenses shall be first paid by the Association, and then billed to the parties concerned by the Treasurer of the Association.

1921

Rule 18—Blank

Rule 19

The Board of Directors of the Association of American Railroads shall appoint a Car Service Division composed of a Chairman and the requisite number of members, territorially representative, invested with plenary power to—

(a) Supervise the application of Car Service and Per Diem Rules.

(b) Suspend or permit departures from Car Service Rules 1 to 6, inclusive, except as provided in Rule 20.

(c) Exempt when necessary, cars of any type, from the provisions of Car Service Rules 1 to 6, inclusive, and provide other regulations under which such cars shall be handled.

(d) Transfer cars from one railroad or territory to another when necessary to meet traffic conditions, with due regard to car ownership and requirements. (See Note.)

(e) Conduct investigations, including examination of car records as may be necessary to insure the observance of Car Service and Per Diem Rules and of any orders issued by the Car Service Division, and in the event that they are unable to adjust such mat-

ters with the individual railroads, report all the facts with a recommendation to the Board of Directors:

(f) Obtain car location statements and other car performance statistics as deemed necessary.

(g) Take necessary action to bring about uniformity of practice among railroads by the standardization of car distribution rules, including record and report forms.

(h) Make recommendation to the Board of Directors when in their opinion a change in the per diem rate is necessary or desirable.

(i) To perform such other duties as may be assigned by the Board of Directors.

The headquarters of the Car Service Division provided for by this rule shall be Washington, D. C.

NOTE TO PARAGRAPH (d), RULE 19.—This provides an adjustment of surplusages and shortages, and is intended to suggest an equalization of service so far as practicable and consistent with car ownerships. By the latter is meant that if one railroad has, in its good judgment, provided amply for its coal-loading patrons, for example, while another has not, and the demand is generally equal to supply, the mines of the first will not necessarily be depleted in order that the mines on the improvident road may be the better served. Generally, as between the provident and improvident roads, it must be recognized that if in time of great car demand, the latter has to be assisted for the benefit of its patrons and its territory at the expense of the former,
1922 there must necessarily be set up some method of compensation for the former, and this of necessity, may go beyond mere car hire. In treatment of short "Feeder" railroads, without any appreciable car ownership, such railroads must be given a measure of car supply from "Trunk Lines" consistent with current distribution percentages on such trunk lines; in other words, they must be treated as industries on the trunk line connection.

Rule 20

Departure from Car Service Rules 1 to 6, inclusive, affecting Canadian Railway Cars on United States Railroads, or United States Railroad cars on Canadian Railways, shall be only by agreement as between the Association of American Railroads and the Railway Association of Canada.

1923

APPENDIX A

Code of Switching Reclaim Rules

Definitions

Switching Roads, Carrier Roads, Switching Service, and Trap or Ferry Cars are defined as follows:

Terminal Switching Road

A terminal switching road is a road on whose rails, or on private tracks connecting therewith:

(a) A car, including a trap or ferry car, received from a carrier road, either direct or through an intermediate road, is unloaded, reconsigned, or reshipped.

(b) A car, including a trap or ferry car, is loaded, reconsigned or reshipped, and delivered to a carrier road, either direct or through an intermediate road.

The service performed being within the designated switching limits and at a switching charge.

Intermediate Switching Road

An intermediate switching road is a road handling a car, including a trap or ferry car, from one railroad, steamship, ferry or barge line, to another railroad, steamship, ferry, or barge line, within designated switching limits (the car not being loaded or unloaded on the intermediate switching road), such road performing the service not participating in the freight rate.

Carrier Road

A carrier road is:

(a) A road which, participating in the freight rate, or which handles its own company material in road haul, on the inbound shipment, delivers a car, including a trap or ferry car, to a terminal switching road, either direct or through an intermediate switching road, for unloading, reconsigning or reshipping.

(b) A road which, participating in the freight rate, or which handles its own company material in road haul, on the outbound shipment, receives a car, including a trap or ferry car, from a terminal switching road, either direct or through an intermediate switching road, that has been loaded, reconsigned or reshipped by the terminal switching road.

Terminal Switching Service

The service performed by a terminal switching road, as defined in these rules.

1924

Intermediate Switching Service

The service performed by an intermediate switching road, as defined in these rules.

NOTE.—An empty car returned in home route to a switching road, previously loaded, reconsigned or reshipped in terminal switching service by such road, which is then delivered empty to another road within the same switching district, will not be considered as handled in intermediate switching service.

Interminal Switching Service

The service performed in handling a car, except a trap or ferry car, which has been loaded or reshipped within the switching limits on one road for unloading or reshipping within the same switching limits on another road and at a switching charge.

Trap or Ferry Car

A car, containing less than carload freight (including cotton), destined or originating beyond the switching limits of station at which loaded or unloaded on a switching road, the contents of which may or may not have been rehandled wholly or in part at freight house or platform located on carrier road within the switching limits of the station at which car is received from or delivered to the switching road.

1925

Rules

(Subject to such changes as may be required to meet local conditions)

Rule 1

The carrier road will allow the switching road a reclaim in accordance with Per Diem Rule 5 at the current per diem rate.

Rule 2

No reclaim shall be allowed for an interterminal switching movement.

Rule 3

Rule 1 of this Code will not apply to cars which are delivered empty to switching road for loading, and are returned empty to carrier road by reason of shippers' cancellation of order, or error on the part of carrier road, and to cars which are rejected by shippers account of being unsuitable for specified loading when received from the carrier road. (See Per Diem Rule 14.)

Rule 4

The right of reclaim is not affected by the fact that in switching service the switching road may collect its charges from the shipper or consignee.

Rule 5

These rules apply only to cars subject to per diem basis of settlement, including cars owned by the switching road, except they shall not apply to cars loaded with company material (including company coal) for the use of the switching road.

Rule 6

SECTION 1. When the average number of days is used as the basis for settlement of terminal switching reclaims, the arbitrary

to be allowed shall be based on the average time required by the switching road to switch cars for all the roads, considered as a whole, in the switching district involved. Such arbitrary shall be obtained from the records of the switching road as follows:

(a) A check covering twelve consecutive months shall be made under the direction of the Association of American Railroads, or otherwise as may be agreed upon between the roads interested.

(b) The check shall cover the loaded cars interchanged, that are included in terminal and trap or ferry car switching reclaim statements for the months to be checked, except that, by unanimous agreement, the check may be confined to any ten-day period, which must be the same for each month checked.

1926 The check shall not include:

(1) Cars loaded with live stock, but not excepting cars loaded with emigrant movables or exhibition live stock;

(2) Cars delivered loaded on or after the first day of the ten-day period, which were received loaded prior to that date, when a ten-day period is agreed upon;

(3) Cars used in local, inter or intra plant and/or interterminal switching services;

(4) Cars on which the required records are incomplete.

NOTE.—The exception applicable to cars loaded with live stock and cars used in local, inter or intra plant, and/or interterminal switching services, means that the car and detention thereto in such services, as well as while in terminal switching service, shall be excluded, except cars owned by or which are at home on the switching road, which will be checked in accordance with Section 2, paragraphs (g) and (h) of this rule.

SECTION 2. In figuring detention, the days shall be computed as follows:

(a) Cars received loaded and returned empty to the road from which received or delivered empty to another road within the same switching district, and cars received empty and returned loaded to the road from which received or delivered loaded to another road within the same switching district, count from date received to date of delivery.

(b) Cars received loaded and returned loaded to the road from which received or delivered loaded to another road within the same switching district, count from date received to date of delivery.

(c) Cars picked up from road haul service and placed in terminal switching service, count from date placed for loading as evidenced by the demurrage records to date delivered to outbound carrier as evidenced by the interchange reports, except when cars are shown placed between midnight and following 7 A. M., inclusive, count from next preceding date.

(d) Cars diverted from terminal switching service to road haul service, count from date of receipt as evidenced by the

interchange reports to date released from inbound load as evidenced by the demurrage records. When 7 A. M. release date is shown, count car released as of 6 P. M. next preceding date.

(e) On cars handled in terminal switching service and subsequently reconsigned or reshipped in road haul service, count from date of receipt, as evidenced by the interchange reports, to date released, as evidenced by the demurrage records.

(f) On cars received in road haul service and subsequently reconsigned or reshipped in terminal switching service,
1927 count from date of release as evidenced by the demurrage records, to date delivered to outbound carrier, as evidenced by the interchange reports.

(g) Cars owned by, or which are at home on, the switching road, which are loaded in terminal switching service, count from date placed for loading as evidenced by the demurrage records to date delivered to outbound carrier as evidenced by the interchange reports, except when cars are shown placed between midnight and following 7 A. M., inclusive, count from next preceding date.

(h) Cars owned by, or which are at home on, the switching road, which are unloaded in terminal switching service, count from date of receipt as evidenced by the interchange reports, to date released from inbound load, as evidenced by the demurrage records. When 7 A. M. release date is shown count car released as of 6 P. M. next preceding date.

(i) Where an intermediate switching road is involved in the terminal switching movement, the receipt from or delivery to the intermediate road shall be considered as receipt from or delivery to the carrier road.

SECTION 3. In computing detention in accordance with this rule, the detention of any car beyond eight (8) days shall be eliminated, except if a car received loaded is made empty, reloaded and returned to the road from which received or delivered to another road, the detention beyond sixteen (16) days shall be eliminated.

SECTION 4. The terminal switching reclaim allowance shall be determined by dividing the total detention, computed in accordance with this rule, by the total number of cars included in the check, cars received loaded which are made empty, reloaded and returned to the road from which received, or delivered to another road, to be counted as two (2) cars. The quotient to be expressed in two decimals, the second decimal to be increased by one (1) when the third (3rd) decimal is five (5) or more.

Rule 7

An Arbitration Committee may be appointed by interested roads in any local territory. All questions arising under these rules shall

be submitted to such committee through its secretary, who shall briefly set forth the points at issue and each party's interpretation of the rule on which the claim is based. Should one of the parties to the dispute refuse to furnish information, such Arbitration Committee shall use its judgment as to whether or not it can properly decide the question at issue, and shall base its decision upon these rules or as modified under agreement between the roads interested and the abstract submitted, and its decision shall govern, except that either party to the dispute may appeal to the Per Diem Rules Arbitration Committee of the Association of American Railroads.

1940 *Exhibit 58*

Item No. 122.[1]

ACCEPTANCE OF CARS ROUTED VIA SEATRAIN LINES, INC.

Cars containing coastwise or export freight for movement via Seatrain Lines, Inc., (through Belle Chasse, La.) will be accepted by the New Orleans & Lower Coast Railroad from connecting carriers only at Gouldsboro, McDonoghville or New Orleans, La., and only upon release of written delivery orders (hereinafter termed "O. K.") of the Seatrain Lines, Inc., and then only subsequent to 12:01 A. M. of the date prior to scheduled sailing of vessel (for which cars are ordered), from Belle Chasse, La.

Such "O. K." will be accepted as indicating that the Seatrain Lines, Inc., are prepared to, and will, accept the cars covered thereby immediately upon their arrival at Belle Chasse, La. The "O. K." must be dated and signed by representative of the Seatrain Lines, and shall be in the following form, or its equivalent:

SEATRAIN LINES, INC.
Hibernia Bank Building
NEW ORLEANS

(Date)_____

Local Freight Agent,
_____Railroad.
_____, Louisiana.

Seatrain_____
Voyage_____
Sailing_____

[1] Reissued from Supplement No. 14, effective July 14, 1935.

DEAR SIR: Bookings of the following shipments having been made for clearance on above steamer, we are now ready to receive same at our Terminal located at Belle Chasse, La.

Pro	Date	Car		Commodity	Weight	Destination
		Initials	Number			

Yours very truly,

SEATRAIN LINES, INC.

Per _____

On cars ordered as above, but not accepted by the Seatrain Lines, Inc., upon arrival thereof at Belle Chasse, La., the said "O. K." will be understood to carry with it responsibility on part of the Seatrain Lines, Inc., for all detention which may accrue upon such cars while they are being held by this railroad awaiting acceptance by the Seatrain Lines, Inc.

Such detention will be computed at the rate of one ($1.00) dollar per car for each twenty-four (24) hour period, or fractional part thereof, commencing with 12:01 A. M., of date following scheduled sailing of vessel, (for which cars are ordered), from Belle Chasse, La.

Exhibit 59

Number of loaded railroad-owned cars held by inbound road haul carriers at New Orleans awaiting acceptance by Seatrain under provisions of Item 122 of NOLC Terminal Charges Tariff No. 3-A, Supplement 20; and total days detention on such cars; 6 months' period July to December, inclusive, 1938

RR	July 1938			August 1938			September 1938			October 1938			November 1938			December 1938			6 months' total		
	Cars	Days	Avg. detention	Cars	Days	Avg. detention	Cars	Days	Avg. detention	Cars	Days	Avg. detention	Cars	Days	Avg. detention	Cars	Days	Avg. detention	Cars	Days	Avg. detention
G M & N	14	9	0 6	17	30	1 8	12	8	0 7	7	10	1 4	11	19	1 7	14	34	2 4	75	110	1 5
G O L	5	17	3 3	9	31	3 4	5	22	4 4	4	5	5 0	9	13	1 4	15	48	3 2	44	136	3 1
I C	75	363	4 8	48	168	3 5	37	84	2 2	83	418	5 0	93	190	3 0	69	190	2 7	375	1, 413	3 8
L & A	19	41	2 2	15	39	2 6	16	33	2 0	19	52	2 7	21	64	3 0	28	116	4 1	118	345	2 9
L & N	8	16	2 0	4	6	1 5	12	12	1 0	17	37	2 1	20	14	.7	12	40	3 3	73	125	1 7
M. P	69	386	5 6	114	434	3 8	86	315	3 6	69	307	4 4	86	303	3 5	132	663	5 0	556	2, 408	4 3
N O P B	26			17			16			13			10			9			91		
SOU	7	14	2 0	22	57	2 6	14	42	3 0	28	54	1 9	22	39	1 7	13	45	3 4	106	252	2 4
T A N O	12	26	2 2	14	47	3 3	13	49	3 7	16	50	3 1	16	52	3 3	19	85	4 4	90	309	3 4
T & P	76	201	2 6	104	235	2 2	75	206	2 7	120	373	3 1	92	268	2 8	125	515	4 1	592	1, 798	3 1
Total	311	1, 073	3 5	364	1, 047	2 9	286	772	2 7	373	1, 306	3 5	356	962	2 7	436	1, 736	3 9	2, 120	6, 896	3 3

UNITED STATES VS. PENNSYLVANIA RAILROAD CO. 1013

1945

Exhibit 60

Witness Randall

Average ratio of loaded car days to total car days

Year	Average number of freight carrying cars on line	Cars loaded per year
	(a)	(b)
1933	2,271,460	29,220,052
1934	2,162,631	30,845,990
1935	2,051,473	31,504,134
1936	1,963,839	36,106,112
1937	1,929,781	37,670,494
Av. 5 yrs.	2,075,833	33,069,996

2,075,833×365=757,679,045 total car days.
33,069,944×6*=198,419,664 loaded car days.
757,679,045÷198,419,664=3.82 or for each loaded car day is required 3.82 total car days.

*From Freight Traffic Report, Federal Coordinator, Vol. 3, pp. 102—"Transportation Speed."
(a) Source—Report of Operating Statistics, I. C. C.
(b) Source—Reports of Car Service Division, A. A. R.

1946

Exhibit 61

Witness Kendall

1947 *Loaded and empty cars handled out of New York and New Orleans on Seatrains "Havana" and "New York" during first 6 months of 1936*

Out of New York				Out of New Orleans			
Loaded cars		Empty cars		Loaded cars		Empty cars	
Foreign	Domestic	Foreign	Domestic	Foreign	Domestic	Foreign	Domestic
50	56	0	1	36	55	8	1
42	32	9	8	44	48	4	4
41	36	19	4	33	54	11	2
25	49	20	6	55	44	0	0
54	66	0	0	51	48	0	0
60	57	0	3	42	55	0	4
48	52	0	0	44	48	1	1
59	59	0	1	11	55	0	0
32	68	0	3	41	58	1	0
60	58	0	0	50	50	0	1
41	56	0	2	54	48	0	1
54	64	0	1	24	27	0	8
38	61	0	0	29	69	1	1
27	71	0	3	32	57	9	2
33	37	0	0	49	51	0	1
29	53	5	6	42	52	7	0
64	53	2	0	40	53	7	1
65	53	0	0	45	52	1	1
63	57	0	0	31	48	10	1
49	51	0	0	42	56	1	0
60	60	1	0	34	54	13	0
53	55	11	1	41	57	0	1
0	73	0	32	31	61	8	1
38	55	3	3	20	71	0	8
39	56	0	3	38	48	12	5
32	57	0	11	38	61	0	2
*957	1,479	70	86	1,027	1,422	101	46
#38	57	3	3	39	55	4	2

*Total.
#Average voyage.

1948 *Loaded and empty cars handled out of New York and New Orleans on Seatrain "New Orleans" during first 6 months of 1936*

To Havana out of New York		To Havana out of New Orleans	
Loaded cars	Empty cars	Loaded cars	Empty cars
28	45	37	42
59	24	62	24
63	13	46	40
5	69	4	69
		21	34
155	151	170	209

1949

LORD, DAY & LORD

25 BROADWAY, NEW YORK

Cunard Building

NOVEMBER 9, 1936.

Seatrain Lines, Inc. v. A. C. & Y. Ry. Co.

Docket No. 25727

GEORGE H. MUCKLEY, Esq.
205 Transportation Building, Washington, D. C.

DEAR MR. MUCKLEY: I have just received your letter of November 6th advising that the statement which I submitted separating as between railroad-owned and privately-owned cars handled by Seatrain did not give the information which you requested. I have just wired you as follows: "Sorry I misunderstood your request information regarding empty cars. Must obtain further information from New Orleans and have telegraphed for it."

The statement was prepared at my direction in accordance with the notes that I made at the hearing of your request. I thought what you wanted was separation between railroad-owned and privately-owned of the empty cars handled by Seatrain, shown on the exhibit identified by Mr. Brush. I have only just received the minutes of the testimony and in checking these I observe that I did not correctly understand what you asked for. With respect to the north-bound movement from New Orleans, it is necessary to obtain information from New Orleans and Mr. Brush has accordingly wired New Orleans for the information and we should secure it in a day or two. Inasmuch as the total number of railroad-owned cars handled in both domestic and Cuban service was very small, I hardly believe that you will be seriously inconvenienced

in this delay in securing the further separation of the number of railroad-owned cars as between Cuban business and domestic business.

Very truly yours,

(Signed) PARKER MCCOLLESTER.

PMcC/WEL.

Copy to E. J. Hoy, Esq., Examiner, Interstate Commerce Commission, Washington, D. C.

P. S.—Since dictating the above this morning, the information has been secured.

Of the 6 railroad-owned empty cars handled out of New York on the Seatrain "Havana" and Seatrain "New York," 1 moved in coastwise service and 5 went to Cuba.

Of the 14 railroad-owned empty cars handled out of New Orleans by the Seatrain "Havana" and Seatrain "New York," 2 moved in coastwise service and 12 went to Cuba.

Of course all of the cars handled by the Seatrain "New Orleans" went to Cuba.

P. McC.

1950

[Copy]

Docket No. 25727

Statement of empty cars handled by Seatrain Lines, Inc., during first 6 months of 1936, divided between railroad owned and privately owned

EMPTY CARS HANDLED OUT OF NEW YORK SEATRAIN "HAVANA" AND SEATRAIN "NEW YORK"

	Total	Railroad owned	Privately owned
Havana 84			
New York 85	1	0	1
Havana 85	26	0	26
New York 86	23	0	23
Havana 86	26	1	25
New York 87	0	0	0
Havana 87	3	0	3
New York 88	0	0	0
Havana 88	1	0	1
New York 89	3	0	3
Havana 89	0	0	0
New York 90	2	0	2
Havana 90	1	0	1
New York 91	0	0	0
Havana 91	3	1	2
New York 92	0	0	0
Havana 92	9	2	7
New York 93	2	2	0
Havana 93	0	0	0
New York 94	0	0	0
Havana 94	0	0	0
New York 95	1	0	1
Havana 95	12	0	12
New York 96	32	0	32
Havana 96	5	0	5
New York 97	3	0	3
	11	0	11
	165	6	159

1951

Docket No. 25727

Statement of empty cars handled by Seatrain Lines, Inc., during first 6 months of 1936, divided between railroad owned and privately owned

EMPTY CARS HANDLED OUT OF NEW ORLEANS SEATRAIN "HAVANA" AND SEATRAIN "NEW YORK"

	Total	Railroad owned	Privately owned
Havana 84			
New York 85	7	0	7
Havana 85	8	0	8
New York 86	13	0	13
Havana 86	0	0	0
New York 87	0	0	0
Havana 87	4	0	4
New York 88	9	0	7
Havana 88	0	0	0
New York 89	1	0	1
Havana 89	1	0	1
New York 90	1	0	1
Havana 90	8	0	8
New York 91	2	1	1
Havana 91	11	0	11
New York 92	1	0	1
Havana 92	7	0	7
New York 93	8	0	8
Havana 93	2	0	2
New York 94	20	10	10
Havana 94	1	0	1
New York 95	13	0	13
Havana 95	1	1	1
New York 96	9	0	8
Havana 96	8	0	8
New York 97	15	0	15
	2	0	2
	152	14	138

1952

Exhibit 62

Witness Kendall

Detention at New Orleans, La., on cars loaded with traffic destined to coastwise water carriers

Steamship lines	July			August			September			October			November			December			Total			
	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	
Clyde-Mallory	7			35			30			13			34			32			141			G. M. & N., L. & N., T. N. O.
Coast Trans.	9			4			17			10			8			12			60			G. M. & N., T. N. O.
Moore-MacCormack	24	5	0.2	13	10	0.8	7	2	0.3	11	1	0.1	9	3	0.3	5			69	21	0.3	G. M. & N., L. & N., T. N. O., I. C.
Morgan Line	96			86			78			99			92			84			535			G. M. & N., L. & N., I. C.
Pan Atlantic	47			19			23	1	0.1	56			43			57	3	0.1	245	4	0.2	G. M. & N., L. & N., T. N. O., I. C.
Totals	183	5	0.03	157	10	0.06	155	3	0.02	189	1	0.01	186	3	0.02	180	3	0.02	1050	25	0.02	

1953

Exhibit 63

Witness Kendall

Detention at New York on cars loaded with coastwise traffic, break bulk lines

	November 1938			December 1938			January 1939			Total		
	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average
Clyde-Mallory	51	43	0.8	61	26	0.4	71	39	0.5	183	105	0.6
Morgan Line	77	64	.8	87	55	.7	61	70	1.1	219	189	.9
Pan Atlantic	12	7	.6	11	5	.4	15	5	.3	38	17	.4
Ocean S. S. Co	24	15	.6	12	8	.6	23	18	.8	59	41	.7
Eastern S. S. Co	6	4	.6	9	4	.4	9	7	.7	24	15	.6
Old Dominion	3	1	.3	2	2	1.0	3	1	.3	8	4	.5
New Tex	6	10	1.6	7	8	1.1	9	20	2.2	22	38	1.7
Total	179	144	.8	183	108	.6	191	157	.8	553	409	.7

NOTE—Check covers 1 week in each month.

1954

Exhibit 64

Witness Kendall

Examples of time in transit, south-bound

VIA SEATRAIN

	Origin	Date Billed	Destination	Date arrived	Days in transit
PRR 90880	York, Pa	12-9	Texarkana, Ark	12-21	12
PRR 86539	Mt. Wolf, Pa	1-10	Dallas, Tex	1-26	16
PRR 72658	Trenton, N. J	1-11	Shreveport, La	1-25	14
B&O 280822	Cumberland Mills, Maine	1-3	Fort Worth, Tex	1-19	16
IC 161244	Gardner, Mass	1-13	Dallas, Tex	1-26	13
MeC 5425	S. Brewer, Maine	12-5	Little Rock, Ark	12-21	16
Erie 78436	Phillipsdale, R. I	12-9	Shreveport, La	12-21	12
MeC 5579	Rumford, Maine	12-8	Fort Worth, Tex	12-22	14
CN 472141	Port Alfred, Quebec	12-13	Dallas, Tex	12-30	17
CN 509256	do	12-13	do	12-29	16
MeC 36261	Lincoln, Maine	12-15	Little Rock, Ark	12-29	14
Erie 97366	Belleville, N. J	12-19	Houston, Tex	12-28	9
NH 71207	E. Walpole, Mass	12-15	Shreveport, La	12-28	13
Erie 99245	Niagara Falls	1-5	Houston Tex	1-18	13
CBQ 45899	Plattsburg	1-5	Shreveport	1-27	22
DLW 48398	Cortland, N. Y	1-9	do	1-27	18
DH 23253	Central Rutland, Vt	1-6	Houston	1-18	12
CN 491834	Jonquiere, Quebec	1-11	Shreveport	1-25	14
NH 70752	E. Walpole, Mass	1-14	do	1-25	11
CN 505918	St. Joseph d'Alma, Quebec	1-13	Paris, Tex	1-26	13
CBQ 120218	St. Johnsbury, Vt	1-20	Dallas, Tex	2-2	13
Erie 76571	Phillipsdale, R. I	1-17	Shreveport	2-2	16
DLW 49083	Cortland, N. Y	1-17	Dallas, Tex	2-2	16
CN 502169	Port Alfred, Quebec	1-18	do	2-2	15
CN 473917	Jonquiere, Quebec	1-20	Shreveport	2-1	12
Average days in transit					14.28

Witness Kendall—Continued

ALL RAIL SHIPMENTS RECEIVED AT DALLAS

Intl. number	Contents	Point of origin	Date billed	Date arrived Dallas	Days in transit
FGE 52154	Fish	Boston, Mass	10/26	11/ 3/38	8
NRC 870	Frozen fruit	Jersey City, N. J	8/13	8/19/38	6
NOR 4551	Clothing	Bush Terminal, N. Y	2/14	2/20/39	6
NYC 48238	Machinery	Jersey City, N. J	12/14	12/19/38	5
WLE 25237	Clothing	Bush Dock, N. Y	10/27	11/ 2/38	6
IC 162082	Electric goods	Pittsfield, Mass	1/27	2/ 5/39	9
PRR 58068	do	do	1/20	1/30/39	10
NX 7918	Bakery goods	Long Island City	1/24	1/30/39	6
NX 8102	do	do	1/19	1/24/39	5
NX 1500	do	do	1/5	1/10/39	5
MC 99650	Electric appliances	Schenectady, N. Y	1/5	1/12/39	7
CNJ 20001	Machinery	Alden, N. J	2/20	2/23/39	3
NYC 52188	Implements	Batavia, N. Y	12/31	1/ 6/39	6
CNW 47581	Combines	do	12/31	1/ 7/39	7
NYC 116966	Washers	Syracuse, N. Y	1/12	1/17/39	5
MC 90895	Tires	Black Rock, N. Y	1/17	1/22/39	5
CB&Q 99177	Ground clay	Emeryville, N. Y	1/25	2/ 2/39	8
Average days in transit					6.1

1955

Exhibit 65

Witness Kendall

Examples of time in transit, north-bound

VIA SEATRAIN

	Origin	Date billed	Destination	Date arrived	Days in transit
T&P 50769	Vicksburg, Miss	11-30	Hoboken	12-20	20
T&P 80125	Laurel, Miss	12-9	So. Kearney, N. J	12-20	11
T&P 80504	do	12-9	do	12-20	11
MoP 30388	do	12-10	Hoboken	12-27	17
T&P 70225	Ponchatoula, La	12-10	Harrison, N. J	12-20	10
T&P 50551	Laurel, Miss	12-15	Port Newark, N. J	12-29	14
T&P 80309	do	12-15	do	12-29	14
MoP 31024	do	12-17	Hoboken	1-3	16
T&P 50508	do	12-18	Mineola, N. Y	1-4	16
MoP 70055	Jackson, Miss	12-20	Paterson, N. J	1-4	15
MoP 42542	Bogalusa, La	12-22	Hoboken	1-3	11
MoP 48717	Laurel, Miss	12-22	28th St. N. Y. City	1-4	13
T&P 40428	do	1-14	Hoboken	1-24	10
T&P 61107	do	1-16	Port Newark, N. J	1-25	9
T&P 80420	do	1-16	do	1-25	9
MoP 93022	do	1-16	do	1-26	10
MoP 42540	Bogalusa, La	1-19	Auburn, N. Y	2-5	17
SLB&M 20209	Laurel, Miss	1-21	Hoboken	1-31	10
SLB&M 20217	Canton, Miss	1-21	do	1-31	10
MoP 30875	Jackson, Miss	1-26	Barber, N. J	2-8	13
Average days in transit					12.8

Witness Kendall—Continued

ALL-RAIL SHIPMENTS

Car	Origin	Date	Destination	Routing	Date arrived	Time in transit
ATSF 126366	Salina, Kans	12-29	Jersey City	ATSF-Erie	1-4	6
MKT 77244	Denton, Tex	2-4	do	MKT-Wab-Erie	1-10	6
ATSF 39350	Ellinwood, Kans	21-5	Hoboken	ATSF-CSSSB-NKP-NYC	2-22	7
ATSF 11926	Blue Rapids, Kans	2-15	Glendale, L. I.	UP-MP-ATSF-IHB-NYC	2-23	8
ATSF 128213	Atchison, Kans	2-2	Jersey City	ATSF-Erie	2-7	5
SLSF 130339	Arkansas City, Kans	2-15	Brooklyn	ATSF-IHB-NYC	2-20	5
Sou 161906	New Orleans	1-10	Jersey City	NONF-AGS-Sou-PRR	1-13	3
ATSF 120795	Ellenwood, Kans	2-6	do	ATSF-CSSSB-PRR	2-11	5
ATSF 125199	do	2-11	do	ATSF-CSSSB-PRR	2-16	5
Average days in transit						5.5

1956

Exhibit 66

Witness MacGowan

Statement of cars forwarded on Seatrain vessels from Hoboken, N. J., for months of January, April, July, and October 1938

	January 1938		April 1938		July 1938		October 1938		Total of 4 months	
Total cars	458		529		367		498		1,852	
To Havana	L-150 E-47	197	L-182 E-137	319	L-180 E-12	192	L-272 E-18	290	L-784 E-214	998
To New Orleans	L-258 E-3	261	L-205 E-5	210	L-172 E-3	175	L-204 E-4	208	L-839 E-15	854
	To Havana	To New Orleans	To Havana	To New Orleans	To Havana	To New Orleans	To Havana	To New Orleans	To Havana	To New Orleans
From trunk lines—Loads:										
R. R. owned cars	80	186	111	168	91	120	89	136	371	610
Group A unrestricted	9	13	2	8	6	11	13	6	30	38
B wholly restricted	66	169	106	150	83	104	69	124	324	547
C	5	3	2	3	2	1	6	4	15	11
D		1	1	7		4	1	2	2	14
Private line cars	42	12	34	2	13	2	15	4	104	20
Coaches					1		3		4	
HMRR local cars—Loads:										
R. R. owned cars	26	60	37	35	44	46	73	63	180	204
Group A	23	48	36	30	38	43	58	55	155	176
B	2	6	1		4		12	5	19	11
C	1	3		3	2	1	1		4	7
D		3		2		2	2	3	2	10
Private line cars	2				31	4	92	1	125	5
HMRR empty cars										
R. R. owned cars	3	1	79		12		18		112	1
Group A		1	74		11		14		99	1
B	1		1				1		3	
C			3				1		4	
D	2		1		1		2		6	

Private line cars		44		2		58		5				3				4		102		14
Total		197		261		319		210		192		175		280		208		998		854

DETAILS OF NONPERMITTED CARS

	Trunk lines	Local	Trunk lines	Local	Trunk lines	Local	Trunk lines	Local	Trunk lines	Local	Trunk lines	Local	Trunk lines	Local	Trunk lines	Local	Trunk lines	Local	Trunk lines	Local
Group B																				
On home route				2										3		2		3		9
In direction of home				1											2	1			2	
Away from home	66	2	169	3	105	1	136		83	4	104		69	9	122	2	324	16	345	
Group C																				
On home route				3				3				1								5
In direction of home			2				1								1				4	1
Away from home			1				2				1				3				3	
Group D																				
On home route				3				2				2				3				19
In direction of home			1				3				3				1				8	
Away from home					1		4				1		1	2	1		2	2	6	
Of these cars this number were received from trunk lines with Seatrain freight and filled out with local freight		1		2		1				3				1		1 2		6		5

Exhibit 67

Witness MacGowan

Statement of cars forwarded on Seatrain vessels from New Orleans, La., for months of January, April, July, and October 1938

	January 1938		April 1938		July 1938		October 1938		Total of 4 months	
Total cars		489		560		498		540		2,087
To Havana	L-249 E-37	286	L-251 E-77	328	L-257 E-32	289	L-258 E-2	260	L-1015 E-148	1,163
To Hoboken	L-195 E-8	203	L-220 E-12	232	L-208 E-1	209	L-279 E-1	280	L-902 E-22	924
	To Havana	To Hoboken	To Havana	To Hoboken	To Havana	To Hoboken	To Havana	To Hoboken	To Havana	To Hoboken
Loads										
R. R. owned cars	209	180	189	190	184	199	192	260	771	829
Group A	51	128	38	139	54	117	66	166	209	506
B	47	32	75	39	37	56	54	68	213	195
C	80	4	56	4	63	14	38	6	237	28
D	28	6	20	8	30	12	34	20	112	46
Private line cars	43	15	92	30	73	9	66	19	244	73
Empty										
R. R. owned cars	7		57	6	32		1	1	97	7
Group A			7	1	4				11	1
B			49	5	19		1	1	76	6
C					6				6	
D			1		3				4	
Private line cars	30	8	20	6		1	1		51	15
Total	286	203	328	232	289	209	260	280	1,163	924

DETAILS OF NONPERMITTED CARS

	L.	E.		L.	E.		L.	E.		L.	E.		L.	E.		L.	E.		L.	F.		L.	F.		L.	F.		L.	E.	
Group B																															
On home route	16	7	54	24		32	17	66	124	25	4	44	21	12	56	18		56	20	1	55	17	1	69	74	66	289	84	5	201
In direction of home				5						11	1					31						46						93	1	
Away from home	31			3			58	3		3			16	7		7			34			52			139	10		18		
Group C																															
On home route						4				1		4						14						6				1		28	
In direction of home																															
Away from home				4						3						14						6						27			
Group D																															
On home route						6						8						12						20						46	
In direction of home																															
Away from home				6						8						12						20						46			

1958

Interstate Commerce Commission

No. 25728[1]

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

Submitted ..... Decided .....

Defendants participating in through routes with Seatrain Lines, Inc., required to interchange their cars with that carrier at the compensation in the code of per diem rules of the Association of American Railroads, provided that Seatrain subject itself to all of the terms and conditions of the code of car-service rules and the code of per diem rules of said association

Graham M. Brush, Frank J. Clark, and Parker McCollester for complainant in No. 25728 and intervener Seatrain Lines, Inc.

H. H. Larimore and Toll R. Ware for complainant in No. 25878.

J. Carter Fort for intervener Association of American Railroads.

William Burger, Charles Clark, Francis R. Cross, Joseph H. Eshelman, F. W. Gwathmey, T. P. Healy, George W. Holmes, H. H. Larimore, Roland J. Lehman, G. H. Muckley, W. T. Pierson, E. A. Smith, Robert Thompson, and Toll R. Ware for defendants.

Report on further hearing by E. J. Hoy and M. J. Walsh, examiners

Filed Aug. 21, 1939

Since October 6, 1932, Seatrain Lines, Inc., hereinafter referred to as Seatrain, has been operating vessels between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, on which freight is transported in railroad cars between Hoboken and Belle Chasse, Hoboken and Havana, and Belle Chasse and Havana. Previously, since January 1929, it and its predecessor, Over-Seas Railways, Inc., had been engaged in similar transportation between Belle Chasse and Havana.

1959 Seatrain's terminal at Hoboken is served by complainant in the title proceeding, hereinafter called the Hoboken, a terminal switching line about a mile and a half in length extending along the waterfront at New York Harbor, and directly controlled by Seatrain through stock ownership. Its terminal at Belle Chasse

[1] This report also embraces No. 25878, New Orleans & Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railway Company et al.

is served by complainant in No. 25878, hereinafter called the Lower Coast, a subsidiary of the Missouri Pacific Railroad Company, extending from Algiers, La., on the west bank of the Mississippi River opposite New Orleans, La., south about 60 miles. Belle Chasse is about ten miles south of Algiers.

Shortly after the inauguration of Seatrain's service between Hoboken and Belle Chasse and between Hoboken and Havana, the American Railway Association, predecessor of the Association of American Railroads, hereinafter referred to as the association, promulgated the following car-service rule:

"Rule 4—Cars of railway ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owner filed with the Car Service Division."

As most of the railroads refused to permit delivery of their cars to Seatrain, those complaints were filed assailing the car-service rule referred to and the rules, regulations, and practices of the railroads relating to the delivery, or the refusal to permit delivery, of their cars to Seatrain as unlawful under section 1 (4) and (11), section 3 (1) and (3), and section 7 of the Interstate Commerce Act. Seatrain intervened in support of the complaints. Defendants moved to dismiss on the ground that the Commission is without jurisdiction of the matters complained of, but in the report on further hearing in Investigation of Seatrain Lines, Inc., 236 I. C. C. 328, the Commission, after discussing fully the jurisdictional question, said, at page 343:

1960 "It is our view that we have jurisdiction to require the establishment of through routes between rail and water carriers, and, where such routes are established pursuant to our order or voluntarily, to require the interchange of cars between the rail and water carriers, and to require that equality of treatment provided by section 3 (3) between connecting carriers, whether rail or water, in the facilities for the interchange of traffic, including through routes and the interchange of cars. We find nothing in the act of imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist.

"This record shows that Seatrain participates in through routes and joint rates with the Missouri Pacific system lines and the Texas & Pacific and their short-line connections, which carriers permit their cars to be delivered to Seatrain. Whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record. Whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided."

No. 25727, referred to in the above quotation, was subsequently

decided and in its report therein, Seatrain Lines, Inc., v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, the Commission found that through routes either existed or should be established and maintained between a certain described portion of official territory and certain described portions of southwestern and southern territories. With respect to the interchange of cars with Seatrain, the Commission said, at page 29:

"We have here found that in certain instances through routes between Seatrain and defendants now exist, and that, in those and other instances, the establishment and maintenance of through routes and joint rates are necessary in the public interest. The record here shows that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be by the interchange of the loaded cars. If defendants parties to the through routes and joint rates herein prescribed refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention either by a request for reopening Nos. 25728 and 25878, the complaints of the Hoboken Manufacturers' and Lower Coast referred to above, or by a new complaint."

There is no question raised by the parties that the through routes required in the above decision have not been established and maintained. Rule 4, however, continues in effect and the defendants who, under said rule, filed notice with the association or its predecessor of their refusal to permit delivery of their cars to Seatrain have not withdrawn such refusals. Accordingly, complainants filed motions seeking reopening of these proceedings for the entry of an order requiring defendants to cease and desist from their refusal to permit interchange of their cars with Seatrain for the accomplishment through transportation over through routes, and upon consideration thereof the proceedings were reopened for further hearing to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with Seatrain.

1961

At the further hearing, over the objections of complainants, intervener Seatrain, and the Missouri Pacific and Texas & Pacific lines, defendants in the title case, the association was permitted to intervene. On brief, complainant in the title case and intervener Seatrain renew a motion made at the further hearing that the examiners' ruling permitting that intervention be reconsidered and the Commission hold that the association was not and is not entitled to be a party to the proceeding, exclude the evidence offered by it, and reject its brief. The motion rests upon two grounds: (1) That the allowance of the intervention was directly contrary to the Commission's Rules of Practice, and (2)

that the association is not empowered to intervene in opposition to some of its own members.

Rule II (1) 1 of the Commission's Rules of Practice provides that anyone entitled under the act to complain to the Commission may petition for leave to intervene in any pending proceeding prior to or at the time it is called for hearing. It further provides that the petitioner shall set forth the grounds of the proposed intervention and the interest of the petitioner in the
1962 proceeding. The first ground of the motion rests upon the contention that the association has not set forth any "grounds" of its intervention nor shown any "interest * * * in the proceeding." Counsel for the association stated of record that he appeared under instructions from its Board of Directors, and asked leave to intervene on behalf of the association because of the duties and concern which it has with car-service and per diem rules. As is well known, and shown by the record in these proceedings, the association, by agreement of all of the important railroads in the country, promulgates rules for car service and per diem and acts as agent for the railroads in car-service matters. It seems clear that its interest in these proceedings is sufficient properly to permit its intervention.

The second ground of the motion rests upon the contention that it has not been shown that the association has the power to intervene. Intervener was not required by the examiners to furnish such evidence, though requested to do so by movants. The association, under section 13 (1) of the act is a party who may properly complain to the Commission, and, accordingly, a party who may properly intervene in proceedings before the Commission. Whether, under the by-laws of the association, the Board of Directors had power to authorize intervention in these proceedings is not a question that the Commission should decide. For the purposes of intervention, it should assume that the Board acted within its authority.

The evidence introduced by the association was adopted as their own by numerous defendants, including the eastern lines, Southern Pacific lines, and most of the important southern lines, and a joint brief was filed by such defendants and the association.
1963 The motion to deny the intervention of the association, exclude the evidence offered by it, and reject its brief should be overruled.

The sole issue here presented is upon what terms and conditions, including compensation, defendants should be required to interchange their cars with Seatrain. This issue is limited to cars containing a portion, but not all, of the traffic transported by Seatrain, and to the interchange of the cars of some, but not all, of the defendants, as will presently appear.

The only jurisdiction which the Commission has asserted with respect to the interchange of cars between defendants and Seatrain is where through routes over their lines exist. Seatrain transports a considerable volume of foreign traffic between Hoboken and Havana and Belle Chasse and Havana. As to such commerce there are no through routes between defendants and Seatrain, and, as found in Investigation of Seatrain Lines, Inc., supra, the Commission has no jurisdiction over the rates and practices of Seatrain in its strictly foreign commerce. Seatrain also handles considerable port-to-port traffic between Hoboken and New Orleans over routes to which complainants are parties but defendants are not. In this connection the Commission said, in the case last referred to:

"We find nothing in the act imposing any duty upon or giving us any jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist."

The territories between which through routes now exist in connection with Seatrain are those between which through routes were required to be maintained in Seatrain Lines, Inc., v. Akron C. & Y. Ry. Co., supra, namely, southwestern territory and a small portion of southern territory, on the one hand, and that portion of official territory within about 550 miles of the north Atlantic
1964 ports, on the other hand. Some of the defendants who refuse to permit delivery of their cars to Setrain for movement in coastwise service, of which the Great Northern Railway Company and Northern Pacific Railway Company are examples, cannot, because of their location, be parties to these through routes.

The issue, limited as described above, presents two questions: (1) The compensation which the defendants who are to be required to interchange their cars with Seatrain should receive for the use of their cars, and (2) upon what, if any, other terms and conditions such interchange should be required, which will be considered in the order stated.

The association publishes rules governing the settlement for the use of railroad owned freight cars between all common carrier railroads, known as the code of per diem rules. The first rule provides that the rate for the use of freight cars, to be known as the per diem rate, shall be $1 per car per day. This has been the per diem rate for several years, and in Rules For Car-Hire Settlement, 160 I. C. C. 369, where the reasonableness of this rate was not questioned, the Commission said, at page 378:

"The per diem rate is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 percent interest on investement. From the evidence

of record, it is estimated that the cost of car ownership and maintenance average 83.812 cents per car day and $305.91 per car unit in the calendar year 1925, and approximately $1 per car day in that year for the periods cars were actually in service. Cars were idle a portion of the year, due in part to unserviceable condition, and in part to the fact that the supply of cars exceeded the demand."

The reasonableness of the per diem rate is not here questioned insofar as it applies between the railroads. Seatrain is willing to pay that rate, although it contends that the cost of maintenance is less when the cars are in its possession because they are motionless and not subject to the wear and tear incident
1965 to through movement over the railroads, and are, to a large extent, protected from the elements. The association and defendants which join it on brief, hereinafter collectively referred to as defendants, contend, on the other hand, that the cars are subject to much greater depreciation on Seatrain than in general railroad service, and that the per diem to be paid by Seatrain should cover not only the time the cars are actually in its possession but also the time attributable to its use of the cars.

Repairs account for a large proportion of the cost of car ownership. Defendants admit that 61.58 percent of running repair expenses totaling 16 cents per car per day, or 9.849 cents, are avoided when cars are not moving. They claim, however, that this saving is more than offset by added cost of repairs due to increased corrosion of the cars while on Seatrain. The evidence submitted to support the latter contention consists of (1) the results of tests conducted on steel of the kind used in freight cars, which tests show that corrosion is considerably more rapid in a full salt atmosphere such as Key West, Fla., than in a semisalt atmosphere such as Sandy Hook, N. J., or in a sulphurous atmosphere such as Pittsburgh, Pa., and that corrosion at the latter points is more rapid than in a relatively pure atmosphere such as State College, Pa., and (2) a showing that steel gondola cars used almost exclusively on the Long Island Railroad Company deteriorated more rapidly than similar cars used in general service on the Pennsylvania Railroad Company. Such evidence cannot be accepted to show an excessive amount of corrosion on cars transported by Seatrain, particularly when other evidence of record shows that Seatrain has transported hundreds of carloads of various iron and steel articles and machinery in box and gondola cars and on flat cars
1966 that were not specially packed for protection against corrosion and has had only occasional complaints, and that any particular car is seldom on Seatrain more than one round trip, or twelve days, in a year. The record warrants the conclusion that the costs of repairs are reduced at least 9.849 cents per car per day while the cars are on Seatrain, and does not warrant the con-

clusion that any part of such saving is offset by additional and excessive corrosion.

In contending that the per diem to be paid by Seatrain should cover not only the time a car is actually in its possession but the time attributable to its use of the car, defendants take the position that, incident to the time spent in active and productive service, railroad cars spend much time in idle and unproductive service, such as when held in reserve to meet peaks of traffic, when being repaired and held for repairs, when being conditioned and placed for shippers, and when in the possession of consignors for loading and of consignees for unloading, and that Seatrain, which has no cars of its own, should bear its full share of the cost of car ownership during the idle and unproductive time. They show that, varying with the meaning given the terms "idle and unproductive time" and "active and productive time" car in general railroad service spend only one day out of each 3.82 to 19 days in active and productive service. When the active and productive time includes only the time the car is rolling under load in line-haul service, not including the time spent in intermediate switching, but one out of every 19 days is so spent. When it includes only the time which elapses between placement of the car for the consignor and release of the car by the consignee, but one out of 3.82 days is so spent. If the time the car is in the possession of the shipper and the consignee is also excluded, but one out of every 7 days is so spent, and if the time spent in switching at origin and destination is also excluded, but one out of every 11 days is so spent.

1967 As heretofore stated, the Commission found in Rules For Car-Hire Settlement, supra, that the full cost of ownership and maintenance of cars was approximately $1 per day, including the time the cars are unserviceable or stored because of lack of demand. While these costs were those of 1925, no attempt has been since made to change the per diem rate, and there is no evidence here indicating increased costs. Accordingly, it must be assumed that such costs of ownership reflect present costs.

For every day the average car is in active service either the owner has the use of the car or some other carrier is paying $1 per diem for its use, whether loaded or empty, and the owner is, therefore, fully compensated, either in rent or use, for the full cost of ownership and maintenance. This being so, there is no good reason why Seatrain should pay a higher per diem rate than $1, particularly when the record shows that the cost of maintenance would be admittedly decreased approximately 10 cents per day while the cars were in its possession.

That $1 per day would be reasonable compensation for cars while in Seatrain's possession is further established by the fact that it is the universal per diem rate between all railroads, even when, as in the case of Seatrain, the railroads own no cars, and between the railroads and other water carriers, such as the various ferry companies; that for the period of almost four years prior to the inauguration of Seatrain's coastwise service in October 1932 all of the rail carriers freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service at that rate; that numerous rail carriers now freely interchange their cars with Seatrain, either in foreign or foreign and coastwise service, at that rate; and that other rail carriers who have filed with the association notice of refusal to permit delivery of their cars to Seatrain have accepted, without protest, per diem of $1 on such of their cars as have moved over Seatrain.

1968 Whether the order requiring defendants to interchange their cars with Seatrain should be subject to other conditions will now be considered. Defendants contend that such an order should be conditioned upon terms which will require Seatrain to assume the same responsibilities with respect to switching reclaims and cars held on connecting roads because of its inability to receive them as if it were a road-haul rail carrier. Complainants and Seatrain contend that only the amount of compensation to be received by the owners of the cars is here in issue, and not how the car expense should be divided between Seatrain, its switching connections, and the road-haul rail carriers who may or may not be the owners of the cars, and, further, that if it were in issue detention of cars cannot be fairly charged to Seatrain unless similar detention is charged to the break-bulk water carriers. It is our view that the period of time during which and the manner in which Seatrain should pay for the use of cars, as well as the amount of compensation, would be appropriate conditions to attach to an order requiring defendants to interchange their cars with Seatrain, and, accordingly, that such questions are here in issue.

As Seatrain's sailings between Hoboken and Belle Chasse are one a week in each direction, it is necessary to hold some cars arriving for interchange with it. At Hoboken these cars are held on the Hoboken. The Lower Coast publishes a tariff which provides that it will receive cars for movement via Seatrain only upon written delivery orders of Seatrain and then only subsequent to 12.01 a. m. of the date prior to the scheduled sailing from Belle Chasse. This tariff provision has the effect of requiring the line-haul carriers to hold the cars. The average detention of cars because of Seatrain's inability to receive them is stated to be two days at Hoboken, and, on 2,180 cars which moved

1969 during the last six months of 1938, was 3.3 days on the line-haul carriers connecting with the Lower Coast.

Per diem rule 15 provides that, in the absence of an embargo, a railroad which fails promptly to receive cars from a connecting railroad shall be responsible to the connecting railroad for the per diem on such cars while held for delivery. In other words, as between connecting railroads the one responsible for the delay must assume the per diem during the delay. If it is to interchange cars with the railroads as freely as the railroads interchange with one another and at the same per diem rate, it is but reasonable and proper that Seatrain should likewise assume the per diem during the time the cars are being held because of its inability to receive them.

The question is also presented as to whether complainants, as to traffic which they interchange with Seatrain, should be considered as terminal switching roads or intermediate switching roads. The main distinction between the two is that the former is one on which a shipment originates or terminates, and the latter is one which handles cars from one road to another. The answer to this question is important in determining the amount of per diem for which Seatrain should be responsible.

The per diem rules provide that for terminal switching the switching line may reclaim from the line-haul carrier for the average number of days, not to exceed five, required in such switching service, and that for intermediate switching the switching line may reclaim one day's per diem from the delivering line if per diem accrued while the car was on the intermediate switching line. If complainants are to be regarded as terminal switching lines so far as traffic interchanged with Seatrain is concerned, as they and Seatrain have contended, their line-haul rail connections, and not Seatrain, should bear, in the form

1970 of reclaims, the per diem charges accruing on their lines.

If, however, Seatrain's service is to be regarded as substantially similar in all essential respects to that of a line-haul carrier, as defendants contend and as we believe it should be, it seems apparent that complainants' services should be regarded as those of intermediate switching lines and that Seatrain's responsibilities in connection with switching reclaims should be the same as those of line-haul rail carriers.

With respect to the contention of complainants and Seatrain that detention of cars cannot be fairly charged to Seatrain unless similar detention of cars is charged to break-bulk water carriers, it is sufficient to state that we do not consider the amount of free time granted under demurrage rules to shippers over break-bulk lines important in determining what would be reasonable terms and conditions under which Seatrain and defendants, parties to

through routes, should interchange cars. Of more importance are the rules under which the railroads themselves have for many years interchanged cars.

At the present time Seatrain settles with complainants for per diem and complainants make payment to the owners of the cars. Defendants contend that Seatrain should make payment direct to the owning railroads and Seatrain has no objection to this. Apparently, however, some modification of the existing per diem agreement would be necessary before this could be done. It is our view that it would be preferable for Seatrain to make direct settlement with the owning railroads.

The Commission should find that defendants, insofar as they participate in through routes with Seatrain, should be required to interchange their cars with Seatrain in the performance of through transportation over such through routes at the
1971 compensation provided in the code of per diem rules of the association, provided that Seatrain subject itself to all of the terms and conditions of the codes of car-service and per diem rules of said association and assume responsibilities the same as those assumed under such rules by line-haul carriers, including per diem for detention due to its inability to receive cars and switching reclaims.

1975 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL.

Exceptions on behalf of complainant Hoboken Manufacturers Railroad Company and intervener Seatrain Lines, Inc., to report on further hearing proposed by E. J. Hoy and M. J. Walsh, examiners

Filed Sept. 19, 1939

1978

EXCEPTIONS

1. Exception is taken to the conclusion on Sheet 6 of the proposed report as follows:

"The motion to deny the intervention of the association (Association of American Railroads), exclude the evidence offered by it and reject its brief, should be overruled."

2. Exception is taken to finding on Sheet 5 as follows:

"It seems clear that its interest (that of the Association of American Railroads) in these proceedings is sufficient properly to permit its intervention."

3. Exception is taken to the following findings on Sheet 5 of the proposed report:

"The association, under section 13 (1) of the act is a party who may properly complain to the Commission, and, accordingly, a party who may properly intervene in proceedings before the Commission. Whether, under the by-laws of the association, the Board of Directors had power to authorize intervention in these proceedings is not a question that the Commission should decide. For the purposes of intervention, it should assume that the Board acted within its authority."

4. Exception is taken to the statement on Sheet 6 with reference to traffic to and from Cuba:

"As to such commerce there are no through routes be-
1979 tween defendants and Seatrain, and, as found in Investigation of Seatrain Lines, Inc., supra, the Commission has no jurisdiction over the rates and practices of Seatrain in its strictly foreign commerce."

if this is intended as a complete statement as to the Commission's jurisdiction of the issues raised by the complaints as to such traffic.

5. Exception is taken to the following conclusion on Sheet 11 of the proposed report:

"It is our view that the period of time during which and the manner in which Seatrain should pay for the use of cars, as well as the amount of compensation, would be appropriate conditions to attach to an order requiring defendants to interchange their cars with Seatrain, and, accordingly, that such questions are here in issue."

6. Exception is taken to the failure of the Examiners to find that since the issues raised by the complaint relate only to the lawfulness of the refusals of owners of cars to permit their cars to be interchanged with Seatrain on such terms and conditions as may be appropriate as between such car owners, complainants and Seatrain, therefore the issues do not relate in any way to the subject of per diem and reclaim which is a matter between complainants, Seatrain and their immediate rail connections, regardless of the ownership of the cars involved or of the consents or refusals of the car owners to permit the interchange of their cars with Seatrain.

7. Exception is taken to the following finding or conclusion on Sheet 12 of the proposed report:

1980 "If it is to interchange cars with the railroads as freely as the railroads interchange with one another and at the

same per diem rate, it is but reasonable and proper that Seatrain should likewise assume the per diem during the time the cars are being held because of its inability to receive them."

8. Exception is taken to the following finding or conclusion on Sheet 13 of the proposed report:

"If, however, Seatrain's service is to be regarded as substantially similar in all essential respects to that of a line-haul carrier, as defendants contend and as we believe it should be, it seems apparent that complainant's services should be regarded as those of intermediate switching lines and that Seatrain's responsibilities in connection with switching reclaims should be the same as those of line-haul rail carriers."

9. Exception is taken to the following finding or conclusion on Sheet 13 of the proposed report:

"With respect to the contention of complainants and Seatrain that detention of cars cannot be fairly charged to Seatrain unless similar detention of cars is charged to break-bulk water carriers, it is sufficient to state that we do not consider the amount of free time granted under demurrage rules to shippers over break bulk lines important in determining what would be reasonable terms and conditions under which Seatrain and defendants, parties to through routes, should interchange cars. Of more importance are the rules under which the railroads themselves have for many years interchanged cars."

1981 10. Exception is taken to the italicized portion of the following conclusion set forth on Sheets 13 and 14 of the proposed report:

"The Commission should find that defendants, insofar as they participate in through routes with Seatrain, should be required to interchange their cars with Seatrain in the performance of through transportation over such through routes at the compensation provided in the code of per diem rules of the association, *provided that Seatrain subject itself to all of the terms and conditions of the codes of car-service and per diem rules of said association and assume responsibilities the same as those assumed under such rules by line-haul carriers, including per diem for detention due to its inability to receive cars and switching reclaims.*" [Italics ours.]

(a) In that the proviso would have the effect of relieving the defendants of any obligation to permit the interchange of their cars with Seatrain in the performance of through transportation unless Seatrain subjects itself to all the terms and conditions of the codes of car service and per diem rules, while at the same time it contains no requirement that the defendants make such changes in the car service and per diem rules agreement as would make it possible for Seatrain to satisfy the proviso.

(b) In that it would attach a condition that Seatrain assume responsibility for per diem during detention caused by its inability to receive cars and for switching reclaim on cars delivered
1982 by complainants to it when the propriety of such a condition is not properly in issue in this proceeding and when, if it were, there would be no justification for such a requirement so long as other water carriers with whom Seatrain competes are not required to assume similar responsibility.

2013 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY, COMPLAINANT

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL., DEFENDANTS

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY, COMPLAINANT

v.

AKRON, CANTON & YOUNGSTOWN RY. CO. ET AL., DEFENDANTS

Exceptions of certain defendants and of the intervener, Association of American Railroads, to the examiners' proposed report

Filed Sept. 19, 1939.

Come now certain defendants* and the Association of
2014 American Railroads, and intervener, and respectfully file the following exceptions to the proposed report of the Examiners:

*Defendants for whom these exceptions are filed are those which adopted as their own the testimony offered by intervener, Association of American Railroads, at the hearing beginning in New York on February 28, 1939, and joined with that intervener in filing a brief. They include the Eastern Lines which are defendants in this case; Southern Pacific Company, and Texas & New Orleans Railway; and the following Southern Lines: Southern Railway Company; The Cincinnati, New Orleans & Texas Pacific Ry. Co.; The Alabama Great Southern Railroad Company; New Orleans and Northeastern Railroad Company; Harriman & Northeastern Railroad Company; Northern Alabama Railway Company; Georgia Southern & Florida Railway Company; New Orleans Terminal Company; Atlantic Coast Line Railroad Company; Receivers of Seaboard Air Line Railway Company; Receivers of Central of Georgia Railway Company; Receivers of Florida East Coast Railway Co.; Clinchfield Railroad Company; Richmond, Fredericksburg & Potomac Railroad Co.; The Nashville, Chattanooga & St. Louis Railway; Atlanta & West Point Railroad Company; Western Railway of Alabama; Georgia Railroad; Louisville & Nashville Railroad Company; Illinois Central Railroad Company; Yazoo & Mississippi Valley Railroad Company; Gulf, Mobile & Northern Railroad Company. (Tr. 925–926; Letter dated March 10, 1939, addressed to Mr. E. J. Hoy, Examiner, by Mr. Charles Clark, pursuant to permission granted at the hearing (Tr. 925).)

I

We except to the failure of the Examiners to find that defendants are under no legal obligation to furnish cars for the use of Seatrain and that the Commission is without authority to require defendants to turn their cars over to Seatrain.

II

We except to the finding by the Examiners that defendants, insofar as they participate in through routes with Seatrain, should be required to interchange their cars with Seatrain in the performance of through transportation over such through routes as the compensation provided in the Code of Per Diem Rules of the Association, which is now, and has been for sometime, $1.00 per day.

2015

III

We except to the failure of the Examiners to find that the payment of $1.00 per diem by Seatrain for each day a railroad car is in its possession would fail justly to compensate defendants and would fail to reimburse them for their car ownership costs for the time during which their cars are in Seatrain's possession and for the idle or non-productive time of such cars attributable to their use by Seatrain.

IV

We except to the failure of the Examiners to set forth in their report the facts of record with respect to the nature of the use and possession by Seatrain of defendants' cars and with respect to the resulting idle or unproductive time of such cars.

V

We except to the finding of the Examiners that defendants' cars are not subject to corrosion at an excessive rate while in the possession of Seatrain, due to the exposure of the cars to full salt atmosphere; and to the failure of the Examiners to find that such excessive corrosion results in additional damage to each car of from 30 to 70 cents per day.

VI

We except to the failure of the Examiners to find that Seatrain should pay to defendants, as compensation for the use of their cars, $10 for each day a car is in its possession.

2042 [REPORT OF THE COMMISSION ON FURTHER HEARING OMITTED. PRINTED SIDE PAGE 76 ANTE].

2051 *Order*

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of January A. D. 1940

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS & LOWER COAST RAILROAD CO.

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and the Commission having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusions thereon, and its finding that said proceedings should be reopened for further hearing, which said report on further hearing is hereby referred to and made a part hereof:

It is ordered, That said proceedings be, and they are hereby, reopened for further hearing.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

2053 Before the Interstate Commerce Commission

Docket No. 25728, et al.

IN THE MATTER OF HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

Docket No. 25878

NEW ORLEANS & LOWER COAST RR. CO.

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL.

HOTEL ST. GEORGE, BROOKLYN, NEW YORK,
Monday, September 16, 1940.

Met, pursuant to adjournment, at 10:00 o'clock A. M.
Before H. W. ARCHER, Examiner. M. J. WALSH, Examiner.

Appearances

Parker McCollester, 25 Broadway, New York, N. Y., appearing for Hoboken Manufacturers Railroad Company, Complainant; and Seatrain Lines, Inc., intervener. Joseph S. Smith and Toll R. Ware, Missouri Pacific Building, St. Louis, Missouri, appearing for Missouri Pacific Railroad Company and Missouri
2054 Pacific Lines in Docket 25728; and New Orleans & Lower Coast Railroad Company in Docket No. 25878. T. P. Healy, 466 Lexington Avenue, New York, N. Y. R. D. Brooks, 466 Lexington Avenue, New York, N. Y. W. T. Pierson, Erie Railroad, Midland Building, Cleveland, Ohio. F. R. Cross, Baltimore & Ohio Railroad, Baltimore, Md. J. F. Eshelman, 1740 Broad Street Station Building, Philadelphia, Pa., appearing for Eastern Railroads, defendants. J. Carter Fort, Transportation Building, Washington, D. C., appearing for Association of American Railways, defendants. J. R. Beil and G. H. Muckley, 205 Transportation Building, Washington, D. C., appearing for Southern Pacific Company and Texas & New Orleans Railroad Company, defendants. Joseph Marks and W. W. McGehee, Southern Railway Building, Washington, D. C., appearing for Southern Railway System, defendants. W. J. Mathey, 39 Broadway, New York, N. Y., appearing for Seatrain Lines, Inc., intervener. William C. Burger, 908 West Broadway, Louisville, Ky., appearing for Louisville and Nashville Railroad Company.

Exam. ARCHER. Gentlemen, as you know, the Interstate Commerce Commission has set for further hearing at this time and place Docket No. 25728, Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company, et al., and Docket No. 25878, New Orleans & Lower Coast Railroad Company v. Akron, Canton & Youngstown Railroad Company, et al.

Who appears for complainants?

Mr. MCCOLLESTER. Parker McCollester, for complainant in Docket 25728, and also for Seatrain Lines, which is an intervener in both dockets.

Mr. WARE. Joseph S. Smith, 1800 Missouri Pacific Building, St. Louis, and Toll R. Ware, Missouri Pacific Building, St. Louis, Mo., for Complainant in 25878.

Mr. MCCOLLESTER. W. J. Mathey is appearing for Seatrain, which is an intervener, on behalf of the Complainant.

Exam. ARCHER. I presume Seatrain are the only interveners in behalf of the complainants.

Who appears for defendants?

Mr. ESHELMAN. T. P. Healy, R. D. Brooks, W. T. Pierson, F. R. Cross, and J. F. Eshelman, for Eastern Railroads.

Exam. ARCHER. Are all present?

Mr. ESHELMAN. Are or will be.

Mr. MUCKLEY. J. R. Bell and G. H. Muckley, 205 Transportation Building, Washington, D. C., appearing for Southern
2057 Pacific Company and Texas & New Orleans Railroad Company, Defendants.

Mr. BURGER. William C. Burger, 908 West Broadway, Louisville, Ky., appearing for Louisville and Nashville Railroad Company.

Mr. MARKS. Joseph Marks, Southern Railway System Lines, Atlantic Coast Lines, receivers for the Seaboard Air Line and receivers for the Central of Georgia and the Illinois Central.

Mr. WARE. Mr. Examiner, Mr. Smith and I appear for the Missouri Pacific Railroad Company and the Missouri Pacific Lines, which are named as defendants in Docket 25728.

Exam. ARCHER. Any other appearances on behalf of the defendants or interveners on behalf of the defendants?

Mr. FORT. J. Carter Fort, for the Association of American Railways, I wouldn't say interveners on behalf of the defendants, but interveners.

Exam. ARCHER. Do you want to state your position?

Mr. FORT. The nature of our intervention is fully disclosed by the record.

Exam. ARCHER. This is a further hearing with respect to the conditions that may properly be imposed in an order requiring the defendants to interchange their cars with Seatrain Lines, Inc.

You might state for the benefit of the reporter who is
2058 to receive the free copy of the testimony for the complainants.

Mr. MCCOLLESTER. I am.

Mr. FORT. For the defendants, I am.

Exam. ARCHER. The complainants may proceed.

Mr. MCCOLLESTER. Mr. Examiner, I don't know that it is necessary to make any statement before we offer our testimony, but since this is your first participation in this proceeding, it might perhaps be helpful to you to state very briefly the history of the case to date.

The complaints were brought in the end of 1932 or 1933, at which time the railroads, through the machinery of the American Railway Association, had adopted car service rule No. 4, providing that no railroad should deliver to a water carrier cars of another railroad without the latter's consent which was to be evidenced by reporting that assent with the American Railway Association.

Pursuant to that rule the various railroads, Class I Railroads, had recorded with the Associations either their consents or their refusals to permit the delivery of their cars to Seatrain. They had at the same time consented to the delivery of their cars to every other water carrier in the country, taking railroad cars or equipped to handle railroad cars. We had a hearing on the complaint in November of 1933. At that time there was no question raised by the defendants, nor had any question been raised by them in
2059 their answers to the complaints as to the compensation which they should, receive if they should be required to deliver their cars or permit the delivery of their cars to Seatrain. I should say that far from offering any evidence on the question of compensation at that time, counsel for the defendant railroads at that time expressly stated that they were not interested in the question of compensation and no claim was made that when cars were delivered to Seatrain, the compensation should be any different from the going per diem rate paid when cars are interchanged with any other carrier.

The defense of the railroads at that time was that the Commission lacked jurisdiction to require them to permit the delivery of their cars to a water carrier.

The Commission rendered its first decision at a somewhat later time, in which decision it held that it did have jurisdiction to require railroads to permit the delivery of their cars to a water carrier in the performance of through transporation over through

routes over which the owning railroads were parties. It said that at that time it could not determine what through routes existed to which the defendant railroads were parties, through routes with Seatrain, and that question was in issue in another proceeding before the Commission, which was then pending, Docket 25727.

Following that, proceedings were held in 25727, and in those proceedings the Commission rendered its decision in which
2060 it determined that the Eastern Railroads, that is, the Trunk Line and New England Railroads, were parties to through routes with Seatrain for transportation between the East and the Southwest via New Orleans; that with respect to the railroads serving New Orleans, there was a question whether they were actually parties or not, but that in any event, whether they were or not, through routes should be required, and they would be required to participate for through transportation by the Seatrain. And the Commission at that time said, referring to this case, 25728 and 25878, that if it reaffirmed its jurisdiction to require the interchange of cars, found that the interchange of cars constituted the economical and efficient way of accomplishing through transportation via rail and Seatrain, it said, if the railroads did not conform their practices to the Commission's findings, the matter might again be brought to the Commission's attention.

In the meantime a considerable number of the railroads which had previously regarded their refusals to permit interchange of their cars with Seatrain, changed those refusals to consents without condition, but there were still a substantial number of railroads who had recorded with the A. A. R. their refusals to permit the delivery of their cars to Seatrain in the performance of through transportation.

2061 Accordingly, in July of 1938, the complainants in Docket 25728 and 25878 filed motions with the Commission for the entry of an order, in conformity with the Commission's previous findings requiring those defendant railroads who had not so far consented, to do so, to consent to the delivery of their cars to Seatrain.

When those petitions or motions were filed, many of the defendant railroads filed their reply to the motions, in which they, for the first time, raised the question as to what compensation should be paid if they should be required to permit the interchange of their cars with Seatrain, and asked that before the Commission enter an order, it determine the amount of compensation to be paid as a condition to the railroad's giving consent to the delivery of their cars to Seatrain.

The Commission reopened the proceedings for further hearing on that petition of the railroad.

The only question raised by that petition, as I have said, was the question of compensation. The Commission, however, by its order reopened the case, said in substance, that the case was reopened for the purpose of further hearing and determination as to the terms and conditions, including compensation, under which the railroads who had not so far consented to the interchange of their cars with Seatrain should be required to do so.

We had a further hearing, pursuant to that reopening, in
2062 the early part of 1939. Testimony was directed to the question of compensation, that is, the question of per diem, and there was then raised, for the first time, by the testimony offered by the Association of American Railroads which, over our objection, had been permitted to intervene, the further question as to who should bear the per diem reclaim of the switching railroads when cars were held at the ports for interchange with Seatrain.

We objected to evidence on that point, on the ground that the question was not in issue; that it could not possibly be a condition of an order requiring interchange of cars with Seatrain, because that was a question which affected simply the Trunk Line Railroads at the ports as connections of the switching lines and not in their capacity as owners of cars. For example, as we endeavored then to point out, since the Missouri Pacific and the Santa Fe and various other railroads had consented to the interchange of their cars with Seatrain, there could be no question of attaching condition to the delivery of their cars by the Hoboken Manufacturers Railroad to Seatrain, and yet there did exist the question whether the New York Central or the Pennsylvania, on the one hand, or the Hoboken, should pay the per diem to the Missouri Pacific for the time the car was held awaiting interchange with Seatrain ves-
sel. But that could not have concerned the Southern Pacific
2063 or the Missouri Pacific or the Santa Fe.

In other words, we claim that there was no relation between those two questions. In spite of that, however, the presiding Examiner allowed the evidence to be received and the hearing was closed. We then had briefs and the Examiner submitted a proposed report in which findings were made on this question of who should assume the per diem for the detention of the cars by the switching railroads at the ports. We filed exceptions to the proposed report, again urging that that question was not in issue; had not been raised by the complaints and by the answers; that it was not an issue which could by any stretch of the imagination constitute a condition to be attached to an order requiring nonconsenting roads to permit the interchange of their cars with Seatrain, and that it had been injected into the case by the Association of

American Railroads, which was only an intervener, and as we believed, had been allowed to intervene improperly.

When we came to argument before the Commission, I again argued the contention that there was no relation between consenting to interchange of cars and who should pay the per diem while the cars were being held. We did conceive, of course, that how much the per diem should be was properly in issue and was a condition to be attached to an order requiring a nonconsenting
2064 railroad to permit its cars to be delivered to Seatrain; that the Commission could attach to that a condition, for example, that the Pennsylvania should permit its cars to be delivered to Seatrain in the performance of through transportation, on the condition that it received one dollar per day or whatever compensation was determined as the reasonable compensation, but that there was no possible way by which there could be made the further condition that the Pennsylvania permit the interchange of its cars with Seatrain on the condition that the Lower Coast should assume the reclaim on a car of the Southern Railway. And that was really what the whole matter of reclaim and detention came down to.

I said, however, that if the Commission, contrary to our contention, considered that this question of who should assume the per diem while cars were held at the ports, was to be determined here as an issue in this proceeding, we wanted a further hearing to present evidence which we considered relevant.

The Commission has reopened the proceeding for further hearing, and that is what we are here for now.

Now, I have had discussions with Mr. Fort, attorney for the A. A. R., but acting as spokesman, as I understand it, for all the defendants here as well as for the intervener, and we have agreed that at this further hearing we will, neither of us, offer any
2065 further evidence on the question of the measure of the compensation.

Mr. FORT. May I interrupt a moment there? I am acting as counsel for the Association and for those defendants that were associated with the Association on the brief, that was our agreement. I did not understand that I was to speak for all the defendants, but I am speaking for those who were associated with us.

Mr. MCCOLLESTER. I thought you were speaking for all the nonconsenting defendants.

Mr. FORT. All the defendants that had been associated with us. Take the Missouri Pacific, for example, that is a defendant, but I did not undertake to speak for them.

Mr. MCCOLLESTER. As to the consenting railroads, those railroads that have recorded their consents to the interchange of their

cars with Seatrain, no order was required. They have consented, they have complied with the Commission's expression of its views as to their obligations. No order is required. They have consented without making any conditions as to their consents, and therefore as to them, no order is necessary. There is no issue left for the Commission to determine.

Exam. ARCHER. Who represents the consenting railroads here, any one?

Mr. MCCOLLESTER. There are some of them that are represented.

2066 Mr. WARE. I do.

Exam. ARCHER. Is that statement correct?

Mr. WARE. Yes.

Mr. MUCKLEY. I think, Mr. Examiner, that this matter is really an investigation by the Commission for the purpose of establishing reasonable practices and rules as to not only the measure of the per diem, but the interchange that was the original issue in the case.

Mr. MCCOLLESTER. This is a complaint proceeding, if the Examiner please.

Mr. MUCKLEY. I think after the order of the Commission reopening this case, it was turned into an investigation by the Commission, as a matter of fact.

Mr. ESHELMAN. Mr. Examiner, if I may have just one word. I take it that counsel's statement was primarily in the nature of an opening statement and was not intended necessarily to define the issues which have already been defined, and we don't care to hear argument on that.

As to the question of whether consenting takes it out of this case, I will call attention to the Commission's order of April 1, 1940, which denied motion of complainant to dismiss as parties defendants the roads which had consented. The fact that the Commission did not permit that dismissal is, I think, an indication on its own part that it regards that there may be some issues

2067 here which may affect some of the consenting defendants, and I don't think therefore, we ought to reframe the issues as framed by it.

Mr. FORT. Mr. Examiner, may I make a very short statement? The record shows very clearly the nature of the intervention by the Association and the character of my appearance. I don't want to reopen this at all. I mention it merely because of the statement Mr. Collester made. In connection with this agreement, I agreed, for the Association, because the Association is the only person I can speak for on the record, each railroad being left to speak for itself, but when we talked together as to the scope of this further

hearing, and the suggestion came from one side or the other, I think from Mr. McCollester, we agreed to limit this hearing in such a way as to introduce no further testimony on the measure of the per diem while the cars were in the possession of Seatrain. At that time I told him I would talk with some of the defendants who had been taking the same position as the Association had, and I did, and made that agreement, but I want the record to be clear that I do not undertake here to speak for the defendants in any event.

Mr. McCollester. Certainly we agree that Mr. Fort does not speak for the consenting defendants.

Exam. Archer. The question of the compensation as well as any other matter of interest in connection with the interchange of trains with Seatrain in this case, not only with
2068 the objecting defendants, but also with the consenting defendants, may be taken up, if they wish to put anything in. It is not a matter of investigation by the Commission, it is a complaint and answer proceeding.

Mr. Fort. Our agreement is not based on the thought on the part of myself, that the reopening did not reopen that issue. In fact, I took the position that the reopening did reopen that issue, but it was merely an agreement by counsel that insofar as evidence was concerned in this reopening, neither of us would introduce evidence on that point, although the issue would remain in the case and be subject to briefing as it now stands and be subject to argument.

Mr. McCollester. That is our understanding.

Exam. Archer. Are the complainants ready to proceed?

Mr. McCollester. May I make one further statement by way of opening and explanation of the evidence we propose to offer?

Our evidence will be confined to the only matter that we know that is in dispute in this proceeding, other than the measure of the compensation as to which, under the agreement with Mr. Fort, we propose to offer. We propose to offer no further evidence and we understand that nonconsenting defendants propose to offer none. We asked for the reopening to put in some further evidence on the question of who should bear the per diem while cars
2069 were held at the ports awaiting interchange with Seatrain.

As we conceive that question, it comes down really to the question whether the railroads are now compensated by their rates for holding cars for such holding as may be necessary, awaiting interchange with Seatrain.

Exam. Archer. You mean their line haul rates?

Mr. McCollester. Their line haul rates; and we will contend that they are compensated in their rates. We will show the Examiners somewhat more fully than we were able to do at previous

hearings the free time provisions of the railroads under which, as a part of their service covered by their rates, they undertake the [to] hold freight for interchange with coastwise and other water carriers, including Seatrain, and we will argue that since, by their tariff provisions, they have undertaken to hold freight in cars for a certain period of free time, that they are not entitled to being relieved of the expense of car hire while they hold those cars, because they are already compensated for it. And to refuse to assume the per diem paid to the car owners during that period would mean that they would be compensated twice for a service covered by their line haul rates.

I should explain perhaps for your information, Mr. Archer, although I know that you are thoroughly familiar with the situation here in New York Harbor, that Seatrain's Terminal is on the Hoboken Manufacturers Railroad at Hoboken, N. J.,
2070 on the west side of the Harbor. This is in the record, but I would like to just point it out to you. There are cars which are to be interchanged with Seatrain, in the case of outbound freight, freight going into the interior, which are brought to New York Harbor by one or another of the Trunk Lines, delivered by such Trunk Line to the Hoboken Manufacturers Railroad, and then by Hoboken Manufacturers Railroad in turn interchanged with Seatrain. Inbound freight brought in by Seatrain is handled in the reverse way, the cars being put off the ship to the rails at the terminal at Hoboken on Hoboken Manufacturers Railroad, which switches the car to the Trunk Line connection.

Now, the Hoboken Manufacturers Railroad is a switching line. For some historical reason, clouded in mystery, so far as I know, it doesn't receive switching charges as such, but receives divisions of the line haul rates, but those divisions are predicated upon the assumption that the Hoboken Manufacturers Railroad should be at no expense for car hire. The Hoboken Manufacturers Railroad, however, is a party to the per diem rules agreement and it makes settlement for car hire for cars that are in its possession directly with the owning railroads rather than paying the Trunk Line railroad and having the Trunk Line railroad remit to the owning railroads. Thus, for example, if a Southern Pacific car is in the possession of the Hoboken Manufacturers Railroad
2071 for a period of three days, the Hoboken Manufacturers Railroad pays three days' per diem to the Southern Pacific, but since the Hoboken's divisions of joint rates are predicated on the understanding that it is to be at no expense for car hire, it is reimbursed for the per diem that it pays in the form of reclaim by the Trunk Line railroad from whom it receives a car or to whom it delivers a car to be moved in service over the Trunk Line railroad. Actually, that is accomplished at the present time and has

been for a long time by the Hoboken Manufacturers Railroad receiving an average reclaim based upon the average detention of all cars, rates having been made a long time ago, and the basis they were determined on having continued since that time. So that there is here in this case, can be here, no question of whether the Hoboken Manufacturers should itself assume the per diem on cars interchanged with Seatrain.

The question arose because of the contention of the Trunk Lines in negotiations, not in any complaint proceeding, but in negotiations that on Seatrain traffic the reclaim to be paid for the Hoboken Manufacturers Railroad to reimburse it, should be limited to a dollar a day, which is the intermediate reclaim, rather than to its actual detention of cars. We have had negotiations with the Trunk Line Railroads on that subject over a period of years and neither we nor they have ever injected that issue into
2072 this proceeding, so we have contended that it is not here.

We have conferred with officials of the A. A. R. on the subject and hoped that the matter would be worked out by negotiation, but that is the only difference that we know of between us here and it is, therefore, our purpose here to confine our showing to justifying the contention that the line haul rates under which the traffic moves to and from the Port of New York include compensation for holding the freight in cars for a certain period of free time, and that therefore it is the obligation of the Trunk Line Railroads to reimburse the Hoboken Manufacturers Railroad for any per diem it has to pay while holding cars for Seatrain: that they do that when the Hoboken Manufacturers Railroad holds freight in cars for other steamship lines; that the same rates are applicable where Seatrain is concerned, and that therefore Seatrain should not be required to assume the burden of reimbursing the Hoboken Manufacturers Railroad for its per diem when no other steamship line is required to assume any expense for per diem for cars for their account or held waiting for interchange at the ports. And the same situation is true at New Orleans, the New Orleans & Lower Coast similarly being a switching line.

Mr. ESHELMAN. Mr. Examiner, if counsel will permit, I think there was a slight inaccuracy in the way you stated the si-
2073 uation on divisions and car hire. I don't want to seem to be bound by that, and I assume that you did not intend that I should be bound by that.

Mr. FORT. They are all subject to check upon the record. I don't think anybody is bound by those opening statements.

Mr. MCCOLLISTER. Before we call our first witness, I would like to ask the consent of counsel that there be included in the record a copy of the latest circular of the Association of American Railroads listing the railroads that have consented or have not con-

sented to the delivery of their cars for interchange with Seatrain. I have a copy here of Special Car Order No. 30, dated July 24, 1940, with a supplement dated August 6, 1940, but I understand there is a still later supplement that I have not received.

Mr. FORT. We have no objection. Within five days we will file it with the Commission and give you a copy.

Exam. ARCHER. What is the title of it?

Mr. MCCOLLESTER. Special Car Order No. 30, with its supplements.

Exam. ARCHER. Showing the consenting railroads; is that it?

Mr. MCCOLLESTER. That's right. It shows the consenting railroads and the nonconsenting railroads.

Mr. MUCKLEY. Who is to furnish that?

Exam. ARCHER. McCollester is to furnish it.

(Discussion off the record.)

Exam. ARCHER. It is to be furnished by Mr. McCollester.

2074 Mr. MCCOLLESTER. We will file it complete now, Mr. Examiner. We file it as the next exhibit.

Exam. ARCHER. That will be Exhibit number 68.

Mr. MCCOLLESTER. Copy of Special Car Order No. 30 (revised) dated July 24, 1940, together with supplement No. 1 thereto dated August 6, 1940, and supplement No. 2 thereto, dated September 9, 1940. Supplement No. 2 adds the Delaware, Lackawanna & Western Railroad as a consenting railroad.

Mr. MUCKLEY. I assume copies of that exhibit will be furnished parties within five days.

Mr. MCCOLLESTER. I think all the parties here are members of the Association and copies are available to them.

Exam. ARCHER. It may be received.

(Complainant's Exhibit 68, Mr. McCollester, received in evidence.)

Mr. FORT. Mr. Examiner, in view of the rather long opening statement that Mr. McCollester made, I wonder if it would be appropriate for me to make a very short one.

Exam. ARCHER. I have no objection.

Mr. FORT. There are some rather sharp differences between the client I represent and the client Mr. McCollester represents with respect to matters to which he directed his remarks. He said he took the first and primary issue to be whether or not the compensation of the railroad was sufficient in their rates to compen-

2075 sate them for a certain amount of holding at the port. Our position is that that is an extreme oversimplification and misconception of the issue. When one railroad interchanges cars with another railroad under established rules already shown in the record, if the first railroad is unable to make that interchange by reason of the disability or fault of the railroad, inability of the

second railroad to take the car, then the second railroad becomes liable for any car detention, entirely properly so, after that time. One railroad may have local rates to Chicago where it is to turn over a car to another railroad, the second railroad is unable to receive it, so, after the tender, the second railroad becomes liable for the per diem. Of course, the local rate of that first railroad in Chicago for local delivery would encompass a certain amount of free time, two days' free time, or something of that kind, but that, in no sense, would be controlling in connection with this interchange of cars between railroads any more than the situation here at the port would be controlling that he speaks of. Furthermore, he referred to water lines in New York and he proclaimed his client as a water line, and that is a matter of terminology. Perhaps it may be called a water line, but it should be said that it is a water line with a distinction from all other water lines here in New York, in that it interchanges cars with railroads and others do not, and that is what this case is about. So when he re-
2076 fers to other water lines, he is referring to something we think has no significance.

Exam. ARCHER. Are there other water lines that interchange with Seatrain?

Mr. FORT. No. That seems to us to be more of a play on words than anything else.

The facts are these, that the railroads bring cars into New York and also into New Orleans. They are not cars that the railroad is free to unload on docks or anything else as if they were going by water, but they are the cars that the Seatrain demands the railroad permit it to use, contrary to the wishes of some of the railroads. When the car comes here, Seatrain cannot take it because it is not ready to take it. The same situation holds true in New Orleans.

Now, in one way or another they have tried to avoid, as the record shows, paying for the per diem during that period of detention when Seatrain is responsible for the detention.

Now, in New Orleans they have done it in this way: An associated company, the switching line there, the New Orleans & Lower Coast, has published a tariff under which it refuses to take these cars until Seatrain gives it a clearance, so the line haul carrier brings the car into New Orleans, holds it on an average of over three days because Seatrain cannot take it, not on any dis-
2077 ability of the line haul bringing it in, and they say we should pay for it.

The situation here in New York is a little more complicated, all shown in the record, and I don't want to take your time now, but substantially the same holds true where the line haul carriers bring the cars into New York, and they must be held here because of Seatrain, not because of the line haul carriers, and Seatrain says,

"Nevertheless, you should pay for them," and that in spite of the fact that it is absolutely settled and provided for by per diem and car service rules, that when those situations exist between railroads and the railroad responsible for the detention pays it. And we say that Seatrain, whether it be a water line, or whatever you wish, being a user of cars, but being an instrumentality of a railroad, should have the same responsibility with respect to this detention that the railroads themselves have.

I hope I haven't taken too much of your time, but I did not want the evidence to be adduced under any misconception of our position.

Mr. McCollester. Mr. Examiner, I suppose it is not appropriate to argue the case further at this stage, but, of course, we do not agree with the view of Mr. Fort.

Very briefly, Seatrain's position, which we hope the proof will sustain, is not that Seatrain refuses to take the cars, but since the Railroads' tariffs provide a certain amount of free time
2078 during which they will hold the freight awaiting interchange with any steamship line, and shippers take advantage of it, that there is no reason why Seatrain should assume the expenses as covered by the railroad rates.

Exam. Archer. That is a matter of proof.

W. J. Mathey having previously sworn, testified further as follows:

Direct examination by Mr. McCollester:

Q. What is your position with the intervener, Seatrain Lines?

A. Traffic Manager.

Q. Before your association with Seatrain, were you connected with one of the Trunk Line railroads serving New York Harbor?

A. I was.

Q. With what railroad?

A. Erie Railroad.

Q. How long were you with the Erie Railroad?

A. Almost 20 years.

Q. What position did you hold with that road?

A. Well, I held almost every position in the Traffic department. At the time I left I was Assistant General Freight Agent.

Q. Did you have to do at that time with the preparation of tariffs relating to New York Harbor operations and undertakings of the Erie Railroad and the Trunk Line Railroads?

A. Yes, in my various capacities, I did.

2079 Q. Since you left the Erie Railroad you have, have you not, kept in touch with the tariff provisions of the Trunk Line Railroads applicable to New York Harbor?

A. I have tried to; yes.

Q. Now, we will show in a moment that the tariffs of the Trunk Line Railroads contain certain provisions under which the rail-

roads undertake to hold freight to be intercharged with water carriers for certain periods of free time. Can you state from your experience what the purpose is of those tariff provisions providing a period of free time under which freight will be held at New York Harbor for interchange to vessels?

Mr. FORT. Mr. Examiner, I don't want to be quarrelsome, but I think a tariff speaks its purpose through its language, and is not subject to proof by one particular person. Innumerable people gathered together in publishing the tariffs he is talking about. There is no reason why one person, whatever his association was, should indicate what the purpose of the tariff was or he thinks it was. The tariff speaks for itself.

Mr. MCCOLLESTER. A tariff is quite different than a contract, whatever its purpose was.

Exam. ARCHER. The witness may state.

Mr. FORT. I object that it is improper for any one witness—I will take an exception.

2080 Exam. ARCHER. All right; take an exception.

A. Well, the business of interchanging freight with a water line, of course, is different than other ordinary domestic traffic delivered by a railroad. For illustration, in connection with the ships, they don't have sailings every day. The sailings in a good many cases are uncertain, due to the vagaries of the weather or other causes. Furthermore, shippers say take time to accumulate certain lots for transportation on any one steamer, particularly if they have a booking calling for a certain amount of cargo on a steamer and it is necessary that this cargo be accumulated at the ports. Furthermore, it is necessary that the shippers in a good many cases, after the shipments have left the point of origin which may be located a thousand or two thousand miles away from the port, desire their appointments and things of that sort before the shipments can actually be submitted to the steamship companies. Furthermore, the railroads cannot always transport the freight from origin to destination to meet the time when the ship was in port.

Again we have a situation that a ship may want its freight delivered according to custom, either alongside the ship or along the pier, so it is not always possible that they immediate, upon the arrival of a car, arrange so that the car can be placed on the pier of the steamship company.

There are other considerations of that kind, but, as the
2081 Commission has said in several of its cases, the water-borne traffic differs in that respect very greatly from the ordinary domestic traffic where ordinarily a shipper or a consignee can take the freight on any one day, which cannot be done by a steamship company.

Q. Is there also involved the element that if all shippers held their freight back so that it would arrive at the port only immediately on the day of sailing, the railroads would find themselves at times confronted with congestion?

A. They may well have happened and they may also, if they held it back, miss the sailings for which the shipments are intended. It is always better to have the cargo here available to the orders of the consignees or the steamship company, whichever gives the orders.

Q. Now, are all of those considerations which you have just described applicable in connection with freight which shippers wish to move via Seatrain?

A. They are in a good many cases.

Q. Now, while it has been shown in the record here that Seatrain generally takes freight in cars by having the freight switched directly in the cars to the ship, does Seatrain also receive freight brought to it by lighters from the railroads?

A. It does. There are a good many cases where freight is delivered to Seatrain docked by lighter.

2082 (Question read.)

Q. Under the tariffs of the Trunk Lines, do shippers have the same option in the case of Seatrain as in the case of any other water carrier to direct that freight be delivered by lighter to the ship?

A. They have.

Q. They exercise that option from time to time?

A. They do.

Q. Now, have you prepared for introduction as an exhibit here excerpts from Agent Curlett's Tariff No. 116, ICC. No. A-620, governing free time allowances on export and coastwise freight in New York Harbor?

A. I have.

Q. Is that the exhibit you have before you?

A. It is.

Exam Archer. It will be marked Exhibit No. 69 for identification.

(Exhibit No. 69, Witness Mathey, marked for identification.)

Q. Will you briefly explain and comment on this exhibit?

A. I have incorporated in this exhibit the pertinent rules covering the free time on export and coastwise freight while being held at the terminals and in the holding yards of the various Trunk Line railroads covered by Mr. Curlett's tariff referred to.

2083 The first item has to do with export freight covered by through export bills of lading. Section A of this item,
8365. deals with the free time on freight covered by through

export bills of lading in connection with the so-called agreement lines. These are lines which have filed either through the old United States Shipping Board or through the Trunk Line Association an agreement whereby they bind themselves to certain conditions in consideration of the allowance of 15 days' free time. This rule was put in, to my recollection, during the war years, I think it was 1919, I haven't the exact date. As I say, it provides for the allowance of 15 days' free time, exclusive of date of arrival, after which time the freight is subject to storage charges except on bulk freight and a few other exceptions where the freight will be subject to demurrage charges. There are separate rules on flour, but they really amount to the same thing.

It will be noted that paragraph 3 in Item 8390 provides that if through omission or failure of the steamship company or operator to clear the freight on any vessel, or during any period for which specifically booked, or to order freight within the 15 days' free time, all storage charges shall be paid by the steamship company or the steamship operator. There are also penalties to the railroads for failure to transport the shipments to the port in time.

The next one is through export bills of lading in con-
2084 nection with the so-called Nonagreement Lines. This provides for ten days' free time exclusive of the date of arrival.

Exam. ARCHER. You refer to the next one, what is that?

The WITNESS. I mean the next one, Section B on page 3. Exhibit No. 69).

Q. Go on.

A. On export freight not covered by through export bills of lading, Rule No. S-20 on pages 4 and 5, the free time period is ten days. On coastwise, intercoastal and export freight held in cars, page 7, Rule No. S-21, the export freight is allowed ten days free time and the coastwise freight is allowed five days' free time. There is also a provision recently added to permit the railroads to hold the cars at some point outside the port limits on account of inability of the consignee, exporter or steamship line, to receive it, or because of other conditions.

Mr. FORT. Is that on export freight?

The WITNESS. That is export, coastwise and intercoastal.

Q. Now, these tariff provisions, all of them, Mr. Mathey, would be applicable on freight interchanged with Seatrain; would they not?

A. They would. There is nothing in the tariff to the contrary.

Q. For example, this last one to which you refer, authorizing the railroads to hold the cars short of New York Harbor,
2085 would they not?

A. They would. There is nothing in the tariff to the contrary.

Q. For example, this last one to which you refer, authorizing the railroads to hold the cars short of New York Harbor would be applicable on cars destined to Seatrain?

A. That is correct.

Q. Now, is it the effect of these tariff provisions that under the railroads' applicable freight rates, they will, without additional charge to the shipper or consignee——

A. Or the steamship company.

Q. Or the steamship company, hold freight that moves via a steamship line in coastwise service for a period of ten days?

A. No; coastwise, five days.

Q That's right.

A. That's right.

Q. And ten days where the freight is to move in export service unless it is to go via one of the Agreement lines, in which event it is 15 days?

A. That is correct.

Q. Now, under these provisions, do the railroads assume all of the expense for car hire?

A. They do.

Q. Incident to holding the cars?

A. That is correct.

2086 Q. Do you find any tariff provision under which the railroads pass on any portion of the car hire during the period of free time to the steamship lines?

A. I cannot.

Q. And in your experience with the railroads, was that ever done?

A. Not to my knowledge.

Q. Now, is my understanding correct that the freight may be held either in cars or unloaded to piers?

A. That's right, it so especially states.

Q. If it is unloaded to piers, the railroads have to provide the piers and the warehouse facilities on piers to hold the freight; do they not?

A. They do.

Exam. ARCHER. Let me be sure that I understand this. Is it Rule 8-21 on page 7 which you claim covers the traffic here involved?

The WITNESS. That is coastwise.

Exam. ARCHER. We are not interested in export.

The WITNESS. Oh, yes; we are.

Mr. McCOLLESTER. We are, Mr. Examiner. There has been throughout this proceeding a considerable confusion on the sub-

ject of export. We have alleged in our complaints, both complainants have, that the refusal of the railroads is unlawful in connection with cars going to Cuba. We concede
2087 that the Commission has no jurisdiction to require through routes to Cuba or to require the maintenance of facilities for the operation of through routes to Cuba, and therefore to the extent that the Commission's jurisdiction to order railroads to permit the interchange of their cars rests under its powers with respect to the requirement of facilities for the operation of through routes. That does not obtain in the case of Cuban traffic, but we have alleged in our complaint, and so far have not been able to get any finding one way or the other from the Commission on that point, that it is discriminatory for the railroads, in violation of Section 3, to permit their cars to go to Cuba via the Florida East Coast car ferry, and to refuse to permit them to go to Cuba via Seatrain. It is a question of prejudice.

Mr. FORT. As I understand the holdings of the Commission today, they have held they have no jurisdiction over these cars that are going to Cuba by Seatrain.

Exam. ARCHER. There is a question of discrimination.

Mr. FORT. The contention is made that the Commission has heretofore held that they have no jurisdiction over these cars going to Cuba on Seatrain, for one reason or another, discrimination or anything else.

Q. Now, the Examiner asked you about export traffic. Your exhibit shows, does it not, that the free time during which the railroads will hold freight in cars without added charge
2088 is greater in the case of export freight than in the case of freight going coastwise?

A. It is.

Q. Now, where there is a difference in the rail freight rates to the port, which are generally the higher, the export rates or the coastwise rates?

A. The coastwise.

Q. Is Seatrain in competition with the Florida East Coast Car Ferry Company for the movement of freight in cars between points in the United States and Cuba?

A. It is very much so.

Q. Have you made an examination—the Florida East Coast Car Ferry operates, where?

A. Port Everglades, Florida, into Havana, Cuba.

Q. Does it take freight in railroad cars?

A. Yes.

Q. It furnishes a nonbreak bulk service to Cuba similar to Seatrain?

A. That's right.

Q. Have you made any inquiry to ascertain whether any per diem or reclaim is charged to the Florida East Coast Car Ferry Company for freight on cars interchanged with it?

Exam. ARCHER. Just a minute. Aren't you comparing now what might be called one export as against another export line, the Seatrain as against this Florida East Coast?

2089 Mr. MCCOLLESTER. Yes, sir.

Exam. ARCHER. I hardly think that is involved. If you want to compare export with what your intercoastal situation is, that may be permissible.

Mr. MCCOLLESTER. We are doing both, Mr. Examiner, but as I conceive it, a railroad may not discriminate between two steamship lines in foreign trade.

Mr. FORT. From different ports.

Mr. MCCOLLESTER. Different ports. You can say the same railroad may not discriminate between two steamship lines in foreign trade, but the question I was going to ask goes also to the argument of our opponents on the question of reasonableness, that because Seatrain takes the cars, it is in a different category from a break bulk line.

Now, we propose to show that the only comparable situation that we have is the Florida East Coast Car Ferry Company, which likewise takes railroad cars, and the witness will testify, if I may ask him the question, that the cars are held at Port Everglades and that the entire expense for detention of cars is borne by the railroads and that the reclaim is not borne by the Florida East Coast Car Ferry Company.

Exam. ARCHER. That is Section 1 you are talking about?

Mr. MCCOLLESTER. Yes, sir.

Q. Is any per diem or reclaim for the time the cars are held for delivery to the Florida East Coast Car Ferry Company

2090 at Port Everglades charged to the Florida East Coast Car Ferry?

Mr. FORT. I ask that counsel be required to establish basis or foundation for knowledge before the question is asked, so that the character of the knowledge may appear.

Q. Did you make inquiry of the Florida East Coast Car Ferry?

A. Yes, sir.

Mr. FORT. By writing or parole?

A. I inquired personally of Mr. Seurat.

Mr. FORT. What did Mr. Seurat tell you?

The WITNESS. Told me that the——

Q. What did you ask him?

A. I asked him, in the first place, how much free time the railroad gave at Port Everglades on export shipments going via the

Florida East Car Ferry Company, and the answer was seven days' free time, as to Florida East Coast Railway, I. C. C. 978. I then asked him does the Florida East Coast Car Ferry assume any per diem on the cars while they are being held and the answer was no.

Mr. FORT. That is hearsay testimony. I won't ask that it be stricken for that reason, but I call attention to it as indicating its limitations.

Q. Now, Mr. Mathey, are there break bulk steamship lines which dock at Hoboken and are assembled by the Hoboken Manufacturers Railroad?

A. Oh, yes, there are.

2091 Q. Is one of those lines a competitor of Seatrain?

(Two previous questions read.)

A. Yes, the Pan Atlantic Steamship Corporation is a competitor of Seatrain.

Q. Is there any provision in the tariffs of either Hoboken Manufacturers Railroad or Trunk Line defendants for the charge to any of those break bulk lines of any part of the per diem or reclaim during the time the cars are held on the Hoboken Manufacturers Railroad?

A. There are no such tariff provisions nor, as a practical matter, is it done.

Q. Supposing, for example, you have two cars containing the same commodity, consigned to Hoboken for coastwise movement, one to move via Pan Atlantic and one to move via Seatrain, the rates would be the same; would they not?

A. They would.

Q. Under the tariff provisions those cars would both be held for the period of free time; would they not?

A. They would.

Q. In the case of the car containing freight going via the Pan Atlantic, would any charge be made to the Pan Atlantic for per diem or reclaim while the car was being held for the free time period?

A. There would not.

Q. The Hoboken would get its reimbursement for per
2092 diem by way of reclaim from the Trunk Line carrier; would it not?

A. That is correct.

Q. Now, is the effect of the tariff provisions shown in your Exhibit No. 69 that after the expiration of free time if freight shall be held beyond the free time, demurrage, or storage charges are colected?

A. While in possession of the Trunk Line railroads?

Q. Yes.

A. Yes, that is the effect of it.

Q. Now, if demurrage is collected after the period of free time the freight is held in cars, who pays the per diem on the car?

A. The railroad.

Q. And if freight should be held in cars indefinitely for a break bulk line so that the demurrage shall accrue, still no part of the demurrage will be charged to the break bulk line as per diem; would it?

A. I don't see how it could be.

Mr. McCollester. You may cross-examine.

Cross-examination by Mr. Fort:

Q. Mr. Mathey, did you say that ordinarily the export rates are lower, that is, the rail export rates to New York are lower, than the coastwise rates?

A. No, I did not say that. I said that where there was a difference as between the port and the coastwise rates, the
2093 export rates were lower, where there is a difference.

Q. Where there is a difference?

A. Yes, sir.

Q. But you have, under the export rates, a ten or fifteen day free time?

A. That's right.

Q. And under the coastwise rate, where you haven't any free time at all, five days' free time?

A. That's right.

Q. That would not seem to indicate any correspondence between the rate and the free time, on the theory that there was compensation in the rate for free time as such; would it?

A. Well, the railroads make rates which cover a good many things. You have got to strike the average. Certainly the rates, if they are compensatory, include all of the expenses in connection with the transportation of freight covered by such rates.

Q. Yes. Now, if you have, for example, a 40 cent rate on coastwise, you would say that would not include the five-days' free time?

A. That's right.

Q. And at the same time you have a 30 cent rate on export and that includes compensation for 15 days' free time?

A. Yes.

Q. I just wanted to make that clear if I could.

2094 A. Maybe the coastwise rate is too high.

Q. I guess there are a lot of things that are wrong, but in this case we are just talking about a few. Now, with respect to the cars that come into New York for the break bulk lines for

coastwise transportation—are you familiar with whether those shipments move ordinarily on free billing, or are billed to the port, or do you know anything about that?

A. I know in connection with some lines. Are you talking about bills of lading now, or billing?

Q. Take them up one at a time.

A. On bills of lading I would say that practically all of them with our competitors move on through bills of lading.

Q. Now, have you made any point to check the amount of holding and detention of cars there is in New York on shipments coming here for movement coastwise for break bulk lines?

Mr. McCOLLESTER. We are going to put in such evidence.

A. Are you talking now about held by the trunk lines?

Q. I am talking about the cars that are detained instead of being carried over to the break bulk lines.

A. Well, I have no way of finding out how many days the cars are held by the Trunk Lines going to our competitors. They would not give you access to their records, Mr. Fort.

Q. I wasn't quarrelling with you about it, I just wanted to know if you knew or not.

A. No, I don't.

2095 Q. Do the demurrage tariffs to which you have referred provide charges for shippers to pay?

A. Well, they are self explanatory. After the expiration of free time, freight not in connection with the nonagreement lines——

Q. The railroads have tariff provisions to show the charges that it will make to shippers, doesn't it?

A. Yes.

Q. And the charges that are published in the tariffs are for that purpose; are they not?

A. Correct; either the shippers or, in this case, there are provisions distinctly that the steamship lines will assume in export business, the agreement lines. In other words, the railroad must collect the charges in my concept of the law and it doesn't make any difference to the railroads whether they collect from the shipper or consignees or any one else, as long as they collect the charges as the law obligated them to do.

Q. But you don't know anything about this actual period of detention here?

A. No.

Q. We do not mean to withhold it, because if you came to us we would tell you about it. Ordinarily there is a certain amount of free time provided for shipper on a shipment going to an interior destination as well as to a port; isn't there?

2096 A. Where it takes local delivery?

Q. Yes.

A. That's right.

Q. And there are combination rates that shipments move on. You are familiar with that, aren't you, that a very large number of shipments in this country move on combination rates?

A. I wouldn't say there is a large number that move on combination rates.

Q. You wouldn't say there was not?

A. I would say that today, to my knowledge of the situation there are not many that move on combinations. If you mean they move on a through rate which is made by the alternate clause of using the combination of aggregate of intermediates in lieu of a published joint through rate, I will say there are many. But, if you say where there aren't any joint through rates in effect, I will say there are very few cases today where that is a fact.

Q. I am talking about where the rate is made up of a combination of intermediates.

A. A great many.

Q. Now, in a case of that kind, the rate of the original line would include compensation presumably on the same theory you have been talking about with a two days' free time for the shipper; wouldn't it?

A. Each factor, unless it was published as a proportional
2097 rate, each factor would. If it was not published as such, it would not.

Q. I am talking about when it is published as a local rate.

A. That's right, each factor would.

Q. Now, if that car reaches that destination of the first local rate and the railroad is unable to turn it over to the connecting railroad because the connecting railroad cannot take it, do you know who bears the cost of car hire during that period?

A. Yes; I think the car service rules provide in a case of that sort that the on-carrying line assumes the cost of the per diem.

Exam. ARCHER. By the "on-carrying line," do you mean the one receiving it?

The WITNESS. The one tendering

Q. How much lighterage does the Seatrain have?

A. I couldn't tell you offhand. We have a great deal of lighterage. I couldn't attempt to tell you in percentage.

Q. What is the occasion for lighterage?

A. There are a good many occasions. The shipper may want it that way.

Q. Is it ordinarily business that originates on your off-line stations?

A. Our off-line stations, none of our off-line business is delivered to us by lighter. On our off-line stations we
2098 either get it by lighters or from our Brooklyn stations.

Q. Is our lighterage business l. c. l. business?

A. No, it is carload business, coming from the trunk line railroads, and there are a certain amount of local lighterage business from points in the harbor.

Q. Is it export business, lighterage business, Cuban business?

A. Both, both export and coastwise.

Q. Do you keep a pretty close track on business on Seatrain here in New York?

A. Pretty well.

Q. Take the last month, for example, were there any lighterage movements in the last month?

A. Yes.

Q. Will you explain what it was?

A. I can't tell you offhand, I don't keep those figures in my head.

Q. Wasn't it a very small part of the business indeed?

A. Not having the exact figures, I can't answer that.

Q. Will you undertake to take the last month and show what the business was and why the lighterage and where it came from?

Mr. McCOLLESTER: I don't see the purpose of showing the amount, if the Examiner please. The fact that there is lighterage freight is the only important fact, and I don't seen any relevancy here in showing the amount.

Mr. FORT. This testimony was introduced whether it has
2099 any relevancy or not by the other side in stating there is lighterage business. I think that general statement, without any particularities at all, is almost without significance. I am willing to have the entire testimony stricken, but if it remains in the record, I would like to have the facts on the lighterage business.

Examiner ARCHER. I would like to see the relevancy of it.

Mr. McCOLLESTER. It is relevant to this extent: I don't think the amount is relevant, but I think that the fact that there is lighterage freight is relevant, because it means that for Seatrain the railroads undertake, as they do in the case of the break bulk lines, to hold the cars for orders to see how or e freight is to be delivered to Seatrain. It may be delivered by lighter or it may be delivered in cars, and in that respect Seatrain is no different, and if they hold the freight under the rates in the lighterage yards or hold the freight awaiting orders as to whether it is to be lightered or not for Seatrain, Seatrain is in the same category as any other steamship line. It is the fact that it is delivered that way that is important, not the amount of it.

Exam. ARCHER. I don't see that it is of very great importance, the fact that it is delivered that way. It is the detention we are

interested in here. How the final delivery is made is not so important.

Mr. McCOLLESTER. I quite agree that so long as they
2100 hold it for us and they hold it for the other fellow——

(Discussion off the record.)

Mr. McCOLLESTER. Mr. Examiner, with respect to Mr. Fort's request, may I also observe that the lighterage is not performed by the Seatrain or Hoboken Manufacturers Railroad, but by the trunk lines themselves, and therefore they are the ones who have the information as to where it was lightered.

Mr. FORT. You mean that it is performed by the railroads of their own free will?

Mr. McCOLLESTER. They may do it because the shipper calls for it, but they are the people that do it and know why they get the orders.

Mr. FORT. I have asked him how much is handled by lighter in this way.

Mr. McCOLLESTER. You can find that out.

Exam. ARCHER. Do you have any objection to furnishing it?

Mr. McCOLLESTER. I haven't any objection to furnishing it, but I don't see the relevancy of it.

Mr. FORT. Then strike the reference from the record.

Mr. McCOLLESTER. No; we won't strike it.

Exam. ARCHER. Then you will furnish it?

Mr. McCOLLESTER. All right, we will furnish it.

Exam. ARCHER. You want it, for how long?

Mr. FORT. For one month.

Exam. ARCHER. How long do you want for furnishing it?

2101 Mr. McCOLLESTER. Ten days from the close of the hearing.

Exam. ARCHER. All right.

By Mr. FORT:

Q. Mr. Mathey, is there any boat line operating out of New York in coastwise business which takes cars from the railroad and uses the railroad cars except the Seatrain, if you would call that a boat line?

A. I call the Seatrain a water line, but I don't know of any other line which takes freight in cars from New York.

Q. Is there any other taking freight that way from New Orleans?

A. No.

Exam. ARCHER. Any further cross examination?

By Mr. MUCKLEY:

Q. Did you say that the railroads either hold the freight in cars or furnish piers for holding the freight?

A. Yes.

Q. Where do they hold it?

A. Over on the Jersey side, in the case of the Jersey railroads, and in the case of the New York Central, at their piers.

Q. At their lighterage piers?

A. That's right.

Q. Don't you know that the freight is transferred directly on arrival to the break bulk line piers?

A. No.

Q. Is there anything to prevent the railroads from unloading their cars on the lighters and immediately delivering to the break bulk lines?

2102

A. The only thing I know about that is the evidence put in by the Trunk Line railroads, that they did deliver freight to you and you wouldn't take it and they gave you demurrage bills, and you said you were not responsible.

Q. Don't you know what this record shows about delivering freight directly to the break-bulk lines?

A. I didn't hear that evidence.

Q. It is in this case.

A. I wasn't at all of these hearings, but the point of the matter is, regardless of whether at the present time or in a good many cases, under the tariffs they are obligated, on anybody's request, to give this free time named by the tariff.

Q. Under the tariffs, considering that the shipments you say are billed through, couldn't the railroads take the freight direct from the break-bulk piers and unload it on those piers?

A. I don't see how they could, without the steamers, the steamship lines' consent.

Q. Do you know what the service of the Florida East Coast is between Everglades and Havana?

A. What do you mean?

Q. Is it daily, or what?

A. No, the sailings are twice a week, and here not so long ago they had a breakdown and it was only a weekly service.

2103

Q. Don't they operate three a week?

A. Two a week, except during the heavy pineapple season, over a period of about six weeks, when they have more frequent service.

Q. Is the Florida East Coast Railway the owner of the Car Ferry?

A. I don't know what the corporate relations are. I assume it is.

Q. Wouldn't the arrangements, if any, which are made between the Florida East Coast Railway and the Florida East Coast Car Ferry be simply an intercompany proposition?

A. I don't know.

Q. Wouldn't it be the same as between the Seatrain and the Hoboken Manufacturers Railroad?

A. I don't know what the relationship is between the Florida East Coast Railway and the Florida East Coast Car Ferry. I know one is in receivership and the other is not.

By Mr. ESHELMAN:

Q. When did you leave the Erie?

A. September 1, 1936.

Mr. MCCOLLESTER. The Florida East Coast Car Ferry is listed as a water carrier in the A. A. R. Special Car Order No. 30, Exhibit No. 68.

Exam. ARCHER. Any other cross-examination?

Any redirect?

(Witness excused.)

2104 Exam. ARCHER. We will take a recess for ten minutes.

(Whereupon, a short recess was taken.)

Exam. ARCHER. The complainants may call their first witness.

Mr. MCCOLLESTER. I will call Mr. Smith.

J. S. SMITH, having previously been sworn, testified further as follows:

Direct examination by Mr. MCCOLLESTER:

Q. Will you state again for the record, Mr. Smith, your business connection?

A. J. S. Smith, 1800 Missouri Pacific Lines Building, St. Louis. I am Assistant General Freight Agent with the Missouri Pacific System Lines, also the New Orleans & Lower Coast Railroad.

Q. Have you prepared for introduction as——

(Discussion off the record.)

Exam. ARCHER. I might say that all exhibits submitted will be received in evidence, unless there is an objection, regardless of whether they are formally offered or not.

Mr. MCCOLLESTER. Then may it be understood that Exhibit No. 69 is received in evidence.

(Exhibit 69, Witness Mathey, received in evidence.)

Q. Have you prepared for introduction as exhibits here two exhibits setting forth pertinent portions of the tariffs of the

2105 carriers at New Orleans and at the Texas Gulf ports, covering their undertaking to hold cars for periods of free time?

A. I have.

Q. Is the first of those the one dealing with New Orleans?

A. Yes.

Mr. McCollester. May the exhibit which is marked "Demurrage Rules applicable to Coastwise and Export Traffic at New Orleans, La., and Sub-Ports" be marked No. 70?

Exam. Archer. It may be received.

(Exhibit 70, Witness Smith, received in evidence.)

Q. Now, your next exhibit, the one marked with the caption: "Demurrage Charges at Texas Gulf Ports on Export and Outbound Coastwise Traffic."

A. Yes.

Mr. Fort. Mr. Examiner, will it be understood that any other provisions of these tariffs covered by 69, 70, and now 71, which may appear to be pertinent to the issues in this case may be incorporated in the record by reference, if the Commission has notice to that effect?

Exam. Archer. Is there any objection to that procedure?

Mr. McCollester. I think we ought to know before we come to briefing what portions of the tariff are referred to. I have no objection to incorporation by reference, provided we have the reference before briefing time.

Mr. Fort. Suppose we say within ten days, notice to all
2106 parties.

Exam. Archer. You will give that notice, Mr. Fort?

Mr. Fort. If there should be any occasion to do so—I have no reason to think there will be.

Exam. Archer. That is understood. You will give notice of any provision you wish to refer to within ten days of close of hearing.

Mr. McCollester. That last document the witness referred to is offered as Exhibit No. 71.

Exam. Archer. It may be received.

(Exhibit 71, Witness Smith, received in evidence.)

Q. Mr. Smith, what is the purpose of the provisions of the tariffs set forth in Exhibits 70 and 71, providing free time during which freight will be held without charge for delivery to vessels?

Mr. Fort. Same objection which was made in connection with Mr. Mathey's testimony on the same point, as to the opinion of this witness on a great many different railroads.

Exam. Archer. I will permit him to answer it, subject to objection by counsel.

A. I don't know, Mr. McCollester, that I understand your question.

Q. Will these tariff provisions that are set forth in Exhibits 70 and 71 provide in the case of freight to be delivered to vessels
2107 in export and coastwise trade a greater period of free time

than is provided on freight to be delivered locally; isn't that correct?

A. That is correct.

Q. My question was as to reasons for allowing that greater period of free time on freight to be delivered to vessels.

A. We reckon that a steamer lines does not have daily service, that there is bound to be a delay in interchanging freight with a steamer line, and therefore we provide a greater free time, to assume, in a measure at least, that delay incident to the interchange with the steamer line.

Q. And is your compensation for assuming that delay during the period of free time in your railroad rates?

A. I think that it is, or we wouldn't be granting the free time.

Q. After the expiration of the free time, whatever if may be, do the railroads collect demurrage?

A. They do.

Q. Now, both during the free time and after the free time, when they collect demurrage, do the railroads holding the cars make any charge to the water lines as with respect to freight moving on line haul rates for per diem?

A. No, sir; they do not.

Q. You have no provision in your tariffs for charging per diem to the water lines on freight moving under line haul rates; do you?

A. No sir.

2108 Q. Have you any comment you want to make on Exhibit 70 and 71.

A. Via New Orleans, coastwise or export freight moves one of two ways, either on a port bill of lading or a through bill of lading. When traffic moves on a port bill of lading, item 110, for instance, first page of Exhibit 70, section A, paragraph 1, provides we will hold that car for interchange with a steamer line 168 hours, or seven days free.

Q. By "free" you mean without charge to anybody?

A. Without charge to anybody. If the car is held beyond the period of free time permitted, seven days, Item 120-A, page 5 of Exhibit 70, provides a charge of $1.10 per car per day or fraction of a day. Now, on cars handled on through bills of lading, we have no tariff provisions for any demurrage or storage charge, which means that we will hold those cars indefinitely, if necessary, free of charge.

Q. Assuming the expense of car hire?

A. That's right.

Q. And when you charge $1.10 per day, after the expiration of free time, the railroad making that charge pays the per diem to the car owner for the car; does he not?

A. That is correct, and I think it is pertinent also to notice that that $1.10 is a depressed charge per day. The domestic charges are $2.20 a day for the first four days after free time and $5.50 a day for every day after four days. In making it
2109 $1.10 on export and coastwise traffic, we are in effect only trying to compensate ourselves for the per diem rate that we pay on the car. Now, at the Texas ports, the situation is the same, whether the shipment moves on a port bill of lading or on a through bill of lading.

By Mr. WARE:

Q. You don't mean by that that it is the same as at New Orleans?

A. No; the free time at the Texas ports is the same whether the shipment is covered by a port bill of lading or a through bill of lading. That is shown in my Exhibit No. 71. The pertinent part is in paragraph 2, on the first page, which says, "On other traffic subject to rules shown in this Section Three, four days, of 24 hours each, free time will be allowed on each car." Now, that four days applies on port bill of lading traffic as well as through bill of lading traffic. Now, in addition to the four days, of course, it is possible under our rules to get a little more time than that, in this way: The free time commences at seven a. m. on the second day following notification. Obviously, there is at least a day there. That perhaps should be added to the four days.

By Mr. MCCOLLESTER:

Q. And it is the undertaking of the railroads to assume the expense, including per diem, of holding the cars during that free time period without any charge in addition to their freight rates?

A. That is correct.

Q. Now, Mr. Smith, your Exhibit 70 and 71 deal with the
2110 tariff provisions in connection with cars containing freight for delivery to vessels and the detention which is involved there. In connection with the break bulk lines handling the freight moving via the break bulk lines, do the railroads have any detention of cars to handle freight arriving at the ports by the break bulk lines, and if so, under what circumstances?

A. Yes; my Exhibits 70 and 71 portray the rules on traffic the rail lines deliver to steamer lines at New Orleans and Texas Gulf Ports. On traffic arriving by steamer line at those ports for delivery to the rail lines, the only rules, demurrage rules, we have are the domestic rules in Agent Jones I. C. C. 3353. Now, as to cargo lines' traffic——

Q. By "cargo lines," you mean break bulk lines?

A. Break bulk lines' traffic, there is a delay for which we are not compensated, in this way: Those lines will order a certain

amount of cars from us to be available for loading when that steamer arrives at the port. That order is placed in advance, of course, of the steamer's arrival, so as to give us an opportunity to accumulate those cars, clean them and what-not. We do that. We may be accumulating those cars three, four, maybe five days. During that time, we, of course, are paying per diem on them to the owning road if the cars are not our own. If they are our own, why, we assume the expenses during that time. When a steamer gets there, they may discover that the they ordered more cars
2111 than they needed. In that event they just cut down their order and, of course, do not use the cars that they don't want. Again they may load that car for switch movement within the port where we get no revenue except our switching charge, which obviously does not compensate for all the expense we have gone to. In that respect the situation as to inbound traffic is materially different via the break bulk lines than it is via the Seatrain.

Seatrain brings a car in, it is immediately interchanged to us, we haul it out of the port, and, of course, we have had no expense of accumulating that car.

Q. Now, is there any provision in any of your tariffs for charging the per diem expense incident to accumulating the cars to the break bulk steamship lines?

A. Not in our tariff, perhaps in this way: Let's take New Orleans as an illustration. If a break bulk line knows that a certain car is going to be loaded in switch movement, they order that car from the switching line, the New Orleans Public Belt, and they pay the Public Belt car rental charge which is a per diem charge, in effect. That is about the only way.

Q. But if the car is loaded with freight to go out in line haul service over your road, and you have held the car for five days accumulating the supply of cars, you charge any part of that five day per diem to the break bulk line?

A. We do not. We assume it.

Mr. McCOLLESTER. That is all, unless you have some-
2112 thing more you want to say on that.

The WITNESS. I don't believe so.

Cross-examination by Mr. FORT:

Q. Mr. Smith, at New Orleans, is there a so-called water carrier which interchanges cars with the railroads and operates in coastwise service?

A. No, sir.

Q. In New Orleans, does the business moving coastwise via break bulk move under through billing as a rule, or not?

A. By "through billing," do you mean through bill of lading or waybilling?

Q. Bill of lading.

A. Generally on a through bill of lading.

Q. There isn't intervention by the shipper at the port, the shipper doesn't take possession at the port?

A. No.

Q. Now, have you made an investigation to determine the amount of car detention there is in New Orleans in connection with cars coming in there to move coastwise via break bulk steamer lines?

A. I haven't myself, but there is an exhibit in a prior case which shows that.

Q. I don't want to stuff the record, but that exhibit shows that the holding is a small fraction of one day; doesn't it?

A. No; my recollection is 3.3.

2113 Q. You were talking about cars now——

Exam. ARCHER. Is that exhibit in the record in this case?

Mr. MUCKLEY. 3.3 is holding for Seatrain.

Q. Yes; the holding for the other break bulk lines is less than one-tenth of one day; isn't it?

A. I don't recall it. The exhibit is in there.

Q. It is exhibit No. 62, and it shows that the average holding of cars coming in by rail for movement coastwise by break bulk lines is two one-hundredths of one day. In other words, there is no detention there. You say at New Orleans, shipments moving under through billing and the break bulk lines wouldn't be subject to these demurrage rules but would be handled as an operating matter; is that right?

A. Yes, we hold the cars indefinitely.

Q. You speak of Texas ports. They weren't referred to in the prior hearings, I believe. How long has the operation of Seatrain been going on from any Texas port?

A. In the Cuban trade, since March 29th inbound, and March 30th, outbound.

Mr. WARE. 1940?

The WITNESS. 1940.

A. (Continuing.) In the coastwise trade May 30th inbound, May 31st outbound. That is also 1940.

Q. Now, is there any other boat line or water carrier

2114 operating to or from Texas City in coastwise business which interchanges cars with the railroads?

A. No, sir.

Q. Is there in foreign business?

A. No, sir.

Q. Now, on this demurrage tariff which you say applies in Texas City but not in New Orleans on commodities moving under through billing, who is billed for that demurrage, the shipper?

A. Via the Texas ports we issue through bills of lading only with the steamer lines that subscribe to the average demurrage agreement. Those steamer lines have the demurrage if the car is held beyond the free time.

Q. The steamer line?

A. Yes.

Q. In effect, then, it is just an operating rule you have with the steamer line rather than demurrage in the ordinary sense?

A. No; that average demurrage plan is also signed by some shippers, by some steamship agents. Whoever signs it is responsible for the demurrage beyond the permitted free time.

Q. If your connecting carrier signs it rather than some shipper, then what he is required to pay to you or what you are required to pay to him is not a matter which the law requires to be published in a tariff; is it?

A. Oh, yes; it is published in a tariff.

Q. Of course, if it is published in the tariff and is not
2115 required, it would be merely surplus.

Mr. McCOLLESTER. May I point out that the subject of the tariff provisions in the Gulf ports has been before the Interstate Commerce Commission in several cases?

Q. Mr. Smith, have you made a check at Texas City to see what the detention of cars actually amounts to when they are moving under through billing with break bulk coastwise steamers?

A. Nos, sir; I have not.

Mr. FORT. I think that is all, thank you, Mr. Smith.

Exam. ARCHER. Any other cross-examination?

By Mr. MUCKLEY:

Q. I understood you to say that the compensation for any delay was in the rates to and from the ports; is that correct?

A. That is correct.

Q. It must be in the rates. I understand your theory to be, because you give the service and you publish the rates; is that right?

A. It is in the rate, Mr. Muckley, or we wouldn't be allowing the free time.

Q. Now, does that statement apply to any services that you give down there, to the Gulf ports, in connection with the water borne commerce?

A. If we undertake the service the compensation for that service is included in the rate.

2116 Q. Does that include car loading and unloading?

A. If we apply our rate to ship side, yes.

Q. You would say that your rates include compensation for that service?

A. If they apply to ship side.

Q. Now, you mentioned the delay, possible delay, rather, incident to freight moving south-bound by break bulk lines, possibly not delay, but car detention, payment of per diem by the rail lines. Have you made any investigation to ascertain how long after the cars are ordered it takes you to get the car?

A. We made a rather exhaustive investigation of that in connection with our division case. I can't recall whether we put in an exhibit on that or not, but it is based on that investigation——

Q. Don't you have—go ahead.

A. At that time.

Q. Don't all the railroads that serve the Texas ports and New Orleans have a supply of cars available at the ports?

A. We hold some cars there, but we don't always have enough cars to meet all of our requirements.

Q. Isn't it true that the empty movement of boxcars is northbound from the ports?

A. Generally I think maybe that would be a correct statement, but it is not only boxcars that are involved.

2117 Q. Doesn't the large cotton and grain movement to the ports give you a large supply of empties at the ports, of box cars?

A. Of box cars, that is perhaps true, but we just had occasion to go all over the railroad to get a bunch of gondolas for pipe loading.

Q. Isn't that an unusual situation?

A. No, sir.

Q. It isn't unusual?

A. No, sir.

Q. How long does it take you to get a car when you are informed by the break bulk lines that the cars are needed?

A. Well, that depends, Mr. Muckly, on just a lot of things. It all depends on what class of car they order, what kind of car, whether box or gondola or flat car, on just how we happen to be fixed on car supply at that time, how our connections are fixed. Sometimes if we don't have them we borrow them from some other line. I don't know that it is possible to answer that question.

Q. When did the break bulk lines inform you as to the number of cars which they would need?

A. Oh, anywhere in advance of steamer's arrival. I don't know that there is any set time.

Q. How far in advance? It takes them four days or four and a half days to get from New York to New Orleans; doesn't it?

A. No, I think your service there——

2118 Q. Or five days?

A. I think it is five days now. It was six days, I believe, when we made this investigation.

Q. It is now five days?

A. I think so.

Q. Yes. Well, now, when did you get information from the Morgan Line, for example, as to what cars they will need at New Orleans, what freight they have for Missouri Pacific at New Orleans?

A. Well, anywhere between the time your ship leaves New York and the time it arrives at New Orleans, generally it is shortly after it leaves New York when you know what you have on it.

Q. Did you ever fail to have enough cars there to get the freight?

A. I couldn't answer that.

Q. You don't know of any such instance, do you?

A. I don't know that, I couldn't answer that.

Q. Do you know of any cases where the break bulk lines have ordered too many lines from the Missouri Pacific?

A. Yes, we showed that up in that Division Complaint.

Q. I didn't hear and such evidence as that and I listened pretty thoroughly to it.

A. I don't know that he put it in, but Mr. Latz made a very complete and thorough investigation of that.

Q. You didn't put it in in the evidence in that case?

2119 A. I didn't attend the Division Hearing, and I don't know what they put in, but we have it in our files.

Q. Will you tell me whether or not the switching rates at New Orleans include per diem?

A. No, sir.

Q. Don't they include something to the switching line for per diem that the switching line pays?

A. No; the switching line assesses a car rental charge.

Q. That is paid, by the shipper or the break bulk line, depending on how the rates apply?

A. On switch movements, yes.

Q. So that any per diem that would occur in a switch movement would be covered by the switching charge paid either by the switcher or the break bulk line?

A. If the Morgan Line, for instance, should order a car from the Public Belt for loading at the Morgan Line dock to be switched uptown in New Orleans, they would pay the Public Belt a switching charge and a car rental charge. On the other hand, if the Morgan Line ordered a car for loading at an industry in New Orleans to be switched to the Morgan Line dock, they would

likewise, either the Morgan Line or the switcher, would pay the Public Belt a switching charge plus a car rental charge, that car rental charge being in effect a per diem for the time the car is in use, that is, on switch business.

Mr. McCollester. That is not true on line haul business though?

2120 The Witness. No.

Q. I was asking you only on switch business.

Mr. McCollester. On line haul business it does not apply?

The Witness. No, we allow the Public Belt a reclaim.

By Mr. Eshelman:

Q. Is it a fact that for whatever reason may underlie it, that the port practices at the Gulf Ports and the North Atlantic Ports are not by any means uniform?

A. That is correct; they are uniform. The port practices at any port are figured into the conditions at that port.

Q. And I take it that the lines, that your lines, are not here asking the Commission to fasten upon them any port practices that we may have in the East that you do not now have; is that correct?

A. I am trying to explain what our situation is at the Gulf Ports.

Q. And similarly, I take it, you are not asking that the Eastern Lines be subjected by the Commission to any practices that you may have that we do not have; is that correct?

Mr. McCollester. I don't know that the witness is asking anything. He is a witness. I called him.

Exam. Archer. That is self-evident.

A. I didn't say a word about the Eastern ports. I am just trying to explain what we do or what we have at the Gulf

2121 ports.

Q. I think perhaps your initial statement is the one which, after all, is the important one. I will be content with that.

By Mr. Fort:

Q. One more question. On shipments moving by Seatrain for switch movement in New Orleans, did you say that in that event Seatrain takes the switching and absorbs the per diem on that switching while the car is in the switch movement?

A. No, I did not. Mr. Muckley's question had to do with the break bulk lines.

Q. What happens when Seatrain does it?

A. Seatrain pays the switching charge, but I couldn't answer you as to whether they also pay the per diem or whether that is offset by car rental charge. I don't know that.

Q. You don't know about that. But they do absorb the switching?

A. I know definitely they absorb the switching charge.

Q. Is that the same rate they charge when the shipment moves through past New Orleans to some interior point, that Seatrain gets the same rate for business coming locally into New Orleans as it does on some shipments it moves beyond New Orleans to the interior?

Mr. McCollester. Your question is confusing to me.

The Witness. It is to me, too.

2122 Q. When Seatrain brings a shipment to New Orleans for local delivery in New Orleans, it gets a certain rate; does it not, for transportation?

Mr. McCollester. Seatrain gets it?

Mr. Fort. Seatrain.

A. Yes.

Q. Is that the same rate that it gets with respect to a shipment that moves on beyond New Orleans to an interior point, when it moves on a combination rate?

A. That is the same rate. In other words, the switching charge between Belle Chasse and New Orleans is $17.93. That charge would apply if the shipment originated or terminated at New Orleans, or if it were delivered to the Illinois Central, the L. & N., the Southern, for road haul movement.

Q. And in any event, the Seatrain would absorb it?

A. Yes.

Q. Whether it is through——

A. No; just on traffic that originates or terminates at New Orleans.

Q. That is what I am getting at. The rate it gets is the same whether it originates or terminates at New Orleans or at an interior point beyond New Orleans.

A. But the Seatrain absorbs only on traffic that originates or terminates at New Orleans.

Mr. McCollester. You are assuming that the freight does 2123 not move on joint through rates?

Q. I said on combination. But it absorbs only when it is local; isn't that right?

A. If I understand your question——

Q. That is easy enough to answer.

A. Well, it is confused to me.

Q. Try to understand it this time: When a shipment moves to or from New Orleans locally, the Seatrain absorbs this switching movement of some $17, absorbs the cost of it.

A. That is right.

Q. If it is moving beyond New Orleans to an interior point, or from an interior point through New Orleans on combination rates, you say that Seatrain does not absorb the switching charges.

A. We absorb it, the rail carriers.

Q. It is to be assumed that that switching charge absorption of some $17 is in the Seatrain rate on that local business, under the theory you have advanced here on rate-making.

A. Obviously, or it wouldn't be absorbing it.

Q. So they have some $17 in their rate there which they have no occasion to expend when it goes on through business; is that right?

A. No, their port-to-port rate need have no connection with the joint rate or with the combination rates.

Q. How about the combination rates? It is the same rate
2124 in both cases, one has $17 in it that is compensation for something, the other has that $17 in it that isn't compensation——

Mr. McCollester. Mr. Examiner, I am going to object to questioning Witness Smith on Seatrain's rates. May I say that we are getting a lot of misinformation, not through Mr. Smith's answers, but largely through Mr. Fort's questions.

Mr. Fort. No facts are going in in any questions, and no information, and I resent that, and it is not so.

Exam. Archer. He has asked whether the same rate applies two or three times. I don't know if he got the answer from the witness or not. You can ask whether the same rate is in effect locally or beyond, when it is on a combination rate.

The Witness. I think Mr. Fort is confused. The combination may be based——

Q. Just a minute. I asked you what the rates actually are.

A. If you will say what rate you have in mind, I will answer the question.

Q. Do you know any rate from New York locally to Hoboken locally made on a combination from New Orleans to an interior point on your line?

A. Do I know of any rate?

Q. Yes.

A. Well, I can't mention any rate, but there are shipments, moving on combinations.

2125 Q. That is what I am talking about. Now, what combination makes up that combination through rate?

A. Generally it is a combination over the Seatrain dock, and our rate includes the switching charge to or from the dock. That is what I was trying to tell you a moment ago.

Q. But what Seatrain—what does Seatrain get in dollars and cents in that movement as compared with what Seatrain gets in dollars and cents if it is local delivery in New Orleans?

Mr. McCollester. I object to those general questions.

Q. They get those same general rates, don't they?

A. Not necessarily.

Mr. Fort. Then I ask Mr. McCollester, in view of his gratuitous participation in this cross-examination, to furnish the facts on that.

Mr. McCollester. We are not going to furnish the facts because it is not part of the direct examination, so this is not proper cross-examination.

Exam. Archer. It was brought out, I think, by this witness, that his rates include the switching charges.

Mr. McCollester. The rail rates, not Seatrain.

Exam. Archer. Then we must know what the Seatrain rates are.

Mr. McCollester. There is no testimony in the record in this case about Seatrain's rates.

Mr. Fort. I am trying to get some now.

2126 Mr. McCollester. You can put it in as part of your case.

Exam. Archer. You refuse to furnish it?

Mr. McCollester. Yes, sir.

Mr. Fort. I am trying to indicate how superficial and oversimplified it is to claim that simply because on a certain rate there may be free time for demurrage, for example——

Exam. Archer. We will recess at this point for lunch for one hour.

(Witness excused.)

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 1:45 o'clock p. m.)

AFTERNOON SESSION

(Whereupon, the hearing was resumed pursuant to recess, 1:45 p. m.)

Exam. Archer. The complainants may proceed.

Mr. McCollester. Mr. Examiner, just so that it will appear on the record, may it be understood that Exhibits 70 and 71 have been received in evidence?

Exam. Archer. They have been received.

Mr. McCollester. Then I will call Mr. McGowan.

A. R. McGowan having been previously sworn, testified further as follows:

Direct examination by Mr. McCollester:

Q. Mr. McGowan, will you state again for the record
2127 your connection with the Hoboken Manufacturers Railroad?

A. Superintendent.

Q. Mr. McGowan, have you at my request prepared from the records of the Hoboken Manufacturers Railroad the one-sheet statement that you have before you with the caption "Average detention on Hoboken Manufacturers Railroad of Railroad-owned cars interchanged with Trunk Lines"?

A. I did.

Q. Was that information correctly taken from the records of the complainants here?

A. It was.

Q. Were the figures of detention shown there under the heading "Seatrain" and the figure under the heading "Break-bulk lines" computed in the same way?

A. They were.

Q. And I notice that you have no figures under the heading "Break bulk lines" for the two earlier periods shown on the exhibit. Was that because in those periods you did not make that segregation?

A. We did not make the segregation.

Q. The detention for the break-bulk lines for those periods would be included in what other figures on the exhibit?

A. The break-bulk lines detention is included in the first column headed "H. M. R. R. Local," and are a part of that figure.

Q. Now, is that true with respect to all three of the
2128 periods, in other words, in the first line does the figure 2.78 include the 3.71?

A. It does.

Q. That is, the cars that make up the 3.71?

A. The cars that make it up.

Exam. ARCHER. I wonder if I understand that. I don't know that I do. Will you please explain that, how that includes the 3.71.

The WITNESS. The cars included under H. M. R. R. are all cars moving directly between the Hoboken Manufacturers Railroad and Trunk Line connections, or the main haul carriers, and includes all cars of which the cars that were furnished to the break-bulk lines on the Hoboken Manufacturers Railroad are a part of the total cars handled between the Hoboken Manufacturers Railroad and the Trunk Line carriers.

Mr. ESHELMAN. Does that include the Seatrain cars, too?

The WITNESS. No Seatrain cars are included in that first column.

Mr. ESHELMAN. Didn't you just say that the Hoboken Manufacturers Railroad local cars include all cars other than those interchanged with Seatrain?

The WITNESS. That's right.

Mr. Muckley. Those detentions on the Hoboken Manufacturers Railroad are simply local traffic?

The Witness. That's right.

2129 Q. By "local," you mean, do you not, cars interchanged with the Trunk Lines and terminating or originating on the Hoboken Manufacturers Railroad?

A. That's right.

Q. Either at a steamship pier or at an industry or at a team track, except Seatrain?

A. Except Seatrain. Seatrain is not included in those figures.

Q. But Seatrain is included in the figure 2.60, for example, under the heading "Total all cars"?

A. All cars, correct.

Q. I notice in the last two columns, for the later period shown, five months, March-July 1940, you show figures as to the average tons per car for Seatrain and for the break-bulk lines. Do those figures represent the average tons of freight per car in the cars interchanged with the trunk lines and interchanged in turn with Seatrain or the break-bulk lines?

A. Under Seatrain is only included the tonnage for the cars that moved direct between Seatrain and the Trunk Line carriers. The break-bulk lines is all cars moving between break-bulk lines and the trunk line carries.

Q. Well, now, if I understand the significance of those last two figures, it would mean the last two figures, of average tons per car indicate, do they not, Mr. McGowan, that, we will say, to

2130 handle 52 tons of freight, there would have been per diem expenses on two cars, if the freight was interchanged with Seatrain, and on three cars if it was interchanged with the break bulk lines?

A. On an average; yes.

Exam. Archer. I just want to be sure that I get this detention here. This total all cars 2.6 days—is that an average of the previous?

The Witness. Previous of the three, the weighted average of these three columns.

Exam. Archer. Which would indicate that you handle a great many more cars in connection with Seatrain than either locally or break bulk lines.

The Witness. No.

(Discussion off the record.)

Q. Now, Mr. McGowan, when you said the figures under the heading "Total all cars" 2.60, pointed out by the Examiner, was the average of the previous figures, is it not correct to say that it is the average detentio nof the cars included in getting the average figures shown under the first two columns?

A. That is correct, in so much as the detention under the third column is already included in those shown in the first column.

Q. Now, Mr. McGowan, in the case of in-bound freight via Seatrain, the car in which that freight is to move out by rail, comes with freight on the Seatrain ship; does it not?

2131 A. It does.

Q. So that all you have to do is take the car and switch it in your own line interchange?

A. That is correct.

Q. Now, what is the situation with respect to furnishing cars for freight brought to Hoboken by break bulk lines?

A. I would have to furnish an empty car, which means an accumulation of sufficient cars to take care of the loading. We endeavor to carry a sufficient pool of empty cars to take care of an average day's loading. We receive from some of the break bulk lines two or three days before arrival an estimate of the number of cars that will be required for the loading of the cargo from that particular vessel. In some cases this will run way above our average, in which case we immediately start to accumulate empty cars, either by holding cars that were made empty or ordering from our trunk line connections sufficient empties to have on hand to take care of the loading.

Q. When you hold cars under those circumstances to take care of loading of freight brought in by the break bulk lines, do you charge the break bulk lines or recover from them any portion of the per diem on those cars?

A. No.

Mr. McCOLLESTER. I think that is all.

2132 Cross-examination by Mr. FORT:

Q. Well, Mr. McGowan, on this first column of your Exhibit No. 72 marked "Local," is that on inbound cars?

A. In and out.

Q. In other words, that 2.78 is the entire amount of time consumed between when the Hoboken gets an inbound car and when it delivers that car back to its connection?

A. It is the average time per loaded car handled. In other words, if a car comes in under load, is made empty and goes back to connecting line under load, that counts two cars against the number of days the car was held. If the car comes in under load and is sent back to the connecting line empty, that is one car against the total days it was held. In other words, if you have a car that comes in loaded and is delivered to consignee for unloading and he unloads it and gives it back to you empty, and you send it out, you would include here under one car that full time from the time when Hoboken first received it until it delivered it back?

A. That's right.

Q. That includes the time which consignee takes to unload his shipment?

A. Yes.

Q. In other words, that 2.78 includes delay incident to the consignee handling the car?

2133 A. Yes, and the delay incident to the placing of the car, includes everything.

Q. Now, I notice you don't show cars here. How many break bulk cars were included in your calculation shown at the top line under break bulk lines 3.71 days?

A. I just took the average days.

Mr. FORT. I think that figure is of little significance unless we know whether it happened to be one or two cars, or a representative number.

Q. Have you that information, Mr. McGowan?

A. Yes, I have that.

Mr. MCCOLLESTER. Whatever the figure is, it was all the break bulk lines you had during that period; isn't that so?

Mr. FORT. I want to how how many.

The WITNESS. Under "Hoboken Manufacturers Railroad Local," the total cars figuring in the 2.78 was 2,679 cars.

Q. On Seatrain?

A. On Seatrain the total was 2,579 cars.

By Mr. MUCKLEY:

Q. Is that Seatrain?

A. Between the Trunk Lines and Seatrain. The local break bulk lines was 628 cars, which is included in that figure of 2,679.

By Mr. FOLT:

Q. Which is included in 2,679?

A. Yes.

Q. There is a duplication in those two figures.

2134 A. That has been explained, that that included it. The grand total of cars handled for the figure 2.60 was 5,258 cars.

Q. What percentage of that 628 cars went in coastwise movement?

A. I haven't got it broken down, but roughly I would say probably 90%.

Q. Went in coastwise movement?

A. Coastwise movement.

Q. What lines did they go by?

A. The coastwise is the Pan-Atlantic.

Q. Pan-Atlantic?

A. Yes.

Q. Have you any other coastwise break bulk line there?

A. No, sir.

Q. Now, on that time that you show for break bulk, is that the time between when the car reaches your line, comes in loaded, and when it goes off your line empty, going back?

A. It would, in that case.

Q. On the Seatrain 2.40 days, would include only the time when you received it and when it went on the Seatrain, because it wouldn't be any back movement on that car, there wouldn't be any, would there?

A. No.

Q. So that really these things that are set up as corresponding figures have that difference?

2135 A. Well, we only figured on the Seatrain one car. In other words, a car coming in loaded from the Trunk Lines, goes to Seatrain loaded or Trunk Lines, we only figure that one car.

Mr. McCOLLESTER. May I interrupt for a second? If you had a car coming in-bound for Pan-Atlantic and it was unloaded at the Pan-Atlantic, then you found an out-bound load for that car, you would take the total number of days the car was on your lines and divide that by 2; would you not?

The WITNESS. Yes, sir.

Q. How do you account for the difference in loading 31.7 tons against 21.2 tons?

A. I don't account for it. That is what was in the cars.

Q. Yes; I know, but what was the reason for that?

A. The only reason that I know would be that the cars that are moving via Seatrain are loaded heavier than the cars in the break bulk lines.

Q. You are not giving the reason, you are repeating the fact. Is it because of the different character of loading, or what is it?

A. There is some different character of loading, and a good deal of it is the same loading.

Q. You are at a loss to account for it?

Mr. McCOLLESTER. The Seatrain has a higher minimum weight. That has been shown on a great deal of freight on the break bulk lines.

2136 Mr. FORT. The break bulk lines do not have a minimum; do they?

Mr. McCOLLESTER. Certainly, for the application of their carload rates.

Q. Does this time shown here for Seatrain include north-bound cars, too?

A. Both directions, sir.

Q. And when they are coming north-bound, you count that as one car, but as soon as that car is unloaded from Seatrain, it goes right on through in 15 minutes or a half hour?

A. Yes.

Q. You have no time on your north-bound cars?

A. There is some time. For instance, we have had during this period a considerable movement of sugar coming from Cuba that was moving on. Those cars have to be held until they are cleared by the Customs and the time on those cars would be from two to three days until they were cleared by the Customs so that the cars could move forward.

Q. What would that 2.40 average be shown for Seatrain if you took into account only south-bound cars?

A. I haven't got those figures.

Q. You don't have those?

A. I haven't got those figures separated here.

Q. It would be a great deal more than 2.40; wouldn't it?

A. Not such a terrible lot. It is more; yes.

2137 Mr. FORT. I ask, please, that the witness submit those figures, that is, taking the five months' period March to July 1940, where it shows the average holding on Seatrain cars as 2.40, and show during that same period of time what the holding is on southbound cars.

Mr. MCCOLLESTER. May I ask the purpose of that request? Mr. Fort, may I say that the detention figures given by the defendants here have not separated as between northbound or southbound, inbound or outbound, as far as the break bulk lines are concerned.

Mr. FORT. Yes, we have, too. I think the figure 2.40 may inadvertently mislead some one that reads the record, and that it is not at all indicative of the holdings and as to what Seatrain's ability was to move, because you haven't any of that delay because of Seatrain's disability. If you want to show that, you should have the southbound cars.

(Discussion off the record.)

EXAM. ARCHER. Can you point out where the rail lines have separated their cars north and southbound as to detention?

Mr. MCCOLLESTER. Mr. Examiner, it is Exhibit 63 which covers detention in New York, which has the heading "Cars showing detention at New York on cars loaded with coastwise traffic on break bulk lines."

EXAM. ARCHER. Will you supply that information.

2138 Mr. MCCOLLESTER. I want counsel to state the relevancy of it before we supply it, because I don't think that the Commission is concerned here with anything except to see what the detention for the railroads is, which is involved in Seatrain's

operation compared with the break bulk operations, and that you get that if you average the movement both ways.

Mr. FORT. I am glad to state it. Our contention is that on cars coming into New York, and the same thing is true in New Orleans, on the railroad loaded with cars going to Seatrain, that there is a considerable detention due to Seatrain's disability to take the cars. Now, we make no contention at all, and it would be foolish to make any, that when they come back with the cars to New York, ready to turn them over to a railroad, that that same type of detention applies, so that when you get an average there it means nothing in connection with the point we are making, and we think it ought to reach, if it is to be introduced at all, the holding we are talking about, and that is on southbound cars.

Exam. ARCHER. I think it will be of some interest to the Commission, and if you will furnish it, I will be glad to have you do so.

Mr. MCCOLLESTER. We will do it within ten days, but may I say that counsel talks about Seatrain's disability and there is also a disability of the break bulk lines which is applicable on inbound freight, and as I understand it, that has been lumped by
2139 them, so far, at least, in the record. They have averaged inbound disability and outbound disability of the break bulk lines, so we have done the same thing. Now, if they are prepared to make a similar segregation for the break bulk lines to show the total length of time involved in accumulating cars for loads for the break bulk lines, then we have no objection.

Mr. MUCKLEY. Mr. McCollester's statement is incorrect, according to Mr. Kendall, as was put in the exhibit.

Exam. ARCHER. We won't go into this any further.

Mr. FORT. I have no further questions.

By Mr. MUCKLEY:

Q. Mr. McGowan, can you tell me what portion of the 628 cars were interchanged with the Pan Atlantic on southbound traffic, and what on northbound?

A. No, I haven't got that figure, the same as on Seatrain again.

Q. Can you furnish that?

A. It can be furnished.

Q. Will you do so?

Exam. ARCHER. Will you furnish that?

Mr. MCCOLLESTER. Now, we are being asked to furnish a lot of things: We will make our requests, but I would like to have you rule on them at the same time.

We will ask that the defendant railroads furnish figures as to the length of time they hold cars awaiting loads from the break bulk lines, the length of time they hold the cars
2140 destined to the break bulk lines awaiting orders, the length

of time they hold freight on lighters for the break bulk lines both separated as between going to the break bulk lines and coming from the break bulk lines, and the length of time they hold freight on piers because they have to supply piers and that represents an investment.

Mr. MUCKLEY. I don't see what that has to do with it.

Mr. McCOLLESTER. I am asking you as a defendant, if you represent one.

Exam. ARCHER. Will you furnish it, covering a period of one month?

Mr. McCOLLESTER. Any representative period.

Mr. MUCKLEY. The five-month period that he shows, 3.71 days.

Exam. ARCHER. All right. Will you do that.

Q. Now, the Pan Atlantic is the only coastwise——

Exam. ARCHER. Will that be the only carrier that you ask?

Mr. McCOLLESTER. My request is directed to the railroad defendants in New York Harbor.

Mr. ESHELMAN. Wait until we get our evidence on and I think that will pretty near cover what he has in mind.

Mr. McCOLLESTER. Then will you withhold your ruling?

Exam. ARCHER. Yes, sir.

Q. Is the Pan Atlantic the only coastwise line that you
2141 serve at the docks in Hoboken?

A. Yes.

Mr. McCOLLESTER. Break bulk line?

Q. Break bulk coastwise line. What ports does the Pan Atlantic serve?

A. I don't know.

Q. From your docks?

A. From our docks, what ports, outward?

Q. Yes.

A. I don't know.

Q. Don't they serve South Atlantic ports as well as the Gulf port of New Orleans?

A. I don't know anything about that.

Q. You don't know that?

A. No.

Mr. MUCKLEY. That is all I have.

By Mr. ESHELMAN:

Q. Under the heading "break bulk lines," are there any export cars there, that is, any export or import cars?

A. What is in this particular statement, I can't answer you. We do handle export cars.

Q. At the prior hearing I recall Mr. Mathey's testimony, I think it was, about the various lines that were served by the Hoboken

Manufacturers Railroad at various piers along your line, but I assume that the war has made some change in that.

2142 A. The war has practically killed our export business as far as the Trans-Atlantic lines go.

Q. Is there some of that that is left?

A. The lines are still there, but the business isn't moving.

Q. Have you any intercoastal business?

A. We have none that I know of whatsoever.

Q. The thing I wanted to ask you was, under this figure 3.71 days as an average, in figuring that average, that reference to break bulk lines, does that include anything other than the Pan Atlantic? Is there something besides Pan Atlantic in there?

A. There have been a few cars in, but comparatively small.

Q. Were those export or import?

A. Those would be export or import. I said as a guess 90% of these cars were coastwise cars.

Q. Would you furnish the detention on those cars or give a separation as a part of what you were going to furnish there? Can you do that conveniently?

A. I can't do that conveniently. I would have to go to the tonnage and pick out every individual car as to where it was moving.

Mr. ESHELMAN: That is all I have.

Examination by Exam. WALSH:

Q. Mr. McGowan, you show on Exhibit No. 72 detention

2143 for a period of five months, 1940, March to July and three months, October to December, in 1938, and five months, November to March, 1936. Is there any significance in the fact that you haven't the same periods in the different years?

A. The top figure for the five months, March to July 1940, was prepared in connection with the hearing that was here. Previous to that we have taken certain periods and made our own check to see how our detention was standing up against our reclaim.

Q. That is all.

A. And those figures were available, and they were added on this statement.

By Mr. MUCKLEY:

Q. I would like to ask you about the Pan Atlantic service. Do they have weekly service in your dock?

A. It has been practically weekly, sometimes a second ship in a week.

Q. Never more than weekly?

A. Yes; I say occasionally a second ship comes in.

Q. Never a long period between sailings than a week?

A. Offhand, I can't say there never was a longer period. It is practically every week. Usually their ship is due on Monday.

There have been one or two occasions, as far as I can recall, storms or something else, where a ship was missing a week.

Q. You cannot state whether the detention you have
2144 shown here, including Pan Atlantic, pertains to traffic on that line to or from New Orleans or where it comes from?

A. I don't know where it comes from.

Q. That is all.

Mr. McCollester. Mr. Examiner, just to keep the record straight, I offer Exhibit 72 in evidence.

Exam. Archer. It is received.

(Exhibit 72, Witness McGowan, received in evidence.)

Exam. Archer. You may be excused.

(Witness excused.)

Roy J. McDermott, having been previously sworn, testified further as follows:

Direct examination by Mr. McCollester:

Q. What railroad are you connected with?

A. Assistant General Superintendent of Transportation, Missouri Pacific Lines, including New Orleans & Lower Coast.

Q. Mr. McDermott, have you compiled from the records of the Missouri Pacific Lines a computation for a representative period of the average detention on your line at New Orleans of cars containing freight to be delivered to the break-bulk lines at New Orleans?

A. I have for the Missouri Pacific, for the period from June to July, inclusive, 1940, representing 5,874 cars, 21,936 days, average detention, 3.74.

Q. That was the time those cars were held on your line;
2145 is that right?

A. Missouri Pacific property at New Orleans, awaiting delivery to the connecting line.

Q. Now, that includes both export and coastwise freight?

A. Correct.

Q. Have you the separation as between export freight and coastwise freight on break-bulk lines?

A. I have a similar statement for the same period, export 5,777 cars involved, 21,028, average of 4.4 days.

Q. That is export. Now, what is your figure for coastwise?

A. Coastwise, check covers the same period, January to July, 1940, inclusive, 797 cars, detained 908 days, average 1.14 days per car.

Q. In order to reach the piers served by the New Orleans Public Belt Railroad your line has to turn the cars over to that railroad; does it not?

A. That is correct, yes; at physical interchange with the New Orleans Public Belt.

Q. Now, in addition to the detention of these cars that you have testified to on your line, there would have to be considered, would there not, the detention of the cars on the New Orleans and Public Belt?

A. That is correct, and that is derived at by averages given over a given period, supervised by the Association of American
2146 Railroads, and the last average which we are now using is 2.46 days per car.

Q. Then, is this the situation, that on freight going to the break-bulk line, docking at a pier served by the Public Belt Railway, your railroad would have the per diem expense for the detention of that car on your line, plus 2.46 reclaim that you would pay to the Public Belt?

A. That is correct.

Q. Have you figures as to the detention of cars delivered to Seatrain?

A. Yes. We have a similar check for the same period, January 1940 to July 1940, inclusive, in which are involved 354 cars, detained 1,224 days, an average of 3.46 days per car.

Q. In the case of interchange delivery to Seatrain you deliver to the New Orleans Lower Coast Railroad, do you not?

A. That is correct. They are the intermediate line.

Q. And they, as a switching carrier, are paid reclaim; are they not?

A. That is correct, intermediate reclaim.

Q. Intermediate reclaim. What is the reclaim figure for the New Orleans & Lower Coast?

A. 0.54, less than a day.

Q. Your Seatrain figure, as I understood you, from talking with you, makes no separation as between coastwise and Cuban traffic; is that correct?

A. That is correct.

2147 Q. Now, then, will you state again the figure for the coastwise via the break-bulk lines? Is that 1.14?

A. That is correct, 1.14.

Q. 1.14. And if we add to that 2.46 for the Public Belt you would have a total per diem expense of 3.60?

A. That is correct.

Q. And in the case of Seatrain, assuming that it is coastwise, was its detention on Cuban traffic, which is not the case on break-bulk, but making that assumption, you would have 3.46, plus 1.14, which is four days?

A. Four days.

Q. And on the break bulk you would have a total——

A. 6.60.

Q. And on the total break bulk, assuming it moved over the Public Belt piers, what would the average figure be?

A. 6.20.

Q. Now, in connection with in-bound freight, Mr. McDermott, that is freight brought to New Orleans by steamship lines and turned over to the railroads for movement beyond, in the case of Seatrain the freight comes to you in the car in which you are going to use it for the rail movement beyond; isn't that correct?

A. That's right.

Q. So you have no problem of accumulating cars to take the freight unloaded from the ship; do you?

2148 A. None whatever.

Q. What is the situation with respect to freight coming in by break-bulk line?

A. Well, somebody has got to furnish the car, and if the handling line, which is the switching line in this instance, does not have an empty available, has to call on the line making the haul, and they have to furnish it to the Belt Line, if the Belt Line doesn't have enough equipment available, in that case the Belt Line would be allowed a reclaim of 2.46 days per car by the road haul line.

Q. By the road haul line; and you would have also the car detention for the time you held the car, and if you do hold the car you turn it over to the Belt?

A. That is correct.

Cross-examination by Mr. FORT:

Q. Mr. McDermott, did you have some notes that you were testifying from in connection with those figures?

A. Yes.

Q. Would you mind letting me see them?

A. Certainly [handing counsel papers.]

Q. When you first spoke of 5,874 cars in a period from January to July 1940—you recall that?

A. Yes.

Q. That included both the export and coastwise?

A. Yes; that is correct.

2149 Q. And I notice that the heading of this statement is Cars moving to the New Orleans Public Belt at Southern Pacific; is that so?

A. That is correct; if they go through the Belt.

Q. Well, some don't go anywhere except from the docks to the Belt, and others go through the Belt to the Southern Pacific?

A. That is correct, depending on what steamship lines they are going to.

Q. You show car days, average days per car. In determining that number of days on the particular car, when did you start your time running?

A. That was taken month by month. Naturally there was a lap-over in some months checking the records.

Q. I am not talking about the lap-over, but on a particular car, when you are trying to get your days here, which are really car days, aren't they——

A. Yes.

Q. When did you start your time running on the particular car?

A. The day they arrived in the terminal on the Missouri Pacific, whatever day it happened to be or whatever time of the day it happened to be.

Q. You mean when they hit the Missouri Pacific yards?

A. Yes.

Q. What yard?

2150 A. Westwago.

Q. It was not a matter of notification?

A. No, sir.

Q. Just as soon as the car came in the yard you took it as the beginning date?

A. Posted it in the record as the arrival date and that is the date you use.

Q. What record did it show on as the arrival date?

A. The local car record at New Orleans.

Q. You mean the company record?

A. The Missouri Pacific record.

Q. That showed when it arrived at that yard?

A. Yes.

Q. What did you take as the cut-off time when you stopped figuring the number of days on the car?

A. The date it was interchanged to the Belt.

Q. Now, it comes in that yard in a line haul train; does it?

A. That is correct.

Q. And the train has to be broken up and cars classified and one thing or another, which is part of railroad operation; isn't it?

A. That's right.

Q. So that that time you are speaking about and which you show here would not be a time, at any rate, when you were holding it because someone else couldn't take it?

2151 A. It would include total detention in New Orleans, irrespective of the time or hour it arrived in the terminal.

Q. The time you used in your ordinary operation in the ordinary routine?

A. That is the way you arrive at all averages.

Q. Did you hold those cars out in the yard at the direction of the break bulk line?

A. We held them out because the New Orleans Public Belt were not prepared to take them. We were waiting for an order from the New Orleans Public Belt.

Q. You were waiting for an order. In New Orleans, don't they go right on the Belt?

A. Not in all instances.

Q. Isn't that the general practice?

A. The general practice is that they will take them; they generally take them.

Q. They take them as fast as they come in there; don't they?

A. Ordinarily.

Q. Do you have any papers from the New Orleans Public Belt or anybody else telling you to hold these cars back in your yard?

A. Not to my knowledge.

Q. That holding was an operating holding; wasn't it?

A. A routine operation.

Q. It was not a holding that you did because the break bulk line told you to hold it back?

2152 A. A certain percentage of it represents the time that the New Orleans Public Belt was not in a position to take them, were not ready for them.

Q. If you could give me the record which show that they could not take them and how long you held them and for what reason——

A. It would require a lot more investigating.

Mr. Fort. I submit, Mr. Examiner, that unless we do get that, this whole thing is worthless.

Q. Now, after that car did go on the Public Belt, have you any records as to these particular cars and how long they were held on the Public Belt?

A. We don't have access to their records.

Q. So, after you held these cars as an operating matter in your yard, and then turned them over to the Public Belt, you don't know how long the Public Belt held them?

A. I do not.

Q. You don't know whether there was a single time the Public Belt could not unload those cars on the dock for the steamship company?

A. I don't.

Q. Is that a regular practice of the Public Belt in New Orleans, to unload there immediately?

A. As a rule.

Q. Without any holding at all?

A. As a rule.

2153 Q. And this 2.26 is merely some average holding on the Public Belt in connection with local business and all other kinds of business?

A. That includes all classes of business.

Mr. FORT. I think, Mr. Examiner, in view of the cross-examination, I should move that this testimony be stricken as throwing no light whatever on any holding in New Orleans due to any ability or disability of the break bulk lines.

Exam. ARCHER. Motion will be noted.

Q. Mr. McDermott, you and I have been talking heretofore about this statement which covers both export and coastwise. Now, what you said with respect to that is true also of the remarks that you made with respect to a division between export and coastwise?

A. Generally, yes.

Q. Now, on your Seatrain cars in New Orleans, you can't deliver those cars to the Lower Coast until you have clearance from Seatrain; can you?

A. That is correct.

Q. You have no such——

A. That is covered by the tariff,

Q. Covered by tariff. There is no such working arrangement with the break bulk lines; is there?

A. No; the Belt Line would not accept cars until they know the steamship is due or about to arrive or going to arrive
2154 at a certain hour.

Q. But you haven't been able to point out a single day's detention in here that was due to that?

A. I don't have the information set up in that way.

Mr. MCCOLLESTER. I can make a reference to New Orleans Public Belt Railway's tariff, I. C. C. No. 30, and so forth, Rule 9, applicable to export, import, coastwise freight. I think it is already in the record in a prior hearing, and it is almost identical with the Lower Coast tariff, as I recall it.

Mr. FORT. I don't think I have any more questions, thank you, sir.

Exam. ARCHER. Any further cross-examination?

By Mr. MUCKLEY:

Q. As I understood you, Mr. McDermott, you said the Missouri Pacific delivered to the Seatrain for the first six months of 1940 only 354 cars.

A. That was correct.

Q. Does that cover all the traffic delivered to Seatrain by Missouri Pacific?

A. That's right.

Q. Coastwise and export?

A. That's right.

Q. That is all.

Exam. ARCHER. Any other questions? And redirect?

(Witness excused.)

2155 W. T. LONG, JR., was sworn and testified as follows:

Direct examination by Mr. McCOLLESTER:

Q. Mr. Long, what is your connection with the Texas & Pacific Railroad?

A. Superintendent of Transportation, Dallas, Texas.

Q. Have you prepared, from the records of your company, or made a computation from its records, as to the average detention of cars for the first seven months of 1940 on the Texas & Pacific Railroad, first, of cars containing shipments for break bulk steamship lines at New Orleans?

A. I have.

Q. Your figures are limited to cars containing coastwise freight; are they not?

A. They are.

Q. What was the average detention during that period of cars containing coastwise freight to be delivered to the break bulk lines?

A. 874 cars, an average of 1.67 days per car.

Q. During the same period, have you computed, and will you state what the average detention was, on your railroad, of cars containing coastwise shipments delivered to Seatrain Lines?

A. 489 cars, an average delay of 2.89 days per car.

2156 Q. Now, on those cars delivered to the break bulk lines, or containing freight for delivery to the break bulk lines, where the average detention on your railroad at New Orleans was 1.67, you had to pay per diem reclaim to the Public Belt Railroad, did you not?

A. That's right.

Q. What is the Public Belt's reclaim that your road paid?

A. $2.46 per car, making a total delay for cars in connection with break bulk steamship lines of 4.13 days per car.

Q. That is the per diem expense the Texas & Pacific had in connection with the holding of cars for delivery to the break bulk lines at New Orleans; is that right?

A. That is correct.

Q. The break bulk coast lines. Now, what switching reclaim do you pay to the New Orleans & Lower Coast Railroad on Seatrain cars?

A. 54 cents per car.

Q. What was the per diem expense, then, to your road for the holding of cars for Seatrain?

A. $3.43 per car, or 3.43 days per car.

Q. Now, in connection with freight moving in the opposite direction and brought to port by steamship line, moved to the interior, when freight comes in via Seatrain for movement out over your line, you don't have to accumulate and furnish a car for it; do you?

A. That's right, we do not furnish the car, neither do
2157 we pay any per diem reclaim to the New Orleans Lower Coast, and cars coming from Seatrain to the Texas & Pacific.

Q. What is the situation with respect to freight coming in by the break bulk lines and going out over your road?

A. Regardless of whether or not the Texas & Pacific furnishes cars, we pay the New Orleans Public Belt a switching reclaim of $2.46 per car.

Q. The suggestion was made in questioning this morning that perhaps there is a large supply of empty cars which accumulates anyhow at New Orleans so that you don't need to bring in empty cars to handle freight on the break bulk lines. What is the situation in that regard so far as your road is concerned?

A. Via the Texas & Pacific Railway there aren't sufficient cars accumulated at New Orleans. We are constantly hauling in empty cars to protect out-bound loading from New Orleans, hauling cars from Texas in many cases.

Mr. McCOLLESTER. You may cross-examine.

Cross-examination by Mr. FORT:

Q. Mr. Long, when you turn cars over to the New Orleans Lower Coast, you make a direct connection, do you, in cars going to Seatrain, for example?

A. Yes.

Q. Is that true of the Southern Railway?

A. From the Texas & Pacific to the Southern?

2158 Q. No; from the Southern Railway to Seatrain.

A. No; the Southern doesn't interchange to the Lower Coast direct.

Q. They would use the Public Belt; wouldn't they?

A. Yes.

Q. Would the Illinois Central use the Public Belt?

A. Probably coming through the T. P.-M. P. Terminal, they both come through the Terminal, as well as the Public Belt.

Q. So as to every railroad delivering to Seatrain, except your line, they would use the Public Belt as well as New Orleans?

A. They would come through the T. P.-M. P. Terminal.

Q. So they would have a per diem reclaim on that basis to the public Belt when they use the Public Belt, and some of them would use the Public Belt, wouldn't they?

A. Some of them use the Public Belt, that is correct.

Q. Then they would pay this reclaim you are talking about to the Public Belt that you pay when you go to break bulk?

A. Coming through the Belt they would have to pay some charge. What it is, I don't know.

Q. So that your situation that you testified to, where, when you go to Seatrain you need to use no line except the Lower Coast, is not representative of the railroads generally serving the Port of New Orleans; is it?

A. In that respect, no; that's right.

2159 Q. Now, how did you figure this 1.66 day average, or 1.67 average holding on break bulk business? Is that from the time the in-bound train reaches your yard until you turn it over to the Public Belt, for example?

A. That is the interchange record from time of arrival in the train yard to the time of delivery, according to the interchange.

Q. That includes the time for breaking up the train, making up the switch train, and various other operating functions?

A. From no days to whatever it might be.

Q. Now, has any carrier testified to in this record asked you to haul a car out on your line?

A. As to Public Belt, you can't always deliver the car on day of arrival or the next day. There may have been conditions where they can't take the car.

Q. There may theoretically be such conditions?

A. There are such conditions.

Q. Do you have anything to show what the reason for that was?

A. I can't tell you the exact amount, but I know there are many cars in there that the Public Belt can't take and didn't take.

Q. But you haven't any record of that that you offer here?

A. Of my own knowledge, I am in charge of the records and interchange movements.

2160 Q. But you have the figure here of what represents holdings for one reason or for another reason, and you have no records here to show what those reasons are.

A. That is the entire time in Texas & Pacific count at New Orleans, as I stated, from no days in many instances to up to ten and fifteen days and more, in some cases.

Q. Now, as to the holding of these cars on the Public Belt, you have no record either of how long these particular cars were held; have you?

A. No; the $2.46 covers what we pay the Belt regardless of their holding. It is an Association of American Railroads check, that

is the check made under their supervision, and I think the figures were arrived at in 1936.

Q. That is, with respect to what is called local terminal switching, isn't it?

A. That's right; that is a regular procedure under the per diem rules.

Q. And in gathering that figure, 2.46, that includes the time of cars that are brought in there for delivery to consignees, switched to consignees, unloaded by the consignee, and all that figure goes to make that average; doesn't it?

A. All of the cars handled by each line.

Q. And has nothing whatever to do with the actual time these cars were held that moved from the Public Belt to the docks of the break bulk lines?

A. It is the average time consumed by the New Orleans
2161 Public Belt in handling all cars from all lines during the period checked, which was one year.

Q. In terminal switching?

A. Well, handled—that is about all the Public Belt does.

Q. All right, thanks.

By Mr. MUCKLEY:

Q. Mr. Long, does the T. P.-M. P. Terminal get any per diem reclaim?

A. They don't here, but the T. & P.—they may have some tariffs, I don't know. I will have to look it up.

Q. Does the T. & P. deliver to New Orleans & Lower Coast for Seatrain through the T. P.-M. P. Terminal?

A. The counts are for the Texas & Pacific interchanged by the Texas & Pacific. They handle that work.

Q. You don't pay them any per diem at all?

A. No, sir.

Redirect examination by Mr. MCCOLLESTER:

Q. Mr. Long, however the $2.46 paid to the Public Belt is computed or was computed in that, the fact is that in addition to your holding of cars, you have to pay the Public Belt $2.46 on every car you deliver to them or on every car you receive for them containing freight for the break bulk lines?

A. That is correct.

Q. You don't get any reclaim yourself or any reimbursement of that $2.46 from any of the break bulk lines?

2162 A. No.

Q. Comes out of your revenue?

A. That's right.

Q. I take it from some of your answers to Mr. Fort that you are not familiar with the details of the arrangements in connec-

tion with the T. P.-M. P. Terminal and the use by the Lower Coast of the T. P.-M. P. Terminal in interchanging with railroads other than yourself.

A. I am talking only about the Texas & Pacific.

(Witness excused.)

Exam. ARCHER. We will take a short recess.

(Thereupon, a short recess was taken.)

Exam. ARCHER. You may call your next witness.

GRAHAM M. BRUSH was sworn and testified as follows:

Direct examination by Mr. McCOLLESTER:

Q. Mr. Brush, I want to ask you on just one point. While Mr. Smith was on the stand he was asked some questions in regard to Seatrain's paying or absorbing per diem expenses on cars handled in switching service in connection with local port freight, that is, freight to or from shippers or consignees in the port of New Orleans and other ports. In order that there may be no misunderstanding on the record on that point, will you please state just what the facts are and just what Seatrain does in that connection?

2163 A. The steamship line's practices in many ports are to absorb switching charges to points in the city and sometimes absorb trucking charges to those points, and Seatrain's rates are made on the same basis as those of the break bulk lines, and where switching or trucking is absorbed, Seatrain absorbs the switching or trucking, and in absorbing switching, if there is a reclaim in addition to the switching, we absorb the reclaim the same as any one else. In other words, our policy at all ports as to places or services, is on a parity with those of our competitors, as well as our rates.

Q. So that where the per diem or reclaim expense incident to a switching movement is borne by break bulk lines, it is also borne by Seatrain; is that right?

A. Under similar circumstances; yes.

Q. And where that expense is not charged to or borne by the break bulk lines, Seatrain's situation is the same as that of break bulk?

A. That is correct.

Mr. McCOLLESTER. You may cross-examine.

Cross-examination by Mr. FORT:

Q. Mr. Brush, do you bear that switching or reclaim, in the instance that you do, from your local rate to that port?

A. That is correct; in some instances. Sometimes our rates are made at the dock the same as other steamship lines rates
2164 are made at the dock. Where they are made to an interior

point or from an interior point to a switching area, then we absorb, the same as our competitors absorb.

Q. Is that absorption out of the same local rate you use in constructing a through rate to a point beyond, in some instances?

A. That is correct, in some instances, and that is why we have always said that Seatrain wanted through rail and water business and local business, because it was more expensive to handle, and we should not charge higher rates for the less expensive business.

Exam. ARCHER. Any other cross-examination?

(Witness excused.)

Mr. MCCOLLISTER. Messrs. Examiner, I should like to offer in evidence copies of the complete testimony of Mr. Oscar A. Frauson, who was a witness for the Eastern Trunk Line Railroads in a proceeding in Agwilines, Inc., et al. v. The Akron, Canton & Youngstown Railway Co., et al., Docket No. 27969.

I offer this testimony of Witness Frauson for the purpose of including in the record here, in the words of the defendants themselves, descriptions of their operations and undertakings in interchanging freight with the break bulk water lines in New York Harbor.

Mr. ESHELMAN. What does that cover?

2165 Mr. MCCOLLESTER. It takes in all the testimony, direct and cross, beginning at page 313 of the record and concluding at the bottom of page 399. I believe the witness was actually excused at the top of page 400, but I did not copy page 400.

If this is not an accurate copy, why, of course, it was intended to be.

Mr. ESHELMAN. O. K.

Mr. FORT. Mr. Examiner, we have had no notice that this testimony would be offered. It is obviously not possible to glance through it at the moment to see whether it is at all relevant to this case, and for that reason, for the sake of the record, we must object, on the ground that it is irrelevant or immaterial to the case.

Moreover, whether it is put in as an admission or not, I don't know, and if it is, what it is an admission against, I don't know. The whole thing is just sprung on us, so I object generally to this transcript.

More than that, there may be something in here which would call for a reply, I don't know. Mr. McCollester didn't tell me so for that reason I think we ought to keep the record in such a state that if it does call for a reply, that we may have an opportunity to prepare or to object. For that reason, we must be in position to put in some documentary evidence bearing on it,

2166 and for that reason I would not want the record closed at this time.

Exam. ARCHER. As I understand it, this was offered by the Eastern Trunk Lines' witness.

Mr. MCCOLLESTER. That's right, the principal witness on the operations of the Trunk Lines.

Exam. ARCHER. It will be received, subject to your objections, and it will be marked Exhibit No. 73.

(Complainant's Exhibit No. 73, Mr. McCollester, received in evidence.)

Mr. FORT. It may be that it will require further evidence on our part, I don't know.

Mr. WARE. I will call Mr. Hopkins.

N. N. HOPKINS was sworn and testified as follows:

Direct examination by Mr. WARE:

Q. Mr. Hopkins, just state your name and your address and your occupation.

A. N. N. Hopkins, Superintendent, New Orleans Lower Coast Railroad, New Orleans.

Q. Now, with regard to Seatrain traffic, Mr. Hopkins, just tell us where the New Orleans Lower Coast extended from and to?

A. Well, it extended from Belle Chasse to New Orleans.

Q. And Belle Chasse is where Seatrain docks?

A. Yes.

2167 Q. Will you state, Mr. Hopkins, what lines at New Orleans the New Orleans & Lower Coast has direct interchange with?

A. We interchange direct on the east side of the river with the Illinois Central, the Louisville & Nashville, the Public Belt, and on the west side direct with Missouri Pacific, Texas & Pacific and the Texas & New Orleans. We reach the Southern, the G. M. & N., the L. & A., and the Louisiana Southern, through intermediates.

Q. Now, do you have direct connections with the Gulf Coast Lines and the L. & N.? On the East Side?

A. That is through the Illinois Central, they operate in connection with the Illinois Central itself, direct.

Cross-examination by Mr. FORT:

Q. How does the Southern Railway business get to and from your line?

A. Through the Public Belt or the L. & N., either one.

Q. How does the L. & N. business get there?

A. Direct.

Q. These lines that you have spoken of as being direct would interchange with you directly Seatrain business?

A. Yes.

Q. How would L. & A. business go?

A. Through the Public Belt.

Q. And Louisiana & Southern?

A. Louisiana & Southern would come through the New
2168 Orleans Terminal and the L. & N. or the Public Belt.

Q. Some one said on these West side lines that 54 cents is reclaim per diem on your line.

A. That is correct.

Mr. WARE. I want to object to that of this witness. I cannot see that that is proper cross-examination.

Mr. FORT. I will ask my question and let the Examiner rule on that.

Q. What is the reclaim per diem on your line in case of the East Side lines that make direct connections, like the Illinois Central?

Mr. WARE. I am going to object to that as improper cross-examination.

Exam. ARCHER. Of course, that objection is well taken. Isn't this already in the record, however?

Mr. FORT. I don't think so. I am not sure that the objection is well taken. In fact, I don't think it is. This witness is the first one that has been produced to testify as to the direct connections and those connections which are not direct with the Lower Coast, and it seems to me, in view of the background of the case, that that is relevant in connection with these reclaims, and if the witness knows, it is proper to ask him about the reclaims, so I insist on my question.

Mr. WARE. I insist on my objection. I think that has
2169 been covered by a previous witness, and they should have asked him that on cross-examination.

Exam. ARCHER. Can you answer the question?

The WITNESS. Yes, sir; I can answer it.

Exam. ARCHER. I will permit the witness to answer it.

Objection will be overruled.

Q. What is the reclaim of the Illinois Central, for example, on direct East side connections?

A. 54 cents.

Q. 54 cents. Is that true of all your connections with the East side or West side?

A. Yes, that is our intermediate reclaim.

Q. That is your intermediate reclaim.

A. Yes.

Q. I am talking about your terminal reclaim.

A. $2.96, I believe.

Q. $2.96. Now, on business going to Seatrain, do you regard that as terminal or intermediate?

A. Intermediate.

Q. Intermediate?

A. Yes.

Q. You are not familiar with the practices of the Hoboken up here; are you?

A. No, sir.

Q. I think that is all, sir.

2170 Exam. ARCHER. Any further cross-examination?

Any redirect?

(Witness excused.)

Mr. McCOLLESTER. That is all we have on our case in chief.

Exam. ARCHER. Defendants may proceed.

Mr. FORT. May we have ten minutes? You see, we are in position of answering the complainant's case and we had no idea what it was going to be, and we would like to get together for a moment.

Exam. ARCHER. All right, we will take a ten-minute recess.

(Whereupon, a short recess was taken.)

Exam. ARCHER. Come to order, gentlemen.

Defendants may proceed.

Mr. FORT. I will call Mr. Kendall.

WARREN C. KENDALL, having been previously sworn, testified further as follows:

Direct examination by Mr. FORT:

Q. You have appeared heretofore as a witness in this case.

A. Yes.

Q. At that time you were sworn?

A. Yes.

Q. At that time, did you explain your occupation and

2171 one thing and another?

A. Yes.

Q. At that time, did you introduce Exhibits 62 and 63?

A. Yes.

Q. Did Exhibit 62 tend to show detention at New Orleans, La., of cars loaded with traffic destined to coastwise water carriers?

A. Yes.

Q. And Exhibit 63 tended to show detention at New York of cars loaded with traffic destined for coastwise water lines?

A. Yes.

Q. The average holdings shown on Exhibit 62 at New Orleans being 0.002 days at New Orleans?

A. Yes.

Q. And 63.7 days per car for new York?

A. Yes.

Q. Have you checked the subsequent periods since the last hearing?

A. Yes.

Q. Take, first, New York. Have you information resulting from check shown in exhibit form?

A. Yes; I have, for the months June, July, and August 1939.

Q. Please explain what that statement shows.

A. That shows that the average detention, which figure was camparable to the one that was obtained before, was 0.8
2172 days; compiled in the same manner as the previous check.

Q. At New York?

A. That is New York.

Q. Does that cover all coastwise break bulk business at New York?

A. Yes.

Q. Or only that that was lightered?

A. This covers the seven break bulk lines, which are the same lines as we took before.

Q. Does it include the Pan Atlantic?

A. Yes.

Q. Does that include these cars that were moved directly over to Hoboken?

A. I don't know.

Q. Or does it include only lighter business; do you know?

A. I dont know. There were 31 cars delivered to Pan Atlantic in these three months.

Q. Do you know what percentage of the coastwise business through the Port of New York is lightered?

A. No, sir.

Q. Do you know approximately?

A. No, sir.

(Question read.)

Q. All right, Mr. Kendall. Will you explain how that detention was calculated with respect to New York cars?

2173 A. That was from the time that the cars arrived in the yard of the receiving road, that is the terminal road in New York, until the car was placed at the lighterage pier, that is the total detention of the car from its arrival at New York until it is at the point where the freight goes to be unloaded and delivered.

Q. At the pier?

A. At the pier.

Q. Does this statement show the number of cars involved?

A. Yes.

Q. And it shows each of the break bulk lines involved?

A. Yes.

Mr. Fort. I ask that this statement be accepted in evidence as Exhibit No. 74.

We will be glad to furnish copies to any one wishing one.

Exam. ARCHER. It may be received as Defendant's Exhibit No. 74.

(Exhibit 74, Witness Kendall, received in evidence.)

Q. Now, Mr. Kendall, do you have a similar statement covering cars at New Orleans?

A. Yes.

Q. Will you explain what that statement shows?

A. The purpose of developing this statement was to continue the previous record which I terminated with December 1938 for another six month period, so that there would be a full
2174 twelve month period. This record covers the period January 1939 to June 1939, inclusive, and shows a total number of cars handled during this period to the five break bulk lines under which there was a record taken, of 2,815 cars, total days detention 618, or an average of .22 days per car.

Q. Does that cover all of the cars for break bulk lines coming into New Orleans?

A. As far as I know; yes.

Q. Does it cover Missouri Pacific and Texas & Pacific?

A. There is some doubt about that, because our records could not be complete on those two lines.

Q. What does your exhibit show with respect to those two lines?

A. It shows some of the cars counted, apparently those on which we could get some evidence as to detention, but we couldn't get a complete check on those two lines.

Q. Why is that?

A. We weren't welcome, our people weren't welcome.

Q. Take the other roads shown there, and as to the other roads, does it show all the break bulk cars that came in?

A. Yes.

Q. What are they?

A. G. M. & N., Illinois Central, L. & A., L. & N., Southern, and T. N. O.

Q. Are they the same cars which were covered by your
2175 Exhibit No. 62, the same railroads?

A. No, sir; at that time we only had four lines, the G. M. & N., the L. & N., T. N. O., and Illinois Central.

Q. Now, getting back to these Missouri Pacific and Texas & Pacific Lines, you say you have some of them in the subsequent period?

A. Yes, sir.

Q. How could you get some if you couldn't get all?

A. That was the report that our investigators made to me. I can't answer the question definitely.

Q. Do you know that they are not all in those two lines?

A. I do know that the figures aren't complete for those two lines.

Q. Is your statement made up in such shape that those two lines could be excluded and yet you could have figures on the other lines to be calculated on the statement?

A. Yes.

Mr. FORT. Mr. Examiner, I offer that statement in evidence and ask that it be marked Exhibit No. 75, and we will furnish copies to all who wish them.

Mr. MCCOLLESTER. I ask that you reserve your ruling on both these exhibits, as I wish to cross-examine the witness on them.

Q. Mr. Kendall, as to that holding in New Orleans, how was that detention calculated?

2176 A. My understanding is that it included the time from the arrival of the car in New Orleans until it was placed at the ship pier.

Q. From the arrival at the line haul railroad yard until placement at the ship pier?

A. That was my understanding.

Q. Have you any doubt about it?

A. It may be, after listening to the testimony that we have had this morning, that it might include the time up to the delivery to the switching line. I am not sure about that. I would like a chance to review it.

Q. You say it might include only the line haul holding?

A. That's right.

Q. Can you check that information with respect to these particular cars and submit it within ten days to counsel on opposing side and any one else who wants a further statement indicating whether there was any additional holding on the switch line as to that shown on your Exhibit 75?

A. Yes, sir.

Mr. FORT. We ask for permission to do that, Mr. Examiner, so that we will be sure about those facts.

Examiner ARCHER. It may be done within ten days.

Mr. MCCOLLESTER. Mr. Examiner, I may want to ask that certain details be shown in that statement.

Examiner ARCHER. That can be added on later.

2177 Q. Mr. Kendall, do you think any further explanation of these two statements is desirable for the purpose of clarity?

A. I don't know of anything.

Mr. FORT. Now, Exhibit No. 59, and I say this merely for the information of the Examiner, which was introduced at the last hearing, shows the holding at New Orleans of the road haul cars, for cars destined to Seatrain, and shows an average of

3.73, so that if this holding that Mr. Kendall is now speaking about at New Orleans is only road haul holding and detention, it is to be compared with the 3.73 shown on Exhibit No. 59.

Mr. McCollester. Yes; but the total of this holding plus the 2.46 of the Public Belt, was to be compared with Seatrain holding plus the 0.54.

Mr. Fort. I don't agree with that at all, Mr. McCollester. Mr. Kendall is going to find what the holding was, if any, on the Public Belt in addition to that.

That is all, Mr. Kendall.

Cross-examination by Mr. McCollester:

Q. Mr. Kendall, have you, in connection with Exhibit No. 74, the detailed figures for the individual Trunk Line Railroads shown on that exhibit?

A. No; I haven't here, Mr. McCollester.

Q. For what purpose was this made up?

A. To ascertain the average detention of the cars un-
2178 loading on coastwise freight for the break bulk lines.

Q. Why did you undertake to do that in June and July and August of 1939?

A. I think that was to get a comparable period with the previous statement. No, it wasn't. That was November, December, and January, '38 and '39. There was no particular purpose in collecting those months.

Q. Now, is it your understanding that the detention figures were arrived at by counting the number of days, including the day of arrival of the car at the break-up yard, to the day the car was placed for unloading at the lighterage pier?

A. They were taken by hours; not by days.

Q. By hours?

A. That's right.

Q. And when the car was placed for unloading at the lighterage piers, the time stopped?

A. Yes.

Q. So that we can't tell from this exhibit how long the cars may have remained thereafter at the lighterage piers, either in the process of unloading or awaiting unloading, can we?

A. They were delivered at the pier ready for unloading at that time.

Q. That is all we know from this?

A. That's right.

Neither do we know from this how long the freight was
2179 detained on the pier after it may have been unloaded from the car?

A. No; I wouldn't know.

Q. Did you make any study of that?

A. No.

Q. Did you make any study of how long, if the freight was moved to the steamship by lighter, how long it remained on the lighter before the steamship took it? You made such a study?

A. Yes.

Q. Have you some data on that for the period covered by your Exhibit 74?

A. No, sir.

Q. Now, for what period have you data on that?

A. February to July 1940.

Q. Have you divided it by railroads?

A. Yes.

Q. Have you the statement in front of you there? May I see it?

Mr. FORT. I think that perhaps he has stated that he made this study. If you want to know what the results of it are, you should ask him. There is no reason why he should give you a statement that he made up. He has the information. If you want it in the record, ask for it.

Q. You have that statement there?

2180 A. I have a partial statement; yes.

Q. It was prepared under your direction?

A. Yes.

Q. Will you produce it for introduction here?

Mr. FORT. He has the information. If you want him to explain it, he can explain it.

Mr. MCCOLLESTER. I will ask him to produce the statement and I will offer it in evidence.

Mr. FORT. You will offer it in evidence?

Mr. MCCOLLESTER. Yes.

Examiner ARCHER. Make him your witness, then.

Mr. FORT. Yes; he is way out of cross-examination.

Mr. MCCOLLESTER. Not a bit. May that be marked in evidence, Mr. Examiner?

Examiner ARCHER. First, let the record show that Defendant's Exhibit No. 75 has been received.

(Exhibit 75, Witness Kendall, received in evidence.)

Examiner ARCHER. Mr. McCollester, you are offering this Exhibit 76?

Mr. MCCOLLESTER. Yes, sir.

Exam. ARCHER. It may be received as Complainant's Exhibit No. 76.

(Complainant's Exhibit No. 76 received in evidence.)

Mr. MUCKLEY. You have two Mallorys on the statement. Is that correct?

2181 The WITNESS. No, sir.

Mr. MUCKLEY. Will you correct it?

Mr. McCOLLESTER. Will you correct the exhibit in any way it should be corrected, so that it might be offered?

Mr. FORT. Those were statements, Mr. Examiner, which we were prepared to offer if the question of lighterage were brought up in the case. It may have been submerged in some of this that may not have been read, that is why we haven't offered it.

Exam. ARCHER. There is plenty of evidence in Exhibit No. 73. This exhibit No. 76, by the way, consists of three pages.

By Mr. McCOLLESTER:

Q. In connection with Exhibit 76, Mr. Kendall, in order that there may be no confusion on the record, how was the time there shown computed? When did it begin and when did it end?

A. It begins, as I understand, when the lighter arrives at the ship' pier or ship's side, either one, and ends when the lighter is released.

Q. Well, this, then, does not include the time of the lighters in loading or unloading at the railroad's lighterage piers or at the time of movement between the lighterage pier and the steamship?

A. I understand not.

Q. Have you made any study in that connection as to

2182 how long lighters are retained at the railroad piers in loading or unloading?

(No response.)

Mr. FORT. That would be a straight transportation service.

Mr. McCOLLESTER. Depends on how you call it.

Mr. FORT. I am talking about if you could call it the right thing.

Q. Mr. Kendall, in connection with Exhibit 74, can you state with respect to the Pennsylvania Railroad, what railroad yard was used as the yard at which you began counting the time at arrival?

A. I don't know.

Q. You know, do you not, that in the case of the Pennsylvania, freight moves through several yards before it finally reaches the water front?

A. It is a movement of a train of cars from one place to another.

Q. Cars, we will say, from Harrisburg, Pa., go through several yards before they reach the one?

A. I don't know the extent to which that car is delayed in transit from the time it leaves Harrisburg until it gets to its final pier.

Q. Now, in the case of all the railroads here, is the yard used the yard immediately adjacent to the water front?

2183 A. I asked them for the terminal yard, arriving in the terminal.

Q. That was the nature of your question?

A. Yes, sir, the elapsed time from its arrival in the terminal yard until it was delivered to the pier.

Q. In the case of the Erie, do you know what terminal yard was taken as the yard for the arrival?

A. I don't know.

Q. If a railroad had used arrival time at its lighterage pier as its port yard, that the car had also been held up at a break-up yard back of the water front, the time of holding in the break-up yard would not appear in Exhibit 74; would it?

A. I don't know.

Q. Now, Exhibit 74 also does not include any detention of cars on orders of shippers or otherwise or steamships or otherwise, at yards short of New York Harbor Terminal; does it?

A. I would assume not.

Q. If you do not know, as I understand you do not, at least you have not shown on your exhibit the length of time that the cars stood at the lighterage piers awaiting unloading or in the unloading operation, may we assume also that you do not know how long it was before those cars were able to pick up other loads for outbound movement?

A. There is no connection between the two that I can see.

Q. You don't know, do you, how much the actual time

2184 was then of those cars incident to the delivery of the freight to the break-bulk lines?

A. I don't know about the actual operation, no, sir.

Q. In computing the time shown on your exhibit 74, I understood you to testify a few moments ago that it was computed on the basis of hours.

A. Yes, sir.

Q. How did you reduce those hours to days?

A. Divided them by 24.

Q. So if a car arrives, we will say, at noon, in the yard—at noon, on one day, and it is placed at the lighterage pier at nine o'clock on the next day, that would be 21 hours; is that right, according to your computation?

A. Yes, sir.

Q. For the purpose of per diem, how many days would that be?

A. One day.

Q. But for your computation it would work out at less than a day?

A. Yes, sir.

Q. Does that account for—does that fact account for, in some instances here, where you show no days at all, although you had six cars?

A. I think it does; yes.

Q. For per diem purposes, where you had six cars, there would be six days here, would there not?

2185 A. In that case, if that is the way it worked, yes, I would like to recheck that to be sure.

Q. Well, for per diem purposes, can you ever have a fraction of a day?

A. No, sir.

Q. And if the car is in the possession of one of these Trunk Line railroads at its terminal, for a fraction of a day, it would mean one day's per diem expense for that road; would it not?

A. Not if it is delivered and returned within the same 24-hour period or calendar day.

Q. Yes; but if it is——

A. If it is held over midnight, it might.

Q. If it is held over midnight, there is at least one day?

A. That's right.

Q. Did I correctly understand that you do not know where these Pan Atlantic cars were delivered?

A. I don't know; no, sir.

Q. Are you sure that all of these cars were delivered to lighterage piers?

A. That is my understanding.

Q. Could you rework Exhibit 74 from the data you have on the basis of per diem days?

A. I will see, and I will if I can.

Q. If you can, would you be willing to do that?

2186 Mr. FORT. Oh, yes.

Q. Would you do the same thing as to the New Orleans Exhibit No. 75?

A. I have to figure that out.

Q. I would like to have it both for New Orleans and New York. I presume you are going to refigure it on the basis of the way it is figured now, but I would like to have it on the per diem basis.

Exam. ARCHER. Is that to be submitted after the hearing?

Mr. FORT. You couldn't do it today.

Exam. ARCHER. Ten days after the hearing, then.

Mr. FORT. Will ten days be long enough?

The WITNESS. Yes.

Q. Do the records that you have, from which you compiled these exhibits, I take it, for example, you compiled Exhibit No. 74,

Mr. Kendall—do they show how long the cars remained at the lighterage piers?

A. No, sir; I haven't that.

Mr. FORT. Can you get that?

The WITNESS. Yes, sir.

Mr. FORT. I ask you to get it. In other words, you will show when they unloaded at the lighterage piers.

Q. Can you break that down as between railroads and also show what the break-up yard that was used for the purpose of your count was?

2187 A. I will do it the best I can. I cannot do it in ten days.

Exam. ARCHER. Is that important?

Mr. MCCOLLESTER. Mr. Examiner, I think it is important, for this reason: As you know, the operations in New York Harbor, cars are held in one yard for a while, then they are moved up into another yard and held for a while, then they finally get up to the lighterage pier. Now, you don't get the entire detention unless you know what yards they are.

Mr. FORT. I want you to show also when you are getting this information whether any of these cars were held at any yards as suggested as a possibility by Mr. McCollester, at the request or order of the steamship company.

Exam. ARCHER. How much time do you want now?

Mr. FORT. How much time will that take, Mr. Kendall?

The WITNESS. 25 days.

Exam. ARCHER. I will give you 25 days.

Q. Mr. Fort, in his last request to you, asked you to show how many cars were held short of destination at the request of the steamship company. Of course, the holding provisions extended not only to steamship companies, but to shipper or consignee.

Mr. FORT. Held at the request of any one and for any other reason except operating purposes.

By Mr. MCCOLLESTER:

Q. So that the record may be clear, I have been asking you

2188 primarily about Exhibit No. 74, but, in connection with Exhibit No. 75, is that also made up on the basis of hours divided by 24 rather than on the basis of per diem days?

A. I think that is on per diem days.

Q. Will you check that?

A. I will check that.

Q. In connection with Exhibit 75, will your records show, when you get the data, will your records show the length of time until the cars were actually released? Will that show it?

A. I can get that. How many cars are there?

Q. 2,815.

A. Can you ease up a little on that and pick some number or some month?

Q. I will do whatever you think is reasonable on that.

A. That is a lot of cars.

Q. I understand.

Mr. Fogg. I would like to have something representative that I think should be shown. Suppose you take the first, third and fifth months shown on the statement.

Q. Now, I did not understand your testimony, Mr. Kendall, as to why you did not have complete figures on the Missouri Pacific and Texas & Pacific? Couldn't you have gotten those from the Public Belt?

A. Well, it was the Missouri Pacific and the Texas & Pacific that we could not get.

2189 Q. I see, but you could have gotten the detention of those cars on the Public Belt?

A. That's right.

Q. But you don't know whether your figures on Exhibit 75 showed any detention on the Public Belt?

A. That is what I am trying to get.

Q. Are cars covered by Exhibit 74 exclusively cars of freight arriving at New York and going out via the steamship lines?

A. Yes, sir.

Q. They do not include any detention in connection with cars for the loading of freight brought to New York by the break-bulk steamship lines?

A. No, sir.

Q. Now, in the case of Exhibit 75, is that also confined to cars arriving by rail at New Orleans for outward movement by steamship lines?

A. Yes.

Q. There again you include no detention of cars for loading freight?

A. No.

Q. In connection with Exhibit 74, do you know whether any of these cars were handled on car floats rather than lighters?

A. I dont know, I doubt it, but I am not sure.

Q. Now, you agree with us, do you not, that whatever 2190 the detention and the per diem or the per diem reclaim may have been on these cars of freight interchanged with the break-bulk lines, there is no provision in the per diem rules or the reclaim rules, or any of the other rules that are under your jurisdiction, for charging any of that per diem expense or reclaim expense at either New York or New Orleans?

A. No.

Exam. ARCHER. Any redirect?

(Witness excused.)

GEORGE C. RANDALL, having been previously sworn, testified further as follows:

Direct examination by Mr. ESHELMAN:

Q. Mr. Randall, while you have been sworn before in this proceeding, I am not sure that the record at present shows the additional titles or duties which you have acquired in the interim, subsequent to the last hearing?

A. Well, effective November 1, 1939, in addition to my other duties, I was made manager of the Port Traffic for the Association, with headquarters in New York.

Examiner ARCHER. What association?

The WITNESS. Association of American Railroads.

Q. Do you have a copy before you of Witness Mathey's Exhibit No. 69, I believe it is, showing rules published by the Trunk Lines covering free time allowance on certain traffic?

A. Yes.

2191 Q. Will you turn over the last page of that exhibit, please? There is an item there, No. 2110, which is indicated to be new. Can you say what is the effective date of that tariff?

A. Well——

Q. I might say, if you want to take my word for it, it is August 1, 1940, Mr. Randall. Does that amount square with your recollection?

A. That is correct.

Q. Can you say why that rule was established?

A. When we opened the office of Manager of Port Traffic at New York, it was found that with the exception of a few scattered ports, there was no effective placement rule in effect in Atlantic and Gulf Ports. It seemed to us that because of the uncertainty of affairs abroad, that it would be good to put in an effective placement rule which would be uniform at Atlantic and Gulf Ports, and I opened the subject up with the Atlantic and Gulf Line Associations and substantially the same rule here will be effective at all Atlantic and Gulf Ports, and practically all with the effective date of August 1st.

Q. Would it be correct to say that this rule does not so much undertake to provide any new free time, but rather that it undertakes to extend the physical area within which you may hold under your existing free time tariffs?

2192 A. I think that is correct. It really has the effect of enlarging the terminal yards without the actual expenditure of cash for track placement.

Q. To what extent, as a practical matter, is the rule applied on export traffic?

A. My investigation as to the holdings indicated that we had had no holdings of coastwise or intercoastal traffic out of the ports, with one exception, and that was intercoastal traffic out of the Port of Albany.

2193 Q. So that with that exception, in practical application, the rule applies to export traffic?

A. That's right.

Q. Under these tariffs which have been referred to, and referring particularly to this, so far as it would affect Rule S-21, shown on page 7 of the exhibit, and which relates, according to its title, to coastwise intercoastal and export freight held in cars, to what extent is the carrier's practice under that tariff indicative of any obligation on their part to hold either in cars or in lighters——

Mr. McCollester. I object to that question.

Mr. Eshelman. Well, I pretty nearly objected to it myself. Let me try it again.

Q. Under the tariffs relating to free time so far as it would apply to coastwise traffic, does the carrier's practice, or do the carrier's practices under that tariff or, rather, do the carriers under those tariffs hold cars or undertake to hold cars, hold freight, either on cars or on lighters?

Mr. McCollester. Just a minute. I think the tariff speaks for itself as to what the carrier undertakes to do.

Mr. Eshelman. We have had everybody else undertaking to explain what the tariff means. I don't think you ought to call the line on me. Let me state it this way:

Q. What may the carriers do under that tariff, as you understand it, or what do you understand that you do under those

2194 tariffs?

Mr. McCollester. Just a minute.

Exam. Archer. Let the witness answer it.

Mr. McCollester. Mr. Examiner, may I say this, as to the extent with which cars are held, we have had figures introduced here. Presumably these cars have been held under those tariffs because those are the applicable tariffs.

Now, as to what the carriers undertake to do, the tariffs themselves speak for the carrier's undertaking and define it.

Now, it seems to me that it is entirely incompetent to ask this witness a general question when the Commission will only be helped by specific data as to what the detention actually is, and that we have already had.

Mr. Eshelman. Mr. Examiner, I might say, I think what I want to prove by this is not at variance with any legal theory as to what was in the tariffs. I do want to show as a practical matter what is

open to the carriers under those tariffs, what they can do. Now, just——

Exam. ARCHER. Doesn't the tariff——

Mr. ESHELMAN. I don't think it will be as plain as if we were allowed to say. I think it would be plainer to you if the witness states what he does under those tariffs.

Mr. MCCOLLESTER. I submit, if your Honor please, if they
2195 want to put in statistics, any further statistics as to holding under the tariffs, they will be relevant and we will be glad to have him.

Mr. ESHELMAN. We are trying to put in our little case here and the rest of these people have had a pretty good chance today.

I would like to have an answer to my question since the Examiner ruled it may be answered.

Exam. ARCHER. You may answer it.

A. Item 8370 of the tariff, Exhibit 69, reads very clearly that the freight will be held in warehouses at the rail termini or at the option of the carriers in cars at stations or in holding areas. Now, the paragraph applicable to coastwise freight really provides for the same thing on coastwise freight; in other words, the tariff provides basically that the freight may be held at warehouses, but at the option of the carriers it may be held in cars or in holding yards.

Q. Now, take, for instance, cars of freight moving on through bills of lading in coastwise service. What, as a practical operating man, do you understand are the alternatives or the courses that are open to you?

A. Such carriers do not come under this tariff.

Q. In other words, when they are moving on through bills of lading, these tariff items do not apply to them?

A. Correct.

Q. Well, take as to these tariff items, and where they
2196 would apply, assuming that they have application on some freight, maybe we are not talking about it in this case, but what course of action is open to you as a practical operating man, or do you understand are the courses which are open to you, and what courses of action do you customarily take?

A. Since I have been at New York I have had occasions to observe the actual practices, and it is my observation that coastwise freight is immediately put on lighters, and immediately on arrival. That is due to the fact that coastwise sailings are fairly frequent and it is the exception rather than the rule that coastwise lines are not in a position to take freight as freely as offered.

Mr. MCCOLLESTER. I move to strike the answer unless they produce the orders—unless they produce the statistics. They are trying to contradict their own testimony.

Mr. ESHELMAN. Are you trying to impeach your own evidence as put in in the Agwilines Case?

Mr. MCCOLLESTER. No, indeed.

Exam. ARCHER. The motion will be noted.

(Question read.)

Exam. ARCHER. Read the answer.

(Answer read.)

Mr. ESHELMAN. I apologize for the length of that question, but let me come back to this: Suppose that during a particularly

2197 active time for lighters that you had need of lighters. Would you, in that case, have to unload carload freight immediately to the lighter, or could you make other disposition of it while still releasing the car?

A. If there was any question about the release of the lighter promptly at the coastwise pier, we would not put the freight on the lighter. As a matter of fact, the question of delay on the lighters has been one of the particular things we have been working on in New York, and we have been able to reduce the lighterage detention on the part of the steamship people by a rigid system of permits that applies particularly to the export situation; but in case there is any possibility of the lighter being delayed and not being released at the steamship pier, even on coastwise freight, we do not load it on the Jersey shore.

Q. To what extent do you have lighterage pier space, or pier space where you can unload onto the pier so that you could release lighters—I mean to say, release cars and still not tie up your lighters?

A. Well, we get reports once a week or twice a week from all of the New York Harbor lines as to their covered pier space available for freight, and at no time during the last six months has there been any case where more than two-thirds of the covered pier space has been occupied. In other words, we have had enough room so that we could unload on the pier should occasion demand.

2198 Q. So that on this coastwise traffic, if you wanted to release a car and did not want to tie up a lighter until there was actual use for it, you could unload, and I am talking about this business moving on through bills of lading, you could unload that right on the pier until such time as you have reasonable prospects of getting your lighter unloaded?

A. Oh, yes; you could do that.

Q. Roughly speaking, would you say about how frequently those piers are switched? I think there was some question from counsel of Mr. Kendall about possibly not including the time when cars were placed for unloading at piers up to the time that

the cars were unloaded. Can you say what that would represent?

Mr. McCollester. I object, Mr. Examiner.

Mr. Eshelman. I thought you wanted to know that.

Exam. Archer. That is going to be submitted.

Mr. Fort. He said he was going to get the actual figures.

Q. To what extent are piers switched?

Mr. McCollester. I object. I know enough about New York Harbor so that if we are going to have any testimony from the railroads about their operations, we want the details. We don't want general testimony for all railroads by a witness like Mr. Randall, competent though he is.

Mr. Eshelman. I think that is all I have.

2199 Cross-examination by Mr. McCollester:

Q. Mr. Randall, as I understood you to testify, you were now reducing lighterage detention by what you described as a rigid system of permits; is that right?

A. That's right.

Q. In other words, is it the fact that you will not load freight onto a lighter for a movement to a steamship company until you get a permit from the steamship company indicating that the steamship company is ready and will take the freight as soon as its brought alongside?

A. That is substantially correct.

Mr. Eshelman. You are not talking about coastwise?

The Witness. That doesn't apply entirely with respect to all steamship companies, but we have some advice from the steamship company that they are able to handle the lighter at a certain time, whether it is a telephone advice or a certificate, or what?

Q. Is that true of coastwise traffic as well?

A. They keep in touch with the coastwise people.

Q. Under those circumstances, if you had a car of freight that came in today for a Pan Atlantic or a Morgan Line ship that was due to sail four days from now, you would be sure that you did not take that freight out of the car and put it on a lighter

2200 until you had the assurance of the water carrier that he would be prepared to release the lighter promptly?

A. In actual practice, the inbound road haul carrier usually calls up the steamship line or the coastwise line as to when they will take it. Usually they will take it on that pier, and in that case we load it up immediately, but if they say they are not ready to put it on the ship, it is not loaded until it can be promptly released.

Q. And under those circumstances, you have no rule in your per diem or reclaim rules for charging the per diem for the holding of that car against the steamship line?

A. That's right.

Q. Now, you testified that the tariff provisions included in Witness Mathey's Exhibit No. 69 had no application to freight moving on through bills of lading.

A. Coastwise.

Q. Coastwise?

A. That's right.

Q. Is the situation there that, then as to freight moving on through bills of lading, there is no limit to the time the freight will be held for delivery to the vessel?

Mr. ESHELMAN. Did you say "will be" or "may be"?

Q. Will be held or may be held for delivery to the vessel.

A. There is no tariff provision covering it.

Q. And no provision for making any charge to the shipper or anybody else if you have to hold that freight for a day or
2201 two days or a week or a month?

A. That's right.

Q. Now, in connection with the first part of your testimony which dealt with this new item No. 2110, I gather from what you say that the purpose which promoted that tariff provision permitting hold of cars at points short of ports, was the possibility that a condition would develop similar to that which we had in the last war, where the railroad yards at the waterfront became congested and it was necessary to hold cars at interior yards; is that the idea?

A. Partly that and partly for the reason that we find it good operating practice not to load up the usual switching tracks at the terminals with cars which are not apt to move within the next few days. Rather than construct a lot of new tracks at the terminals, it seemed the part of good judgment to be able to hold those cars at points where we could readily get them and at the same time have the port rules and charges applied to them.

Q. Well, if it was freight which was moving coastwise on a bill of lading to the port and you should see fit to have that freight held back because the particular steamship line was not ready to take it, you would hold that freight back at some interior yard for five days, without making any charge in addition to the freight rate?

A. That's right.

2202 Q. To anybody?

A. That's right.

Q. Either to the shipper, the consignee or the steamship?

A. The same rule would apply as was in effect at the port of embarkation.

Q. And if it is freight that is moving on through bill of lading coastwise, it then becomes entirely a matter of the railroad's operating convenience and it is free to hold the freight back at an interior point because the shipper does not enter into it at all, it becomes a through bill of lading?

A. That's right. Such traffic as that does not come within the provisions of these tariffs anyway.

Q. That's right; and as to that, there is no limit, to the time that the freight will be held by the railroads if they have to hold it.

A. The situation there would be the same as another railroad being unable to take freight currently. You would have to dicker with them to make arrangements to take it.

Q. But if it were freight for a steamship line that couldn't take it, you have no provision if it is on a through bill of lading for charging that steamship line per diem while you hold the cars; have you?

A. That's right.

Redirect examination by Mr. ESHELMAN:

2203 Q. Would it also be correct to say that you do not have to hold it on the car or on the lighter and you can unload it on the lighterage pier?

A. Hold it in storage at the port.

Q. You don't have to tie up either your car or your lighter?

A. The tariff says you may unload it and store it at the port, or, at the carrier's option, hold it in cars.

By Mr. FORT.

Q. Mr. Randall, do you know of a single instance where any car for coastwise transshipment in New York has been held back from the port in any yard at all by reason of request, order or inability of the coastwise steamship company?

A. No, sir.

Exam. ARCHER. Any other questions?

Re-cross examination by Mr. MCCOLLESTER:

Q. Are you familiar, in connection with your new duties, with the Hoboken Manufacturers Railroad?

A. Haven't had any occasion to get over there.

Q. Have you seen that railroad?

A. I have not.

(Witness excused.)

Exam. ARCHER. We will adjourn until ten o'clock tomorrow morning.

(Whereupon, at 5:20 o'clock p. m., the hearing was adjourned to September 17, 1940, at 10:00 o'clock a. m.)

2205 Before the Interstate Commerce Commission

Docket No. 25728, et al.

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

Docket No. 25878

NEW ORLEANS & LOWER COAST R. R. CO.

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL.

HOTEL ST. GEORGE, BROOKLYN, NEW YORK.
Tuesday, September 17, 1940.

Met, pursuant to adjournment, at 10:00 o'clock A. M.
Before: J. W. ARCHER, Examiner. M. J. WALSH, Examiner.
Appearances (same as heretofore noted).

2206 PROCEEDINGS

Exam. ARCHER. Are the defendants ready to proceed?
Mr. ESHELMAN. Yes, sir.
Exam. ARCHER. Call your first witness.
Mr. ESHELMAN. Mr. Hodkinson.

E. A. HODKINSON was sworn and testified as follows:

Direct examination by Mr. ESHELMAN:

Q. State your name and connection.

A. E. A. Hodkinson, Commerce Statistician, Trunk Line Association, 143 Liberty Street, New York.

Q. Mr. Hodkinson, is it part of your duties to prepare from time to time various traffic studies for use in cases that are before the Interstate Commerce Commission?

A. Yes; and not only that; I prepare traffic studies from my own information for the settlement of questions that are not before the Commission.

Q. And have you, in the course of such studies, had occasion to determine to what extent, approximately, coastwise shipments between the eastern seaboard and the southwest are on through bills of lading?

A. Practically all of the traffic moving between the Official Territory on the one hand and Southwest on the other through the break bulk carriers is covered by through bills of lading.

Q. And to what extent is that traffic on through way bill?

2207 A. Insofar as the Morgan Line is concerned, it is all through way bills. The Clyde-Mallory and the other lines have a rebilling proposition out of New York.

Q. To what extent, approximately, does this tonnage move by lighter as distinguished from direct, by rail to the carrier, break bulk carrier?

A. The only carriers serving the port of Greater New York in connection with which it is possible to make delivery from cars to boat are the Bull Line over Port Newark, and the Pan-Atlantic Line over at Hoboken, and those two lines only carry a small proportion of the total tonnage moving between Official Territory and southwestern territory via the break bulk lines. By far the major portion of the tonnage is lightered.

Q. Where there is this through billing, there is no intervention of the shipper, for instance, at the port?

A. No; there is no necessity for any intervention on the part of the shipper at the port.

Q. In other words, there is the straight carrier obligation to take it from original origin, you might say, to final destination?

A. That is correct.

Q. Have your studies indicated to you the extent, or the approximate extent to which all rail traffic moves on combination of rates?

Mr. McCOLLESTER. Well, now, that is a pretty broad question, I should say.

2208 Mr. ESHELMAN. Well, I am only referring to his studies. I do not mean to go beyond those.

Mr. McCOLLESTER. Well, I think that you ought to ask him first what studies they were, for what purpose, in what territory, and what railroads they covered.

Mr. ESHELMAN. Well, I think his answer will cover that.

Exam. ARCHER. Go ahead.

A. My answer is that prior to the 17,000, Part Two decision of the Interstate Commerce Commission, to a great extent, traffic between Official Territory and Western Trunk Line Territory was moving on combination rates. The division of through rates brought into issue the question of divisions, and we were handling that question with the Western Trunk Lines for a number of years. Finally, it was decided that—mutually decided between the Western Trunk Lines and the Official Lines that one of the best ways of settling divisional questions was to determine just what is involved, and with that thought in mind, very comprehensive traffic study was made covering a year's period, from March 1935 up to and including April 1936.

The eastbound study was made absolutely under my supervision, and the westbound study under the supervision of Mr. Wettling, who was then the manager of the Statistical Bureau for the Western Trunk Lines; and I had the job of consolidating both the eastbound and the westbound traffic studies.

2209 That study was made by rate groups. First, we dealt separately with all traffic moving under the rates arising directly out of the Commission's decision in 17,000, Part Two Case.

Then, another group of traffic is traffic moving under combination of local rates, or combination of intermediates.

Now, as to that Group Two tonnage, the traffic study included—I might say that the traffic study included all merchandise traffic other than fresh meats and packing house products, and grain and grain products.

Exclusive of fresh meats and packing house products, there were 18,877 cars, which constituted 11.6 percent of the total tonnage which moved under combination rates.

Now, during the same period there were 71,603 carloads of fresh meats and packing house products, and the majority of those likewise moved under combination rates.

In addition to this, there are many other commodities moving between Official and Western Trunk Line Territory where the combination rates apply. That is particularly true of grain and grain products. That is a very heavy moving commodity from the west to the east, and the rates are made on the primary markets. There are no through rates from Western Trunk Line Territory to Official Territory on grain and grain products. They all move on combination of locals.

It is a fact also that there is a large movement of 2210 traffic between Official Territory and Southwestern Territory, all rail, which moves on combination of local rates, and that was one of the principal points of dispute between the Official Lines and the Southwestern Lines, as to just what divisional formula should be used in the division of those rates.

We contended that they should be divided as made, and the Southeastern Lines contended that they were through rates, and should be subject to the divisions arising out of the Commission's prescribed formula. There is heavy movement of traffic all rail even today on the basis of combination rates.

Q. Do you know whether or not the per diem situation as between the carriers in the case of such combination rates is at all dependent upon the fact either of the shipments moving on combinations or on through rates?

A. The rate situation is never taken into consideration in the determination of per diem charges.

Mr. ESHELMAN. That is all I have, Mr. Examiner.

Exam. ARCHER. Cross-examine.

Cross-examination by Mr. MCCOLLESTER:

Q. The per diem situation is, however, taken into consideration in the determination of rates and divisions of rates, is it not?

A. I don't think so. It isn't my experience that we make any rates with any consideration being given to the per diem situation.

2211 Q. Have you never——

A. That is one factor that I have never know of, to be taken into consideration in the determination of rates.

Q. How about divisions?

A. It might be a facter to be considered in connection with divisions.

Q. It is, is it not?

A. Not generally.

Q. Not generally.

A. No.

Q. It is between the railroads and water carriers, is it not?

A. No.

Q. Now, when you speak about combinations of rates and proportion of traffic moving on combination, did your analysis go further, to inquire what proportion of the factors used in the combinations was proportional rates, rather than local rates?

A. As to the specific figures that I have given you, they were all combination of local rates.

Q. How about the grain rates?

A. But on talking of grain and grain products, I did not give you any specific figures. I told you there was a tremendous movement, and, of course, it is well known that the combination as to grain rates is combination of the proportionals.

Q. Yes. You failed to mention that in your direct testi-

2212 mony, however, did you not?

A. Not exactly. I said the combination of the locals, whereas, perhaps, to be technically correct, I should have said combination of proportionals.

Q. Yes; and those proportional rates are lower than the respective local rates to and from the junction point, are they not?

A. Yes; but I have yet to find very many cars of grain moving under the so-called local rates.

Q. Now, with respect to freight moving coastwise, or freight moving in connection with water carriers, part of the rail rates of the eastern carriers are proportional rates, are they not?

A. No.

Q. Is that true in connection with export traffic?

A. On export traffic we have specifically export rates.

Q. Export rates; and those rates are lower than the local rates, generally speaking?

A. Where there is any difference between the domestic rates and the export rates, the export rates are lower.

Mr. McCollester. I have nothing further.

Exam. Archer. Is that all the cross? (No response.) Any redirect?

Mr. Eshelman. No.

Exam. Archer. You are excused.

2213 (Witness excused.)

Mr. Eshelman. Mr. Clark.

F. H. Clark was sworn and testified as follows:

Direct examination by Mr. Eshelman:

Q. Mr. Clark, how long have you been with the Pennsylvania Railroad?

A. Thirty-one years.

Q. All in the operating department?

A. Yes, sir.

Q. Are you familiar with the operating situation in New York Harbor so far as refers to the practices under the tariffs shown in the exhibit introduced yesterday?

A. Yes, sir.

Mr. McCollester. For the Pennsylvania Railroad?

Mr. Eshelman. Pardon me?

Mr. McCollester. For the Pennsylvania Railroad.

The Witness. Yes, sir.

By Mr. Eshelman:

Q. What is the practice with respect to unloading cars to release equipment?

A. When there is a congestion at the ports, and the operating conditions make it necessary or advisable, such commodities are unloaded generally to the lighterage piers, to release the equipment. The railroad considers it has the right to release its equipment, and does so when necessary.

2214 Now, is this actually done today on any important branch of traffic?

A. Yes, sir. It is done on export traffic. We have several hundred cars unloaded at the present time, roughly, about four or five hundred, on our lighterage piers.

Q. Do you currently do it on the break-bulk traffic to the southwest?

A. It is not necessary in the case of coastwise traffic, because that moves directly to the steamship line on arrival, and consequently the cars are released promptly.

Q. You do not require a permit on that coastwise business?

A. No, sir.

Q. And while you do not do it on the coastwise business, that is do not customarily unload to piers, may you do so if operating conditions make that course advisable?

A. If we had the same situation we had with export we would unload to lighterage piers or dispose of the lading in some form to release the equipment.

Q. So that you do not have to tie up either your cars or your lighters if conditions make it inadvisable for you to do it?

A. No, sir.

Mr. ESHELMAN. That is all.

Exam. ARCHER. Cross-examine.

Cross-examination by Mr. McCOLLESTER:

2215 Q. Mr. Clark, if I correctly recall your testimony in the New Jersey Lighterage Case, where you were a witness; were you not?

A. Yes, sir.

Q. You testified that you had two sets of lighterage piers, at Harsimus Cove and at Greenville; is that right?

A. That is right.

Q. And that you used your Harsimus Cove piers generally for boxcar freight?

A. Closed-top freight.

Q. And that you use your Greenville lighterage piers for open-top freight?

A. Generally speaking; yes.

Q. And that in the case of open-top freight going to the Greenville piers you customarily hold the freight in the cars and transfer directly from cars to lighters?

A. I don't recall testifying to that effect, but, contrarywise, we unload considerable freight to lighterage piers in Greenville as well.

Q. Yes; but did you not also testify that where the freight is of a character where it would be more economically transferred directly from car to lighter you hold it in cars and do not unload it to the pier?

A. If it is bulk freight that would be the normal practice.

Mr. McCOLLESTER. That is all.

Exam. ARCHER. Any other questions? (No response.)

2216 **Exam. ARCHER. You are excused.**

(Witness excused.)

Mr. ESHELMAN. I call Mr. Eyre.

L. G. EYRE was sworn and testified as follows:

Mr. ESHELMAN. Mr. Examiner, before proceeding with the testimony of this witness perhaps some word is appropriate on my part so that the nature of the offer will not be misunderstood.

I might say that as perhaps is generally known, the Pennsylvania Railroad Company and the New York Central Railroad Company brought individual suits in the United States District Court for the Southern District of New York against Hoboken Manufacturers Railroad Company and Seatrain Lines, Incorporated, to recover compensation for use of cars, and those suits are now pending.

The answers of Hoboken Manufacturers Railroad Company and Seatrain Lines, Incorporated, in those cases take issue with the theory of the complaints brought before the Court, and state in one of the defenses that our right is before this Commission rather than before the Court.

In order that there will not be any misrepresentation of the nature of the allegation there made by the Hoboken and Seatrain, I have a copy of the language so that I will not overstate or understate their position.

2217 That is my understanding of what the language means, although the Commission would probably determine that for itself.

But in view of the apparent reliance of Hoboken and Seatrain upon the jurisdiction of this Commission, the Pennsylvania and the New York Central felt that they had too much at stake in that litigation to pass by this opportunity, particularly in view of the nature of the Commission's language reopening this case, and the later allegation of Hoboken and Seatrain before the Court, which was apparently made in the light of the Commission's language reopening this case.

Therefore, I merely wanted to show that in introducing this evidence—and I think the evidence itself, which will be very brief, will not itself be a matter of controversy—I merely wanted to show that it was not that I am surrendering our rights before the Court, or that we thought we were not right in that case, but rather, that bowing to their apparent view, we had no such pride of opinion about the proper forum that would prevent us from tendering that evidence here for whatever action defendant or the Commission may decide to give it.

Mr. MCCOLLESTER. Mr. Examiner, of course, until I hear counsel's questions, I cannot tell what the evidence is going to be, but before he begins his examination of the witness, all I can say is that I think that the fact that same proceeding may be pend-

2218 ing before this Commission certainly does not give any

party a right to do what Mr. Eshelman refers to as airing their views in this proceeding; nor do I conceive that in this proceeding the Commission can try out the proceeding pending in Court.

So far as the Court litigation is concerned, the answers of the defendants have set up that the question of the obligation of the railroads to permit the interchange of their cars with Seatrain, and also the question of the reasonable compensation to be paid for those cars are questions for determination by the Commission in the first instance under the Interstate Commerce Act.

Those, as I recall it, are the only questions which we have alleged in our answers to be questions for the jurisdiction of the Commission and not the Court.

Now, I cannot see that any testimony here may affect the answers in that case, or may be relevant because of the pendency of that case, and I certainly object to offering testimony here because a Court proceeding is pending.

If the testimony is relevant to the issues in this proceeding raised by the complaint and answers, why, of course, it is admissible, but I shall object to anything that is not relevant to the issues in this case, or is offered for any other purpose than determination of the issues in this case.

Mr. ESHELMAN. Mr. Examiner, I might say that it would not be my purpose here to seek to, you might say, air views
2219 upon the record, as counsel stated. In other words, the evidence that I have is very brief. If I might make the suggestion, I should like to introduce the evidence, and since counsel has indicated that he will object to it, I should like to have it taken, and I have no objection to his asking ruling.

I should at least like to have it put upon the record, where it may be determined——

Mr. MCCOLLESTER. I do not know what counsels' strategy may be, Mr. Examiner——

Mr. ESHELMAN. I have no strategy. It is very simple.

Mr. MCCOLLESTER. They may want to get something on the record here that they can refer to in some other proceeding. Of course, that is not a proper ground for putting in evidence here.

I think that all of Mr. Eshelmans' introductory remarks and his explanation ought to be stricken, and that he ought to proceed with the examination of the witness subject to your rulings as to whether the questions and answers called for are relevant to the issues in this proceeding.

Mr. ESHELMAN. In fairness to myself, Mr. Examiner, I might say that it might make a difference as to whether this was put in on my own volition or in response to the pleading of Hoboken and Seatrain in the Court case, and, therefore, I did not want it to

appear that I was first, on my own motion, coming to the
2220 Interstate Commerce Commission about it, but, rather, with reservation of the point that we thought that we were in the right pew in the Court, that it was that we had no such pride of opinion but what we were willing that if the Commission should hold the complainant to be right, or hold Seatrain——

Mr. McCollester. Then I will certainly object to proceeding with the examination of the witness.

Exam. Archer. You may proceed with the witness.

Mr. McCollester. May I have an exception, Mr. Examiner, since this is not being offered, as I now understand it, on counsel's own volition, but in response to an answer of the defendants in a proceeding in the United States District Court.

That certainly makes it inadmissible in this proceeding.

Exam. Archer. The objection will be noted.

Mr. Eshelman. Mr. Examiner, I should first like to tender, if counsel will do us the same favor that we did yesterday in his case, in not objecting to the question of the formality of proof, as to whether or not the stenographer copied this exactly—I know it has been compared, and I think it is accurate—I should like to introduce this as the next exhibit in order, and it is entitled, "Excerpts From Amended Answer of Hoboken Manufacturers Railroad Company," and so forth.

Mr. McCollester. I object, Mr. Examiner. There is no showing that this is relevant to the issues in this proceeding.

2221 Mr. Eshelman. Mr. Examiner, as the next——

Mr. McCollester. Mr. Examiner, will you rule on my objection?

Exam. Archer. I will overrule the objection.

Mr. McCollester. May I have an exception?

Exam. Archer. Yes.

(Exhibit 77, Witness Eyre, received in evidence.)

Mr. Eshelman. As the next exhibit I should like to introduce a similar sheet, but entitled, "Excerpts From Amended Answer of Seatrain Lines, Incorporated," etc.

Mr. McCollester. Same objection, Mr. Examiner.

Exam. Archer. Same ruling.

Mr. McCollester. I should like to ask, if I may, for the purpose of such appeal as may be appropriate from the Examiners' ruling the theory on which the Examiners conceive that these exhibits are relevant to the issues in this case, or on which counsel claims they are relevant.

Mr. Eshelman. The Examiner ruled on it. If you desire argument, I am, of course, prepared to give it, but if——

Mr. McCollester. It is, of course, relevant in the Court proceeding whether our allegation is correctly taken or is not cor-

rectly taken, but I do not conceive that there has been referred to the Commission by the Court any such question for determination by the Commission, and it certainly is not raised by the
2222 pleadings, or by the Commission's order of investigation in this proceeding.

Mr. ESHELMAN. May I proceed with the witness, Mr. Examiner?

Exam. ARCHER. Yes; you may.

(Exhibit 78, Witness Eyre, received in evidence.)

Direct examination by Mr. ESHELMAN:

Q. Mr. Eyre, what is your position with the Pennsylvania Railroad Company?

A. Assistant Chief Clerk, Superintendent of Car Service.

Q. Do you have a statement in summary form of the car days of detention of Pennsylvania Railroad cars as reported to the Pennsylvania Railroad Company by Hoboken Manufacturers Railroad Company by months for the period from September 1932 to July 1940, both inclusive?

A. I do.

Q. And is this the exhibit?

A. Yes, sir; that is the exhibit.

Q. And was that prepared in your bureau under your supervision?

A. It was.

Q. And is it true and correct to the best of your knowledge and belief?

A. It is.

Mr. McCOLLESTER. May I ask counsel to state to what issue in this proceeding this proposed exhibit is claimed to be relevant?

2223 Mr. ESHELMAN. Do you want to hear from me on that, Mr. Examiner?

Exam. ARCHER. Yes.

Mr. ESHELMAN. Mr. Examiner, I think that it will perhaps better appear from the concluding testimony of the witness, but I am merely desiring to show that as between the reports, the per diem reports, and the per diem reclaim reports tendered to the Pennsylvania by the Hoboken Manufacturers Railroad Company, there is a wide balance, even by Hoboken's own reports—a wide balance of car detention in favor of the Pennsylvania.

I am not trying to strike a precise figure, in that you will note that this first exhibit does not refer to money, but, rather, to car days of detention; but I am introducing it because I understand that complainant here takes the position that our right, if any, in respect of protection of these earlier claims for per diem are before the Commission rather than before the Court.

Mr. McCollester. Mr. Examiner, this is certainly the most extraordinary, unlawyerlike proceeding that I have ever seen, to bring into one case, and try to try out in a proceeding before the Commission, where no issue has been raised, something that is involved in another case.

Now, we have, admittedly, with the New York Central and Pennsylvania, a controversy over the payment of per diem and the payment of reclaim. We have counterclaimed against
2224 them, and if we are going into that, we will bring in all of that.

We have counterclaimed against them for reclaim, for divisions, for breach of contract, because they haven't paid contract divisions to the Hoboken Manufacturers Railroad.

There is a great deal in that case other than what counsel is here saying, but I——

Exam. Archer. May I ask a few questions here, to see if I can get this straight?

Mr. Eshelman. Surely.

Exam. Archer. Is this exhibit, which will be number 79, introduced for any other purpose than to show the per diem submitted by the Hoboken Manufacturers Railroad? It is not submitted for any purpose of getting the Commission to award any damages, or anything like that to you, is it, in this proceeding?

Mr. Eshelman. Mr. Examiner, I might say that I am not certain what the Commission considers is the extent of its jurisdiction in this case, or what might be held. I think that the Examiner realizes that there has been a considerable change in the attitude of the Courts as to what should be done in some of these cases——

Exam. Archer. Well, now, I don't believe we care to go into any argument along that line.

Mr. Eshelman. May I state another thing?

Exam. Archer. Briefly.

2225 Mr. Eshelman. All right. Counsel has stated that the issues in this case do not include any question of the relations of the various roads. One of the questions, as we conceive it, before the Commission here, and particularly for the future, is the question as to whether Seatrain, if our cars are to be ordered into Seatrain's service—as to whether it shall bear a responsibility direct to the other lines, as line-haul carriers do.

At the present time, Hoboken makes the reports. We do not get reports from Seatrain.

Now, one of the questions, as you will see from the former record, as you doubtless have seen, is whether or not the Commission will require Seatrain to deal directly with the railroads in the matter of per diem, rather than through its connecting carriers.

Now, from our standpoint, we think that there might be a grave question as to whether the Commission should force us to deal alone with the connecting carriers if that would not be a full protection of our rights; so that for the future, this is pertinent to that thing.

I might say that the issues, despite what counsel has said here in this hearing—as to the issues brought by the complaint, if your Honor will look at the issues as they were read in the original hearing by Examiner Fleming—I think it is at page ten of
2226 the record—you will see that it applies to the relations of three sets of persons: Hoboken, Seatrain, and the railroads—the relations among themselves.

Now, may I say one other thing? Mr. Examiner, I might ask that you do not be unduly impatient with me, because, from our standpoint, this is a very important claim. If we are wrong, you have no hesitation about overruling us or overruling our claim.

Exam. ARCHER. Well, if you are thrown out of Court by reason of lack of jurisdiction of the Court, why, then you can come in to the Commission for these damages that you are claiming in the Court.

I do not see just why, or what purpose it is going to serve to put it in here. As I understand it, the Commission cannot award any redress on your Court action in this proceeding.

Mr. ESHELMAN. Well, I am afraid that you are thinking along the lines that we were thinking when we went to Court, but counsel apparently says to the Court that we are all wet.

Exam. ARCHER. Well, that is all right, but if——

Mr. ESHELMAN. And, therefore, I would like to protect ourselves. He might persuade the Commission, or he might persuade the Court, and——

Exam. ARCHER. Well, suppose he does persuade the Court that you are in the wrong forum?

Mr. ESHELMAN. Notice, Mr. Examiner——

Exam. ARCHER. Don't you have any redress then before
2227 the Commission?

Mr. ESHELMAN. No; I may have lost it by then, sir.

Mr. Examiner, may I read to you two things?

Exam. ARCHER. Are you going to save it by putting it in here?

Mr. ESHELMAN. May I read to you two things, one out of the report of the Commission reopening this case, and one the precise allegation?

Exam. ARCHER. I think I am familiar with it.

Mr. ESHELMAN. I call your attention to the chronology. In this very report, this last report of the Commission—I think perhaps you have it right there——

Exam. ARCHER. Off the record——

(Discussion off the record.)

Mr. ESHELMAN. In the Commission's report of January 8, 1940, in these cases—I am reading from the mimeographed decision, beginning at page 8—the last paragraph is this:

"It is our view that the period of time during which, and the manner in which Seatrain should pay for the use of cars, the amount of compensation it should pay, and any other condition which the evidence adduced shows would be an appropriate condition to attach to an order requiring defendants to interchange their cars with Seatrain are questions here in issue. The proceedings will be reopened for further hearing."

2228 I have no means knowing whether complainant will contend before the Court that the period of time goes back to the beginning of his complaint, wherein he asked the Commission to fix the obligations of the parties among themselves, and, moreover, I——

Exam. ARCHER. Do you think that the period of time refers to the filing of a complaint?

Mr. ESHELMAN. I thought what the Commission meant by this language, Mr. Examiner—and I am frank to say, both here and before the Court, that I thought that the Commission, by that language, meant how soon should the obligation obtain; that is to say, if Hoboken brought the car down and gave it to Seatrain, or tendered it to Seatrain, and Seatrain wasn't ready to take it, as to when Seatrain's responsibility began.

Exam. ARCHER. That is right.

Mr. ESHELMAN. But notice, then, the language of Hoboken——

Mr. MCCOLLESTER. That is the way we have interpreted it, may I interject right there, so that we may have some agreement between us.

Mr. ESHELMAN. Well, then, may I have counsel's statement on the record that he does not interpret that language as meaning the period of time from the beginning of the complaint?

Mr. MCCOLLESTER. Oh, there is no claim for reparation in so far as the railroads are concerned in this complaint. You are not claiming anything from us in this proceeding. What

2229 we are asking for is an order requiring the interchange of cars. We have not asked any money order in this proceeding, but just an order for the interchange of cars.

Mr. ESHELMAN. Do we have here that first transcript?

Mr. MCCOLLESTER. I have it, if you want it.

Mr. ESHELMAN. May I refer to page 10 there?

Mr. MCCOLLESTER. Surely.

Exam. ARCHER. Off the record.

(Discussion off the record.)

Mr. ESHELMAN. At page 10 of the transcript in this case, Mr. Examiner Fleming, in summarizing the issues, stated as follows:

"Examiner FLEMING. Speaking of these cases collectively, the complaints assail the lawfulness of Car Service Rule 4 maintained by the American Railway Association on behalf of its common carrier railroad members, also defendants' rules, regulations and instructions and practices under such Rule 4 or in connection therewith, alleging a violation of Section 1, Paragraphs 4 and 11; Section 3, Paragraphs 1 and 3; and of Section 7, all of the Interstate Commerce Act. Complainants ask the Commission to establish and put in force reasonable rules, regulations, and practices in conformity with the provisions of said Act, in regard to car service by defendant rail carriers, subject to said Act, and with respect to the interchange of cars between
2230 the lines of such defendants, the lines of complainants, and the vessels of Seatrain Lines, Incorporated; also to award reparation for damage claimed to have been sustained by reason of the alleged violations of said Act.

"This summary of the issues states and sets forth all of the major issues presented. I will ask any of the parties if they find error in that view to point to such errors at this time."

I do not understand that there was any dissent on the part of the complainants from that statement of the issues.

(Discussion off the record.)

Mr. MCCOLLESTER. So far as the reparation feature is concerned, Mr. Examiner, that is very ancient history. The circumstances as to consents and otherwise have changed since the case was brought.

The Commission made a finding and entered an order in the case. We are here on the case as reopened on our petition.

Our petition sought reopening the case solely for the entry of an order requiring the interchange of cars, pursuant to the findings. We have not asked for any reopening on the reparation feature, and I am willing to state on the record that we waive our claim for reparation in this case.

Mr. ESHELMAN. Mr. Examiner, I might say that the chief reason I thought that was of importance is that it clearly makes plain that the practices which the Commission was asked
2231 to fix in that case were practices between three sets of persons or parties: The Seatrain, The Hoboken, and The Trunk Lines, among themselves.

May I now read—well, I think it is not necessary to read it into the record, since Exhibit 77 is here. I take it it is still in the record; is it not?

Exam. ARCHER. It is still in the record up to this point.

Mr. ESHELMAN. Yes. But I think, as your Honor will see from that, that this appears to us to state to the Court that what we are there asking the Court to do for us—that Hoboken and Seatrain are saying to the Court that all those things are involved, not in some case before the Commission, but in No. 25728 on the docket of the Commission.

Now, Mr. Examiner, the question as to where administrative bodies stop and begin these days in the eyes of the Court, as you know, is a constantly varying thing, and I would appeal to the Examiner to let me put this in the record physically, subject to whatever reservations or restrictions you may draw upon me; and then, if necessary, it can be ruled one way or the other, but I should like to have this in the record, if you please, sir.

Exam. ARCHER. Well, sir, if it affects anything other than facts which we may properly consider in this case, and it has nothing to do with your suits in the Courts, it may be
2232 put in, but if it has anything to do with those, I do not want to receive it.

Mr. MCCOLLESTER. May I say, Mr. Examiner——

Mr. ESHELMAN. Will you stop me, then, if I go beyond?

Mr. MCCOLLESTER. May I say, Mr. Examiner, just one thing further? Mr. Eshelman stated finally, as I understand it, as his reason for wanting to show the number of car days reported by the Hoboken Manufacturers Railroad to the Pennsylvania, that it might be contended by them that Seatrain if the defendants are required to permit the interchange of their cars with it, should make settlement directly with the owning railroads rather than through the medium of the Hoboken Manufacturers Railroad, and I inferred from Mr. Eshelman's remarks that he intended by the proposed exhibit, and perhaps some others, to show some discrepancies resulting from the present method of settlement.

Mr. ESHELMAN. No; I don't think I——

Mr. MCCOLLESTER. I had not been aware of any discrepancies, because we had accepted your figures. I thought we were in agreement on the figures——

Mr. ESHELMAN. We are.

Mr. MCCOLLESTER. But this was what I wanted to say: That we have previously offered on the record in this case, so far as Seatrain is concerned, to make settlement directly with the owning railroads, and to become a party to the car service
2233 and per diem rules agreement, that is, for Seatrain to do so.

When Seatrain first started operations, it asked to become a party, and was told by the A. A. R. or its then predecessor that it could not do so because the Association's membership was lim-

ited to railroads, and therefore, that under the rules of the Association, Seatrain would have to make settlement with a switching line from whom it received cars, and the switching line would have to be responsible to the owning roads for per diem on their cars.

And at the last hearing, Mr. Kendall, for the Association, confirmed on the record here what was our understanding: That Seatrain cannot make settlement directly with the owning roads under the A. A. R. set-up unless that set-up is changed.

Now, if the defendants themselves want to change it, so that Seatrain may make direct settlement, Seatrain is willing to do so, but that is up to the defendants, and not Seatrain.

Mr. ESHELMAN. Shall I proceed with the questions?

Mr. MCCOLLESTER. Mr. Examiner——

Exam. ARCHER. Just a minute. Off the record.

(Discussion off the record.)

(Exhibit 79, Witness Eyre, marked for identification.)

By Mr. ESHELMAN:

Q. Mr. Eyre, have you another statement, entitled "Summary of Per Diem Reclaim Reports Submitted by Hoboken Manufacturers Railroad," etc.?

A. I have.

2234 Q. And was this likewise prepared in your Bureau, under your supervision?

A. It was.

Q. And it is true and correct, to the best of your knowledge and belief?

A. It is.

Exam. ARCHER. This will be 80.

(Exhibit 80, Witness Eyre, marked for identification.)

Mr. MCCOLLESTER. May I ask counsel again to state the relevancy of this exhibit to the issues in this case?

Mr. ESHELMAN. Mr. Examiner, may we have to do that again, in view of the nature of the Examiner's ruling?

Mr. MCCOLLESTER. I do not yet see the——

Mr. ESHELMAN. This is just the other side of the picture.

Mr. MCCOLLESTER. I do not see the relevancy of the previous exhibit, No. 79.

Exam. ARCHER. I think there is some relevancy in 79, possibly, but I do not know about 80. That is a mere matter of computation, however, I imagine, and nothing more.

Mr. ESHELMAN. There is much in the record already, your Honor, about the reclaim situation, and this is really a part of that. It is along the lines of Mr. Randall's testimony.

(Discussion off the record.)

Mr. McCollester. I fail to see, Mr. Examiner, what either 79 or 80 have to do with the particular issues in this case.
2235 I take it that these are from exhibits attached to or portions of the complaint and answer in the suit in question.

Mr. Eshelman. No; these are not identical—I think. I think, so far as the months——

Mr. McCollester. Substantially.

Mr. Eshelman. I think they cover a different period.

Mr. McCollester. But may I point out to your Honors, so that it will not be overlooked, that the exhibit which has been marked 79 doesn't show anything as to the length of time the cars were held at the ports. It is, as I understand it, a report submitted by Hoboken Manufacturers Railroad to the Pennsylvania, or a compilation of reports, showing the total number of car-days of Pennsylvania Railroad cars for which the Hoboken was responsible for per diem under the per diem rules agreement.

It includes the time cars were on the Hoboken and the time that cars were on Seatrain.

Now, we admit that the Hoboken is responsible to the Pennsylvania for per diem on cars during all of the time that the Hoboken held the cars, and during all of the time the cars were in Seatrain's possession, until the cars got to some other railroad, signatory of the per diem rules agreement.

We admit that; there is no issue on that.

Mr. Eshelman. Mr. Examiner, may I say one word on that, please, sir? One of the points to which Mr. Randall's
2236 testimony was directed in the former hearing was as to what the Commission should find as the reasonable reclaim rate for the Hoboken on cars which it interchanged between the trunk lines, on the one hand, and Seatrain, on the other.

As I think you know, Hoboken, prior to the advent of Seatrain, had a terminal switching arbitrary or reclaim of 2.54 days per loaded car, and, as shown by the record in this case, with the advent of Seatrain, there came about a difference of view as between the trunk lines, on the one hand, and the Hoboken, on the other, as to whether Hoboken was entitled to that same terminal arbitrary of 2.54 of reclaim, or whether it was entitled to a dollar.

Now, what Mr. McCollester has said about not showing any differentiation between Hoboken local cars and cars to and from Seatrain is correct, because their reports to us do not make that segregation, so far as I——

Mr. McCollester. I did not say that.

Exam. Archer. Just let me ask, in what way will these help the Commission to decide the issues in this case? That is all that I am interested in.

Mr. Eshelman. I think the Commission——

Exam. ARCHER. Now, that does not show, if Mr. McCollester's statement is correct, any detention. It just shows the amount of time that the cars are in the possession of Hoboken and Seatrain.

2237 Mr. ESHELMAN. It does show the detention. That is the exact——

Exam. ARCHER. Hoboken and Seatrain. They admit they are liable for that, for that time.

Mr. ESHELMAN. Yes.

Mr. MCCOLLESTER. This includes all Hoboken Railroad's local freight; it includes cars that never went to Seatrain at all.

Mr. ESHELMAN. Oh, yes; surely.

Exam. ARCHER. There is an issue here, if I understand it correctly—and I will ask Mr. Walsh to watch this—there is an issue here as to when the per diem should start before it gets on Seatrain, but when it is absolutely in the possession of Hoboken and Seatrain, there is no issue of it.

Now, there is a question of the compensation during the entire period.

Mr. MCCOLLESTER. Yes; but we have agreed to that. We will not offer additional evidence.

Mr. ESHELMAN. No; we are not proposing to do that.

Exam. ARCHER. I understand——

Mr. ESHELMAN. Not proposing to offer evidence.

Exam. ARCHER. No, but I understand that is the issue, one issue.

Mr. ESHELMAN. Now, there is another issue, Mr. Examiner, that I think you will appreciate, from the Commission's

2238 language.

Exam. ARCHER. Well, can you answer this question?

Mr. ESHELMAN. That this applies to an issue in this case?

Exam. ARCHER. How this is going to help the Commission in this case.

Mr. ESHELMAN. Yes; I think so, sir.

Exam. ARCHER. That is what I want to know.

Mr. ESHELMAN. This exhibit——

Exam. ARCHER. Which one?

Mr. ESHELMAN. This reclaim exhibit.

Exam. ARCHER. No. 80.

(Discussion off the record.)

Mr. ESHELMAN. In connection with Exhibit 79, which is the one on per diem, these show the summation of Hoboken's reports to the railroad. They would show that even at their own report, and at their own valuation, and entirely apart from any question as to whether, on Seatrain traffic, Hoboken is entitled to the 2.54 reclaim, or something less, it would show that even apart from that,

there is some very large amount of credits outstanding to this railroad.

Now, one of the points that the Commission, I think—the precise amount, I don't think is important. You will notice I have not put the per diem here in in dollars, and I was going to bring that out by the witness; but it does show that there is this large amount of credits even under their own estimation.

2239 Now, they are asking for the Commission to fix the terms and conditions, and, presumably, in this case, the Commission will say—we will find a rate of so much; we will find that the reclaim situation on the Seatrain traffic should be so and so; we find that either Hoboken or Seatrain should be responsible for the time of the car while it is on Seatrain, and so forth.

Now, those will be things that you will determine, as to what we must do for the future. Now, there is this question as to whether Seatrain shall itself be responsible. If in the past Seatrain detention shows up only to us on a Hoboken report, if those accounts are still outstanding, that might influence the Commission as to whether they would make Seatrain directly responsible to us, or force us to do business through an intermediary; and for that purpose we think that is relevant.

Mr. McCollester. Well, we have offered to do business directly with you.

Mr. Eshelman. Yes; but——

Mr. McCollester. If you will make it possible for us to do so; so what issue have you?

Mr. Eshelman. But, Mr. Examiner, counsel's answer there doesn't distinguish between what the railroads have done, which the Commission may or may not like, and what the Commission will require of us, so that his is no answer at all.

2240 Exam. Archer. Well, I do not see that they do any particular harm in the record, and I am certainly not in a position at this time to say that they do any particular good.

Mr. McCollester. Well, Mr. Examiner, it is just making the record muddy, and what I anticipate—the reason I am objecting so here—I want to say this perfectly fr[illegible]ly, because I think, if we speak out in the open, it will make clear the atmosphere on both sides—I have an idea that what Mr. Eshelman wants by putting these in the record is to have the Commission here find that as a condition of the Pennsylvania Railroad being ordered to permit the interchange of its cars with Seatrain, the Hoboken Manufacturers Railroad or Seatrain shall pay the Pennsylvania Railroad so many dollars on the past accounts.

Now, I assume the Commission will not do that.

Exam. Archer. No, sir.

Mr. McCollester. I make this statement to make that clear on the record.

Exam. Archer. That is definite. I don't think there is any chance of that, in view of the amended complaint, if you want to call it such.

Mr. Eshelman. That may be, your Honor, but I still think that perhaps counsel himself has suggested a point there that adds to what I have said, in that the very fact that the Commission
2241 itself might consider as a condition the squaring up of accounts, whatever they be, whether that be in some other fashion—I don't expect the Commission to enter any order for payment of money; you will notice I haven't even given them a basis on this exhibit for that, but it seems to me that——

Mr. McCollester. If you are going to even suggest such a condition, we would ask similar condition that the Pennsylvania Railroad pay us the money that we claim is owed us for breach of contract.

Mr. Eshelman. Yes, but——

Mr. McCollester. But we don't ask that here, and we think that——

Exam. Archer. That is out. There is no question about it.

Mr. McCollester. No question about it.

Exam. Archer. I do not think there is any question about that.

Mr. McCollester. Now, may I just ask the witness, before you really let Exhibits 79 and 80 in, but bearing on——

Mr. Eshelman. Well, I have not——

Mr. McCollester. Bearing on their admissibility.

By Mr. McCollester:

Q. Mr. Witness, can you state, from Exhibit 79 how many of those car days accrued on the cars when they were in possession of Seatrain?

A. No, sir.

2242 Q. Can you state how many of those cars ever went to Seatrain at all?

A. No, sir.

Q. Now, with respect to Exhibit 80, that, so far as you know, represents all the reclaim that the Hoboken Railroad claims from the Pennsylvania during all of the years shown, does it not?

A. That is right.

Q. And that would include reclaim on cars that were never handled by Seatrain, would it not, so far as you know?

A. As far as I know.

Q. And can you tell how much of that reclaim has nothing to do with cars that moved via Seatrain?

A. No.

Mr. McCOLLESTER. I think the Exhibits 79 and 80 are clearly inadmissible.

Mr. ESHELMAN. I was going to bring that out for him myself.

Exam. ARCHER. I think they are clearly inadmissible then, on that statement.

Mr. ESHELMAN. Oh, no; because——

Exam. ARCHER. You cannot show that any of them, or what portion of them moved by Seatrain, and that is all we are interested in.

Mr. ESHELMAN. Mr. Examiner, may I say this: I trust
2243 you will be patient with me. One of the questions, as I repeat, is with whom we must do business for the future, and whether or not——

Exam. ARCHER. Well, this does not have anything to do with that question.

Mr. ESHELMAN. Oh, yes; because we have now proved by counsel's own questions that from their reports to us, they make no segregation of time. We will doubtless ask the Commission, if Seatrain is to——

Exam. ARCHER. They will probably admit that without any admission of testimony.

Mr. ESHELMAN. Yes; but that does not make these inadmissible, your Honor, because we will want to ask the Commission that Seatrain time shall be reported to us.

Exam. ARCHER. All right. These exhibits will be received for the sole purpose of showing that there is no segregation made by the Hoboken Railroad.

Mr. ESHELMAN. And——

Exam. ARCHER. For no other purpose.

Mr. ESHELMAN. Will you kindly note an exception on that, please, sir?

Exam. ARCHER. Yes, sir.

(Exhibits 79 and 80, Witness Eyre, received in evidence.)

By Mr. ESHELMAN:

Q. Mr. Eyre, why does the reclaim statement stop with the month of December 1936?

2244 A. Up to and until January 1937, the Pennsylvania Railroad assumed responsibility of a road haul carrier with the Hoboken Manufacturers Railroad in respect to payments of reclaims. Beginning January 1937, the New York Central was an intermediate between Pennsylvania and Hoboken, and assumed the responsibility for reclaims on cars to or from the Pennsylvania Railroad.

Q. So that so far as Pennsylvania Railroad accounts with Hoboken are concerned, the reclaims stop with the end of December 1936?

A. Right.

Mr. ESHELMAN: Now, I am going to ask counsel if he will let me cover two of the things that were brought out by his question, or ask him if he will agree to this: It is agreed that not only do the per diem reports of Hoboken to the Pennsylvania not identify such cars as the Hoboken may have interchanged with Seatrain Lines, but neither do they disclose any segregation of car days of detention as between time on Hoboken and time on Seatrain?

In other words, to get the——

Mr. MCCOLLESTER. Hoboken Manufacturers Railroad, being a party to the per diem rules agreement, is obligated to report cars in the manner called for by that agreement, which is a contract, the terms of which are set by the defendant railroads.

2245 It makes its reports in accordance with the requirements of the per diem rules agreement, and reports the cars which it is responsible for per diem. Those cars are all the cars that come into its possession until possession of the cars is taken by some other railroad, according to the per diem rules agreement.

Mr. ESHELMAN. Then you will agree, will you not, that they do not show a segregation of time on Hoboken and time on Seatrain?

Mr. MCCOLLESTER. I will agree that the per diem rules agreement neither permits nor requires such a segregation at the present time.

Mr. ESHELMAN. I don't mind asking the witness. I thought counsel would agree to it.

Exam. ARCHER. Well, the answer is——

Mr. MCCOLLESTER. Yes; but I don't want to have any improper inference drawn from it.

Exam. ARCHER. Yes. Well, you correctly stated your position, sir.

Mr. BRUSH. May I add something? That this segregation that you are speaking about, as if we had refused——

Mr. ESHELMAN. I didn't say——

Mr. BRUSH. We have asked the A. A. R. repeatedly to make the per diem reclaim check, and they have refused to do it in accordance with the rules, and you would have had it,

2246 and you can get it from your own records.

You know the car numbers that move via Seatrain. Seatrain is shown on every bill of lading, and you are giving the impression that Hoboken and Seatrain are trying to conceal something, when you have the complete record yourself; and what is more, if you stopped, the Pennsylvania Railroad stopped the reclaim by reason of using New York Central as an inter-

mediary. I don't see that you have any interest whatsoever in this proceeding.

By Mr. ESHELMAN:

Q. Mr. Eyre, what is the per diem reclaim allowed Hoboken by its respective road-haul connections on loaded cars handled in terminal switching service?

A. 2.54 days, or $2.54 per loaded car.

Q. On what rate are the per diem reclaim reports based, which were submitted by Hoboken Manufacturers Railroad Company to the Pennsylvania Railroad Company?

A. Did I understand you to say per diem reports?

Q. Per diem reclaim reports.

A. Reclaim?

Q. Yes.

A. $2.54.

Q. And does this include such of these cars as Hoboken Manufacturers Railroad Company may have interchanged with Seatrain Lines?

A. It does.

2247 Q. As Hoboken Manufacturers Railroad Company filed its per diem reclaim reports with the Pennsylvania Railroad Company, what position did your Bureau take as to the applicability of the terminal switching reclaim of 2.54 to Seatrain traffic?

Mr. MCCOLLESTER. Well, now, Mr. Examiner——

Mr. ESHELMAN. Well, maybe that is sufficiently shown. I suppose that is shown by Mr. Randall's testimony.

Mr. MCCOLLESTER. It is in the record already.

Mr. ESHELMAN. And I am content to withdraw that question. That is all I have.

Exam. ARCHER. Any cross-examination?

Cross-examination by Mr. MCCOLLESTER:

Q. You know, do you not, Mr. Eyre, that the Hoboken Manufacturers Railroad tendered settlement to the——

Mr. ESHELMAN. I object to the question.

Q. (Continuing.) Pennsylvania Railroad currently for the per diem for cars shown on Exhibit 79, less the reclaim that it claims, and that this tender was refused by the Pennsylvania Railroad?

Mr. ESHELMAN. I object to the question as not proper cross-examination of anything the witness testified to on direct.

Exam. ARCHER. I think it goes in the Court case.

Mr. MCCOLLESTER. I think it does, too.

2248 Exam. ARCHER. The witness need not answer.

Mr. MCCOLLESTER. I have nothing further.

Mr. ESHELMAN. That is all I have, sir.

(Witness excused.)

Mr. ESHELMAN. Mr. Lipscomb.

C. E. LIPSCOMB was sworn and testified as follows:

Direct examination by Mr. ESHELMAN:

Q. Mr. Lipscomb, what is your connection with Pennsylvania Railroad Company?

A. Assistant Chief Clerk, Treasury Department.

Q. Is settlement of per diem and per diem reclaims as between the Pennsylvania Railroad Company and Hoboken Manufacturers Railroad Company made through your department to the extent that settlement is made?

A. That is right.

Q. Have you seen Mr. Eyre's exhibits, Nos. 79 and 80?

A. Yes.

Q. With respect to per diem and per diem reclaims, as reported to the Pennsylvania Railroad Company by the Hoboken Manufacturers Railroad Company?

A. I have.

Q. Do you know whether the Pennsylvania Railroad Company paid to Hoboken Manufacturers Railroad Company the per diem reclaims as claimed by the latter, and summarized in Exhibit No. 80?

2249 Mr. MCCOLLESTER. Objection, the same as the objection to my question of the previous witness.

Exam. ARCHER. I think so. Objection sustained.

Mr. ESHELMAN. Mr. Examiner, I offer to prove—I will ask another question.

By Mr. ESHELMAN:

Q. Do you know whether Hoboken Manufacturers Railroad Company has paid the Pennsylvania Railroad Company the amounts of per diem reported to it and summarized on Exhibit 79?

Mr. MCCOLLESTER. Same objection.

Exam. ARCHER. I do not see that it has anything to do with this proceeding.

Mr. ESHELMAN. Well, Mr. Examiner, one of the questions here that I take it the Commission is going to decide is whether we must do business with Seatrain or with Hoboken.

Exam. ARCHER. Yes; but what has this to do with that?

Mr. ESHELMAN. Why, it seems to me it has a great deal to do. Mr. Examiner, suppose, for example, that Hoboken were bankrupt. Does it mean that Seatrain could hide behind that shield and refuse to do business with us directly? The Commission itself might say that if our cars are to be delivered to Seatrain, Seatrain

should bear certain rights and certain obligations the same as we. Now, we think it is important to show this fact.

Mr. McCOLLESTER. Well, now, Mr. Eshelman, if the
2250 Pennsylvania will use its control of the A. A. R. to have the——

Mr. ESHELMAN. I object to that.

Mr. McCOLLESTER. Per diem rules agreement modified so that Seatrain can become a party to it, we will make direct settlement with you, but as to payment for the past, that is not in issue here, as to any reparation or amounts of payment. We had to do business on the basis of the per diem rules agreement as it then was.

Mr. HEALEY. You will agree that you haven't made any payments?

Mr. BRUSH. We will agree that we have tendered them.

Exam. ARCHER. Off the record.

(Discussion off the record.)

Mr. ESHELMAN. Mr. Examiner, may I say a word, please, on the record?

Exam. ARCHER. Yes, sir.

Mr. ESHELMAN. It seems to me that counsel's statement unfairly restricts the limits of the Commission's jurisdiction in this respect: That he says that if the Pennsylvania Railroad Company will exercise some alleged control of the American Association of Railroads, then they will do certain things. This Commission here has before it the question of what it will require of us.
2251 It is not a question of whether one of us will do this, or two of us, or ten, or a majority will——

Exam. ARCHER. Let me just add—that is right; you are right about that. But the mere fact that one railroad has tendered and the other refused—has that anything to do with——

Mr. ESHELMAN. I think it has, yes, because I think it depends what conclusion you might come to, as to whether you will require a direct settlement or whether you will not require a direct settlement. I think you have a right to know that fact.

Mr. McCOLLESTER. Well, Mr. Examiner, may I say this: That there was a proposed basis of settlement of all of this controversy——

Mr. ESHELMAN. I object to that.

Mr. McCOLLESTER. Which contemplated that——

Mr. ESHELMAN. I object, your Honor.

Mr. McCOLLESTER. Just a minute. I am not going into anything except just one thing.

Mr. ESHELMAN. Well, I don't think you ought to do that either.

Mr. McCOLLESTER (continuing). Which contemplated that Seatrain should become a party to the per diem rules agreement, and that they would be so changed that Seatrain could and would

make direct settlement; and that settlement never went through. Now, it wasn't our fault that it didn't go through.

2252 Mr. ESHELMAN. Well, that does not limit the Commission's power here.

Mr. MCCOLLESTER. No. Do you concede——

EXAM. ARCHER. Off the record.

(Discussion off the record.)

Mr. MCCOLLESTER. Does the Pennsylvania Railroad consent that the Commission may enter an order here requiring that the per diem rules agreement and the underlying statutes, or whatever they are, of the Association of American Railroads, may be so modified that Seatrain may become a party to the per diem rules agreement, and make direct settlement with the owning roads?

Mr. ESHELMAN. I cannot conceive that this is of any interest to the Commission, because they can tell us whether or not we have got to do it.

Exam. ARCHER. I know, but do you agree to that? Are you willing to make that agreement?

Mr. ESHELMAN. At this particular time?

EXAM. ARCHER. Yes.

Mr. ESHELMAN. I don't see how.

Exam. ARCHER. They don't agree.

Mr. MCCOLLESTER. All right.

Mr. ESHELMAN. That does not mean that if the Commission tells us to do it, we will not do it.

EXAM. ARCHER. Oh, no.

2253 Mr. ESHELMAN. We might want to ask the Commission to——

Exam. ARCHER. It might simplify the matter if you agreed; that is all.

(Discussion off the record.)

Mr. ESHELMAN. Mr. Examiner, I have forgotten how we stand right now. May I reask that question?

Exam. ARCHER. Yes, reask it.

By Mr. ESHELMAN:

Q. Do you know whether the Pennsylvania Railroad paid to Hoboken Manufacturers Railroad Company the per diem reclaims as claimed by the latter and summarized in Exhibit No. 80?

A. I know that they have not been paid.

Mr. MCCOLLESTER. I objected to that.

Exam. ARCHER. I am going to permit the witness to answer, just to get along with this proceeding.

Q. Do you know whether the Hoboken Manufacturers Railroad Company has paid the Pennsylvania Railroad Company the amounts of per diem reported to it and summarized on Exhibit 79?

Mr. McCollester. Well, now, Mr. Examiner, I am going to object to that because I asked the previous witness whether we had tendered them, and the witness wasn't allowed to answer.

Mr. Eshelman. Because this is the man that you should question.

Mr. McCollester. That wasn't the ground of the objection. The ground of the objection——

2254 Mr. Eshelman. The ground of the objection was that it was not proper cross-examination; that I had not asked him anything about that. Now, this is the man you can ask. Your rights to cross-examination will be fully met here.

Mr. McCollester. It was objected to——

Exam. Archer. I cannot conceive of any relevancy. Supposing they have paid or haven't paid?

Mr. Eshelman. Well, may we have it anyway, and get this over with here, Mr. Examiner?

Exam. Archer. Yes.

Mr. McCollester. Mr. Examiner, I do not think we want to have it anyway, because——

Exam. Archer. Note your objection.

Mr. McCollester. It has been our experience in too many of these Seatrain cases that—may we have things anyway, to get them in—that are then used to make fallacious arguments, and muddy the waters; and that is why we have been at this for seven years.

Mr. Eshelman. Well, may I have that answer, please, sir?

A. We have not received payments of per diem amounts reported by Hoboken Manufacturers Railroad Company.

Q. And that covers all the period shown on Exhibit 79?

A. That is right.

Q. I show you page 787 of the transcript of testimony in
2255 this case, and call your attention to a statement, not testimony, by counsel for complainant, which reads: "Mr. McCollester: What is correct is that the Hoboken has regularly tendered all the per diem earned by the Hoboken and received from Seatrain to the various railroads, and it has been refused by those railroads because of the dispute as to the amount of the reclaim." Is the statement of counsel for the complainant correct; as far as the Pennsylvania Railroad Company is concerned?

Mr. McCollester. Just a minute.

(Discussion off the record.)

Mr. McCollester. May I ask the witness a question?

Mr. Eshelman. No; I would like to finish this, and you can get plenty of cross-examination.

Mr. McCOLLESTER. Wait a minute. This goes to the competency of his answer.

Mr. ESHELMAN. All right.

By Mr. McCOLLESTER:

Q. There was correspondence, was there not, between the Pennsylvania Railroad and the Hoboken Manufacturers Railroad in regard to payment of per diem and reclaim?

A. I don't know of any correspondence between them on that subject; no.

Q. Does the correspondence relating to settlement for per diem reclaim come under your jurisdiction?

A. It does.

2256 Q. Do you have access to the files containing such correspondence?

A. I do.

Q. How long since you have looked at those files?

A. I have had charge of those files for a number of years, longer than this goes back.

Q. Have you written no letters to the Hoboken Manufacturers Railroad regarding tenders made by it?

A. I have not.

Q. Never?

A. Never.

Q. Has anybody in your office?

A. No, sir.

Mr. McCOLLESTER. Well, Mr. Examiner, I was going to object on the ground that the oral testimony was not the best evidence. I cannot do that because the witness cannot bear out that there was correspondence. This puts us in a most embarrassing position, because I have a whole file of correspondence in my office with the Pennsylvania Railroad regarding settlement for per diem and reclaim.

The WITNESS. I am speaking of the Treasury Department now. I am speaking of the Treasury Department.

Mr. McCOLLESTER. Oh, I see.

The WITNESS. I am from the Treasury Department.

By Mr. McCOLLESTER:

2257 Q. Well, you don't say, then, that there has been no correspondence between the Auditing Department and the Hoboken Manufacturers?

A. I can't say that; no.

Q. No. Well, when does the Treasury Department come into the picture? After the settlement has been passed by the Auditing Department?

A. After the figures are reported by the Superintendent of Car Service to the Comptroller or Accounting Department, and they refer the figures to the Treasury Department for collection.

Mr. ESHELMAN. I think you have got the competency. Let me add one more question here. It may stir up another thought on your part.

By Mr. ESHELMAN:

Q. Do your records show, or do you know of any refusal by the Pennsylvania Railroad Company to accept payment for the per diem reported to it as summarized in Exhibit No. 79?

A. I do not know of any such instance.

Mr. ESHELMAN. That is all I have, Mr. Examiner.

Mr. McCOLLESTER. Well, I move to strike that, Mr. Examiner, as being irrelevant. If you rule it is relevant, why, we are going to have to bring in files here.

Mr. ESHELMAN. I wish you would.

Exam. ARCHER. I am going to grant the motion to strike.

Mr. ESHELMAN. And what part of the testimony does that apply to?

2258 Exam. ARCHER. To all of it, as far as I can see.

Mr. ESHELMAN. Well, Mr. Examiner, may I then have an exception to that ruling, please, sir?

Exam. ARCHER. Oh, certainly. It is on the record, and we can submit it to the Commission.

Mr. ESHELMAN. Mr. Examiner, I take it that your ruling is that we should argue that, for instance, on brief, as to whether that is admissible?

Exam. ARCHER. Argue its admissibility in brief.

Mr. ESHELMAN. I think that is all I have, sir.

(Witness excused.)

Exam. ARCHER. Have the defendants anything further?

Mr. ESHELMAN. Just a minute.

(Discussion off the record.)

Exam. ARCHER. Five-minute recess.

(Thereupon, a five-minute recess was taken.)

Exam. ARCHER. Have the defendants anything further at this time?

Mr. FORT. I am not a defendant; I am an intervener, Mr. Examiner, and I have nothing to offer, but I have this to say: In the beginning you talked about the issues in this case. We still regard the fundamental issue as whether the Commission has any right to require these cars to be interchanged at all. Of course,

2259 the Commission has expressed its view on that at various times, and the record shows it, but, nevertheless, we do not want anything that we may do or fail to do to indicate an acquiescence in that ruling.

Exam. ARCHER. Any rebuttal?

Mr. MCCOLLESTER. No rebuttal, Mr. Examiner. We rest.

Exam. ARCHER. Nothing more? (No response.)

Exam. ARCHER. Do the parties wish a proposed report on this further hearing?

Mr. ESHELMAN. I think we ought to have, if you please, sir.

Exam. ARCHER. Do you wish to file briefs?

Mr. ESHELMAN. Yes.

Exam. ARCHER. Have you any date to suggest?

(Discussion off the record.)

Exam. ARCHER. Briefs will be due November 15, 1940. If there is nothing further, the hearing is closed.

(Whereupon, the hearing closed at 11:45 o'clock A. M.)

2260 —

Exhibit 68

ASSOCIATION OF AMERICAN RAILROADS

OPERATIONS AND MAINTENANCE DEPARTMENT, CAR SERVICE DIVISION

Transportation Building

File 619-1-4

WASHINGTON, D. C., *July 24, 1940.*

Special Car Order No. 30 (Revised) (Cancels special Car Order #30 of March 17, 1933, and all supplements thereto, also Circular No. CSD-143 of January 17, 1933)

To All Railroads:

Pursuant to the requirement of Car Service Rule 4, reading: "Cars of railroad ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owners filed with the Car Service Division." railroads owning cars have filed the following instructions with the Car Service Division respecting the delivery of their equipment to steamship, ferry, or barge lines as hereinafter stated.

Railroads are hereby notified that delivery of cars contrary to these instructions will constitute a violation of Car Service Rule 4.

1. List of steamship, ferry, or barge lines:

Canadian Pacific Car and Passenger Transfer Company.
Drummond Lighterage Company.
Florida East Coast Car Ferry Company.
Foss Tug and Barge Company.
Grand Trunk-Milwaukee Car Ferry Company.
Mackinac Transportation Company.

Ontario Car Ferry Company, Ltd.
Pennsylvania-Ontario Transportation Company.
Puget Sound Navigation Company.
Seatrain Lines, Incorporated.
Toronto, Hamilton and Buffalo Navigation Company.
Yorke and Son Barge.

2261 2. Statement of Permission as filed by car owners:

A. Roads granting permission for their cars to be delivered to all water transportation lines without restriction:

Akron, Canton & Youngstown Ry. Co.
Atchison, Topeka & Santa Fe Ry.
Bangor & Aroostook R. R. Co.
Birmingham Southern Ry. Co.
Burlington, Rock Island R. R. Co.
Central Railroad of New Jersey.
Chicago and Eastern Illinois Ry. Co.
Chicago, Burlington & Quincy R. R.
Chicago Great Western R. R. Co.
Chicago, Rock Island & Pacific Ry.
Colorado & Southern Ry.
Delaware & Hudson Railroad Corporation.
Denver & Rio Grande Western R. R. Co.
Denver & Salt Lake Ry.
Duluth, South Shore & Atlantic Ry.
Fort Dodge, Des Moines & Southern R. R. Co.
Fort Worth & Denver City Ry.
Georgia & Florida R. R.
Kansas City Southern Ry.
Lehigh & Hudson River Railway Co.
Lehigh & New England R. R. Co.
Live Oak, Perry & Gulf R. R. Co.
Louisiana & Arkansas Ry.
Manufacturers Railway Company.
Minneapolis & St. Louis R. R. Co.
Mississippi Central R. R.
Missouri & Arkansas Ry. Co.
Missouri-Kansas-Texas Lines.
Missouri Pacific Lines: International-Great Northern R. R. Co.; Gulf Coast Lines; New Orleans, Texas & Mexico Ry.; New Iberia & Northern R. R. Co.
Missouri Pacific Railroad.
New York, New Haven & Hartford R. R. Co.
New York, Ontario & Western.
New York, Susquehanna & Western R. R. Co.
Northampton & Bath R. R.

Northeast Oklahoma Railroad Co.
Pittsburg & Shawmut R. R. Co.
Pittsburg, Shawmut & Northern R. R. Co.
Reading Company.
Rutland Railroad.
St. Louis-San Francisco Ry. Co.
Tennessee Central Railway.
Texas & Pacific Ry. Co.
Texas Electric Railway.
Western Maryland.
Wheeling & Lake Erie Ry. Co.
Wichita Falls & Southern R. R. Co.

2262 B. Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc. (Permitting no movement via Seatrain Lines, Inc.):
Algoma Central & Hudson Bay Ry. Co.
Alton Railroad Co.
Ann Arbor R. R. Co.
Atlanta & West Point R. R. Co.; Western Railway of Alabama; Georgia Railroad.
Atlanta, Birmingham & Coast R. R. Co.
Baltimore & Ohio R. R. Co.
Barre and Chelsea R. R. Co.
Bay Terminal R. R. Co.
Bessemer & Lake Erie R. R. Co.
Boston & Albany Railroad.
Boston & Maine Railroad.
Cambria & Indiana R. R. Co.
Canadian National Railways.
Canadian Pacific Railway.
Central of Georgia Ry. Co.
Central Vermont Ry., Inc.
Chesapeake & Ohio Ry. Co.
Chicago & Illinois Midland Ry. Co.
Chicago & Western Indiana R. R. Co.
Chicago River & Indiana R. R.
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.
Clinchfield Railroad Co.
Colorado & Wyoming Ry. Co.
Copper Range R. R. Co.
Cumberland & Pennsylvania R. R. Co.
Delray Connecting R. R. Co.
Delaware, Lackawanna & Western R. R. Co.
Detroit, Toledo & Ironton R. R. Co.
Detroit & Mackinac Railway Co.

Detroit & Toledo Shore Line R. R. Co.
Duluth, Missabe & Northern Ry. Co.; Duluth, Missabe & Iron Range.
Duluth, Winnipeg & Pacific Ry.
East Jersey Railroad & Terminal Co.
East St. Louis Junction R. R. Co.
Elgin, Joliet & Eastern Ry. Co.
Erie Railroad Company.
Florida East Coast Ry.
Grand Trunk Western R. R. Co.
Green Bay & Western R. R. Co.; Kewaunee, Green Bay & Western R. R. Co.; Ahnapee & Western Ry. Co.
Great Northern Ry. Co.
Huntingdon & Broad Top Mountain R. R.
Illinois Terminal R. R. System.
Interstate Railroad Co.
Lake Superior & Ishpeming R. R.
Lehigh Valley Railroad.
Litchfield & Madison Ry. Co.
Long Island Railroad.
Maine Central Railroad Co.
Michigan Central Railroad Co.
Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.
2263 Montour Railroad Co.
New York Central R. R. Co.
New York, Chicago & St. Louis R. R. Co.
Norfolk & Western Ry. Co.
Norfolk Southern R. R. Co.
Pennsylvania Railroad.
Pere Marquette Ry. Co.
Pittsburgh & Lake Erie R. R. Co.
Pittsburgh, Lisbon & Western R. R. Co.
Pittsburgh & West Virginia Ry. Co. (The).
Port Huron & Detroit R. R.
Quebec Central Ry.
Richmond, Fredericksburg & Potomac R. R. Co.
St. Louis & Hannibal R. R. Co.
Savannah & Atlanta Ry. Co.
Seaboard Air Line Railway.
Spokane International Railway Co.
Spokane, Portland & Seattle Ry. Co.
Temiskaming & Northern Ontario Ry. Co.
Toledo, Peoria & Western Railroad.
Toronto, Hamilton & Buffalo Ry.
Union Railroad Co.

Virginian Railway Co.
Wabash Railway Co.
Winston-Salem Southbound Ry. Co.

C. Roads granting permission for their cars to be delivered to all water-transportation lines other than Seatrain Lines, Inc., and to Seatrain Lines, Inc., only for movement between New York and Havana; New Orleans (Belle Chasse) and Havana; and Texas City and Havana:

Chicago & North Western Ry.
Chicago, St. Paul, Minneapolis & Omaha Ry.
Illinois Central System.
Northern Pacific Ry. Co.
Salt Lake & Utah R. R. Co.
Union Pacific System.
Utah Idaho Central R. R. Co.

D. Roads granting permission for their cars to be delivered to all water transportation lines other than Seatrain Lines, Inc., and to Seatrain Lines, Inc., only for movement between New Orleans (Belle Chasse) and Havana; and Texas City and Havana:

Chicago, Milwaukee, St. Paul & Pacific R. R. Co.
Columbus & Greenville Ry. Co.
Gulf, Mobile & Northern R. R. Co.
Mobile & Ohio R. R. Co.
St. Louis Southwestern Ry. Co.
Southern Pacific Lines (Pacific).
Texas & New Orleans R. R. Co.

2264 E. Roads granting permission for their cars to be delivered to all water transportation lines other than Seatrain Lines, Inc., and to Seatrain Lines, Inc., only for movement between New Orleans (Belle Chasse) and Havana:

Alabama, Tennessee & Northern R. R. Corp.
Atlantic Coast Line R. R. Co.
Charleston & Western Carolina Ry. Co.
Chicago, Indianapolis & Louisville Ry.
Louisville & Nashville R. R. Co.
Southern Railway System.

F. Roads granting permission for their cars to be relivered to all water transportation lines other than Seatrain Lines, Inc., and to Seatrain Lines, Inc., only for movement between New York and Havana; and New York and New Orleans (Belle Chasse); and New York and Texas City; and New Orleans (Belle Chasse) and Havana.

Western Pacific.

W. C. KENDALL.

Lists CS1, CS1A, CS1B, DM.

2265 ASSOCIATION OF AMERICAN RAILROADS

OPERATIONS AND MAINTENANCE DEPARTMENT, CAR SERVICE DIVISION

Transportation Building

WASHINGTON, D. C., *August 6, 1940.*

Supplement No. 1 to Special Car Order No. 30 (Revised)

To all railroads:

Effective this date, Special Car Order No. 30 is amended as follows:

Under Item 2–A—Roads granting permission for their cars to be delivered to all water transportation lines without restriction:

Add: East Jersey Railroad & Terminal Company.

Under Item 2–B—Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc. (permitting no movement via Seatrain Lines, Inc.):

Eliminate: East Jersey Railroad & Terminal Company.

Add: Muncie & Western Railroad Company.

Under Item 2–D:

Eliminate: Nashville, Chattanooga & St. Louis Railway.

Under Item 2–E:

Add: Nashville, Chattanooga & St. Louis Railway.

W. C. KENDALL.

Lists CS1, CS1A, CS1B, DM.

2266 ASSOCIATION OF AMERICAN RAILROADS

OPERATIONS AND MAINTENANCE DEPARTMENT, CAR SERVICE DIVISION

Transportation Building

WASHINGTON, D. C., *September 9, 1940.*

Supplement No. 2 to Special Car Order No. 30 (Revised)

To all railroads:

Effective this date, Special Car Order No. 30 is amended as follows:

Under Item 2–A—Roads granting permission for their cars to be delivered to all water transportation lines without restriction:

Add: Delaware, Lackawanna & Western R. R. Co.

Under Item 2-B—Roads granting permission for their cars to be delivered to all water transportation lines except Seatrain Lines, Inc. (permitting no movement via Seatrain Lines, Inc.): Eliminate: Delaware, Lackawanna & Western R. R. Co.

W. C. KENDALL.

Lists CS1, CS1A, CS1B, DM.

2267

Exhibit 69

Witness Mathey

RULES PUBLISHED BY TRUNK LINES COVERING FREE TIME ALLOWANCES ON EXPORT AND COASTWISE FREIGHT IN NEW YORK HARBOR

Agent W. S. Curlett's Tariff No. 116, I. C. C. No. A-620

Rule No. S-15:

EXPORT FREIGHT COVERED BY THROUGH EXPORT BILLS OF LADING

All inland charges must be prepaid and in cases where permits or steamship quotations require prepayment of ocean charges, said charges must also be paid.

Through export bills of lading subject to the following conditions may be issued via the port of New York on carload freight entitled to free lighterage and less than carload freight which in carloads is "lighterage free" (see Rule No. A-25 for Restricted Articles). Through export bills of lading on carload freight not entitled to free lighterage or on less carload freight should include the cost of transfer or other port charges at New York and should only be issued when the cost of transfer has been ascertained and arrangements made with the Foreign Freight Agent of the carrier at New York, N. Y.

Section A—Through Export Bills of Lading on Freight in Connection with Agreement Lines.

In the pursuance of an agreement entered into by these companies, direct or through the United States Shipping Board, or through the Trunk Line Association, and the Steamship Companies, or Steamship Operators, named in paragraph 8, serving the Port of New York, either direct or through the United States Shipping Board, through export bills of lading on carload and less than carload traffic will be issued in connection with the United States Shipping Board and/or its Agents, and with other steamship companies or steamship operators, as named in paragraph 8, on the following basis:

1. Through export bills of lading will be issued only when founded on written ocean contract and on traffic moving under railroad transportation permit, issued by Foreign Freight Agent, of the carrier at New York, N. Y.

Agents must endorse number of transportation permit on revenue waybills and must see that the quantity of freight covered by the permit is not exceeded and that shipments are not accepted after expiration of time limit specified in permit.

Section A. Through Export Bills of Lading on Freight in Connection with Agreement Lines.

2. Freight, in carloads, also less than carload freight for lighterage delivery, except:

Flour handled under items Nos. 8375 to 8385;

Freight handled under Rules Nos. S–35 and S–45;

Grain or Grits, in bulk, handled under Rules Nos. G to G–260;

2268 covered by through export bills of lading issued in connection with the lines and operators named in paragraph 8, will be held in warehouses at the rail termini or at the option of the carriers, in cars at stations or in holding yards, as shown in Note 16, free of charge for a period of not exceeding fifteen (15) days, exclusive of date of arrival (Note B); thereafter, such freight will be subject to storage charges as published in Rule No. S–30, except that freight in bulk (see Note), Railway Equipment, on own wheels and freight in tank cars will be subject to Car Demurrage Charges published in Section 1, Rule 7, Section A, of Agent B. T. Jones' Tariff No. 4–T, I. C. C. No. 3353, P. U. C.—N. J. No. 8, P. S. C.—N. Y. No. 211, T. C.—N. Y. No. 37, supplements thereto or reissues thereof, without further allowance of free time (R. A. 8173).

NOTE.—Freight in bulk includes such commodities as are loose or in the mass and such commodities as must be shoveled, scooped, or forked in the handling.

Flour, in carloads, and less than carloads, which under the rules named herein is entitled to free lighterage consigned in shipping order or bill of lading for export, when consigned "For official inspection by New York Produce Exchange Flour Inspection Department," or when not so consigned for inspection and this Company receives notice from consignee or owner not less than twenty-four (24) hours before the date of arrival of the Flour at the storage point, that inspection is desired, will be unloaded on arrival into carrier's warehouse or pier at stations shown in Note 15.

When Flour is actually inspected by the New York Produce Exchange Flour Inspection Department and inspection return slip is furnished to the carrier, it will be accorded free storage in the carrier's warehouse or pier for a period not exceeding

fifteen (15) days, exclusive of date of unloading from cars to warehouses or piers, thereafter storage charges as per Rule No. 8–30 will be applied.

When Flour consigned "For official inspection by New York Produce Exchange Flour Inspection Department," or upon which consignee or owner gives notice in accordance with this rule, is not actually inspected by the New York Produce Exchange Flour Inspection Department, the free storage time and charges thereafter will be in accordance with Item No. 8370 of this Rule.

3. In the event of omission or failure of the steamship company or operator to clear freight on any vessel, or during any period for which specifically booked, or to order freight within the fifteen (15) days' time, all storage charges accruing after the period of free time of fifteen (15) days shall be paid by the steamship company or steamship operator.

4. If the rail carriers fail to transport shipments to the port in time to clear on steamer, or to clear during the period (Note C) for which specifically booked, storage charges will not apply until the announced date of the steamer on which it is again booked, after which date storage charges will apply as set forth in paragraph 3.

Note C.—If freight is booked to be lifted during a certain period (not booked for a vessel to sail on a specific date) it will be understood that the railroad shall have cargo ready for delivery at the port on the first day of such period.

2269 5. In the event storage charges should accrue, due to interference with transportation by shipper, or his agents, through the issuance of orders to hold such freight, or to divert such freight, or due to delay in securing or error in preparing proper export documents, or for any other cause for which shipper or his agent may be responsible, such charges shall be collected from and paid by the shipper.

6. Where rail carriers deliver freight at port more than fifteen days in advance of the date for which the freight is booked, such excess time shall be considered an additional free time.

7. Storage charges will cease to apply on and after receipt by the railroad from steamship company or steamship operator of order for delivery provided steamer for which the shipment is intended is ready to accept cargo. If freight is to be delivered to a steamship pier (not operated by a railroad carrier) the storage charges will cease to apply on delivery of freight to the steamship company's pier (Note).

Note.—Storage charges will cease to apply on and after the date on which delivery of the freight is required, as indicated in permit or order received by the railroad from the steamship company or operator, provided not less than seventy two (72) hours is allowed in which to make delivery from the date permit or order is lodged with terminal railroad agent. If by reason of rail carrier's disability, delivery cannot be made within seventy two (72) hours from date permit or order is lodged with terminal railroad agent, no storage charges will be assessed after expiration of the seventy two (72) hours.

Section B—Through Export Bills of Lading in Connection with Non-Agreement Lines. On Export Freight Moving in Connection with Steamship Lines or Steamship Operators not Named in Section A, Paragraph 8, the Following Rules will Apply.

1. Through export bills of lading will be issue only when founded on written ocean contract and on traffic moving under railroad transportation permit, issued by Foreign Freight Agent of the carriers at New York, N. Y., and then only when shipper gives written guarantee that any storage charges accruing at the seaboard will be paid.

Agents must endorse number of transportation permit on revenue way-bills and must see that the quantity of freight covered by the permit is not exceeded and that shipments are not accepted after expiration of time limit specified in permit.

2. Storage charges will cease to apply on and after receipt by the railroad from steamship company or steamship operator, of order for delivery provided steamer for which the shipment is intended is ready to accept cargo.

If freight is to be delivered to steamship pier (not operated by railroad carrier) the storage charges will cease to apply on delivery of freight to the steamship company's pier (Note B).

Note B.—Storage charges will cease to apply on and after the day on which delivery of the freight is required, as indicated in permit or order received by the railroad from the steamship company or operator, provided not less than seventy-two (72) hours is allowed in which to make delivery from the date permit or order is lodged with terminal railroad agent. If by reason of rail carrier's disability, delivery cannot be made within seventy-two (72) hours from date permit or order is lodged with terminal railroad agent, no storage charges will be assessed after expiration of the seventy-two (72) hours.

3. Freight, in carloads, and less than carloads, for lighterage delivery, except:

Flour handled under Item No. 8465;

Freight handled under Rules Nos. S–35 and S–45;

Grain or Grits, in Bulk, handled under Rules Nos. G to G–260; which, under the rules named herein, is entitled to free lighterage, consigned in shipping order or bill of lading for export, will be held free of charge, in warehouses at stations named in Note 15 or at carriers' option, in cars at stations or in holding yards named in Note 16, for a period of not exceeding ten (10) days (Note C), exclusive of date of arrival; thereafter storage charges as published in Rule No. S–30 will be applied.

Note C. In computing free time, Sundays and full legal holidays will be excluded, and when a holiday falls on a Sunday the following Monday will be excluded.

Flour, in carloads and less than carloads, which under the rules named herein is entitled to free lighterage consigned in shipping order or bill of lading for export, when consigned "For official inspection by New York Produce Flour Inspection Department,"

or when not so consigned for inspection and the carrier receives notice from consignee or owner not less than 24 hours before the date of arrival of the Flour at the storage point, that inspection is desired, will be unloaded on arrival into carrier's warehouse or pier at carrier's stations shown in Note 15.

When the Flour is actually inspected by New York Produce Exchange Flour Inspection Department and inspection return slip is furnished to the carrier, it will be accorded free storage in the carrier's warehouse or pier for a period not exceeding ten (10) days, exclusive of date of unloading from cars to warehouses or piers; thereafter storage charges as per Rule No. 8-30 will be applied.

When Flour consigned "For Official Inspection by New York Produce Exchange Flour Inspection Department," or upon which consignee or owner gives notice in accordance with this rule, is not actually inspected by The New York Produce Exchange Flour Inspection Department, the free storage time and charges thereafter will be in accordance with Item No. 8460.

Rule No. 8-20:

EXPORT FREIGHT NOT COVERED BY THROUGH EXPORT BILLS OF LADING

(See Exceptions for account of C. R. R. of N. J. in Item No. 8525)

(a) Freight, in carloads, other than—

Coarse carload freight handled in accordance with Rules Nos. 8-35 and 8-45.

Flour, handled in accordance with paragraph (b).

Grain or Grits, in bulk, handled in accordance with Rules Nos. G to G-260.

:271 which, under rules named herein is entitled to free lighterage, also in less than carloads, which in carloads is lighterage free for lighterage delivery, consigned in shipping order or bill of lading for export, will be held in warehouses at rail termini, or, at the carrier's option, in cars at stations or in holding yards as shown in Note 16, free of charge, for a period not exceeding ten (10) days (see Rule No. 8-25); thereafter storage charges as per Rule No. 8-30 will be applied, except that freight in bulk (see Note) and Railway Equipment on own wheels will be subject to Car Demurrage Charges published in Section 1, Rule 7, Section A, of Agent B. T. Jones' Tariff No. 4-T, I. C. C. No. 3353, P. U. C.—N. J. No. 8, P. S. C.—N. Y. No. 211, I. C.—N. Y. No. 37, supplements thereto or reissues thereof, without further allowance of free time (R. A. 81713).

NOTE.—Freight in bulk includes such commodities as are loose or in the mass and such commodities as must be shoveled, scooped, or forked in the handling.

(b) Flour, in carloads, which, under the rules named herein is entitled to free lighterage, also in less than carloads for lighterage delivery:

"Consigned in shipping order or bill of lading for export, when consigned "For Official Inspection by New York Produce Exchange Flour Inspection Department"; or

"When not so consigned for inspection and the carrier receives notice from consignee or owner not less than 24 hours before the date of arrival of the Flour at the storage point, that inspection is desired"—

will be unloaded on arrival into carrier's warehouse or pier at carrier's stations shown in Note 15.

When the Flour is actually inspected by New York Produce Exchange Flour Inspection Department and inspection return slip is furnished to the carrier, it will be accorded free storage in the carrier's warehouse or pier for a period not exceeding ten (10) days, exclusive of date of unloading from cars to warehouses or piers (Sundays, full legal holidays (Note), and date of unloading from cars to warehouses or piers not included). Thereafter storage charges as per Rule No. 8–30 will be applied.

NOTE.—In computing free time, Sundays and full legal holidays will be excluded, and when a holiday falls on a Sunday the following Monday will be excluded.

When Flour consigned "For Official Inspection by New York Produce Exchange Flour Inspection Department," or upon which consignee or owner gives notice in accordance with this rule, is not actually inspected by The New York Produce Exchange Flour Inspection Department, the free storage time and charges thereafter will be in accordance with Item No. 8475 of this Rule.

(c) Freight shipped direct to stations in—

B. & O. R. R.
B. & O. Lighterage, Jersey City, N. J.:
New York, N. Y.
Brooklyn, N. Y.
C. R. R. of N. J.:
Jersey City (Communipaw), N. J.
New York, N. Y.
Brooklyn, N. Y.
D. L. & W. R. R.:
Hoboken, N. J.
Jersey City, N. J.
New York, N. Y.
Brooklyn, N. Y.
Erie R. R.
N. J. & N. Y. R. R.
N. Y. S. & W. R. R.:
Jersey City, N. J.
Hoboken, N. J.
Weehawken, N. J.
Edgewater, N. J.
New York, N. Y.
Brooklyn, N. Y.
L. V. R. R.:
New York, N. Y.
Brooklyn, N. Y.
Jersey City (Grand St.), N. J.
N. Y. C. R. R.:
New York, N. Y.
Brooklyn, N. Y.

N. Y. O. & W. Ry.:
Hoboken, N. J.
Jersey City, N. J.
Willow Ave. (West Hoboken), N. J.
Weehawken, N. J.
New York, N. Y.
Brooklyn, N. Y.
P. R. R.:
Jersey City (Henderson St. Station), N. J.
P. R. R.—Continued
New York, N. Y.
Brooklyn, N. Y.
W. S. R. R.:
Jersey City, N. J.
Hoboken, N. J.
Willow Ave. (West Hoboken), N. J.
Weehawken, N. J.
New York, N. Y.
Brooklyn, N. Y.

for export, will not be placed in public warehouses until five (5) days after arrival. During said period, if delivered to a carter who presents a bona fide vessel permit for exportation of the property, no storage charges will be assessed; but if taken for local delivery after the expiration of two (2) days, storage or car demurrage and track storage rules and charges, as shown in Paragraph (e), will be assessed.

Free time will be computed from the first 7 A. M. after date on which notice of arrival is sent or given to consignee. In computing free time, Sundays and full legal holidays will be excluded, and when the holiday falls on a Sunday the following Monday will be excluded.

(d) If export freight is billed at carload rates "Lighterage Free," such part of the shipment as is ordered to the piers, stations, or terminals of the carrier, as named in Note 21, will be held at such stations, upon arrival, for a period of not exceeding five (5) days without charge and thereafter storage or car demurrage, and track storage charges, applicable on domestic freight as shown in Paragraph (e), will be assessed.

Free time will be computed from the first 7 A. M. after date on which notice of arrival is sent or given to consignee. In computing free time, Sundays and full legal holidays will be excluded, and when the holiday falls on a Sunday the following Monday will be excluded.

(e) After expiration of free time at stations, provided in Paragraphs (c) and (d), when the freight is held on carrier's piers or in the carrier's warehouses, the storage rules and charges applying on domestic freight, as per Agent B. T. Jones' Tariff No. 4-S, I. C. C. No. 3250, P. U. C.—N. J. No. 6, P. S. C.—N. Y. No. 204, T. C.—N. Y. No. 25, will apply.

After expiration of the free time provided in Paragraphs (c) and (d), when the freight is held in cars, the car demurrage rules and charges, as per Agent B. T. Jones' Tariff No. 4-S, I. C. C. No. 3250, P. U. C.—N. J. No. 6, P. S. C.—N. Y. No. 204,

T. C.—N. Y. No. 35, and track storage rules and charges as per Rule No. S-50, will apply.

No further allowances for free time than provided in Paragraphs (c) and (d) will be made, in applying storage, demurrage, and track storage rules and charges.

2273 (f) East-bound freight in carloads not consigned in shipping order or bill of lading for export, which is ordered for exportation after arrival of shipment at stations or in holding yards shown in Note 16, and which has not passed from the possession of the carrier, will be subject to the rates, rules, and regulations applicable on export freight or the same as would have applied had the freight been originally consigned for export and will also be subject to a reconsignment charge of $2.97 per car.

(For account of N. Y. C. R. R., N. Y. O. & W. Ry., and W. S. R. R.)

For all other services at stations shown in Note 15 or in holding yards in Note 16, the storage rates, rules, and regulations applying on domestic traffic will govern.

(Exceptions for account of C. R. R. of N. J. only)

All cars containing export Lumber, carloads (not covered by through export bills of lading and not subject to warehouse storage rules), consigned to Jersey City (Communipaw), N. J., for export held at those points for a period of ten (10) days, exclusive of date of arrival (Note A), thereafter the provisions of Agent B. T. Jones' Tariff I. C. C. No. 3250 will apply.

All cars containing Hay, Straw, and Lumber, in carloads, shipped to New York, N. Y., Jersey City, N. J., for export "Lighterage Free," and afterwards delivered to vessel for export, will be held free of charge at Jersey City or Elizabethport (Docks), N. J., for a period of ten (10) days, exclusive of date of arrival (Note A), thereafter will be subject to car demurrage charges as specified in Agent B. T. Jones' Tariff No. 4-S, I. C. C. No. 3250, P. U. C.—N. J. No. 6, P. S. C.—N. Y., No. 204, T. C.—N. Y. No. 35.

Note A.—In computing free time, Sundays and full legal holidays will be excluded, and when a holiday falls on a Sunday, the following Monday will be excluded.

Rule No. S-21:

COASTWISE, INTERCOASTAL AND EXPORT FREIGHT HELD IN CARS

All cars containing export freight not covered by through export bills of lading and not subject to warehouse storage rules or ground storage rules in Rules Nos. S-35 and S-45, held at stations or in holding yards shown in Note 16, will be allowed ten (10) days free time. Free time to be computed from the first 7 A. M. after the day on which notice of arrival is sent to consignees (Note).

All cars containing freight other than export freight or ground storage freight covered by Rules Nos. S-35 and S-45, for transshipment to vessels for forwarding to points on or beyond Long Island Sound or Sandy Hook, held at stations or in holding yards shown in Note 16, will be allowed five (5) days free time. Free time to be computed from the first 7 A. M. after the day on which notice of arrival is sent to consignees (Note).

Note.—In computing free time, Sundays and full legal holidays will be excluded, and when a holiday falls on a Sunday, the following Monday will be excluded.

2274 After expiration of the free time provided in this rule, freight will be subject to Car Demurrage Rules and Charges published in Agent B. T. Jones' Tariff No. 4-S, I. C. C. No. 3250, P. U. C.—N. J. No. 6, P. S. C.—N. Y. No. 204, T. C.—N. Y. No. 35, without further allowance of free time.

EXPLANATION OF NOTES

Amend Note 16, page 37 of Tariff, as indicated below:

Note 16

B. & O. R. R.
B. & O. Lighterage, Jersey City, N. J.
St. George Lighterage, S. I., N. Y.
C. R. R. of N. J.:
Jersey City, N. J.
D. L. & W. R. R.:
Harrison, N. J.
Hoboken, N. J.
Jersey City, N. J.
New York Lighterage Station.
Secaucus, N. J., or at holding yards at Dover, N. J., or east thereof.
Erie R. R.
N. J. & N. Y. R. R.:
Croxton, N. J.
Jersey City, N. J.
Weehawken, N. J.
L. V. R. R.:
South Plainfield, N. J., and east thereof.
N. Y. C. (E.):
60th St. Station, New York, N. Y. Or holding yards at
N. Y. C. (E.)—Continued.
Croton-on-Hudson or North White Plains, N. Y., or south thereof; or at Weehawken, N. J., or holding yards at Little Ferry, N. J., or south thereof.
N. Y. C. (W. S.):
Weehawken, N. J., or holding yards at Little Ferry, N. J., or south thereof.
N. Y. O. & W. Ry.:
Weehawken, N. J., or at holding yards at Little Ferry, N. J., or south thereof.
N. Y. S. & W. R. R.:
Edgewater, N. J.
Jersey City, N. J.
Little Ferry Jct., N. J.
Weehawken, N. J.
Pennsylvania R. R.:
Greenville Piers, N. J.
Manhattan Piers, N. J., holding Yards, Rahway, N. J., or east thereof.

(See also Item No. 2110 of Tariff, as amended on Export, Coastwise, and Intercoastal Shipments.) (R. A. 82434, S–1.)

2275 Item No. 2110 (New):

HOLDING OF EXPORT, COASTWISE, AND INTERCOASTAL SHIPMENTS OUTSIDE THE PORT

When delivery of a car cannot be made on account of the inability of the consignee, exporter, or steamship line to receive it or because of any other condition attributable to the consignee, exporter, or steamship line and it cannot be reasonably accommodated on tracks at destination, port of exit, or points in Note 1, it will be held at an available hold point and written notice of such holding will be sent or given the consignee or party entitled to receive same within twenty-four (24) hours after arrival at point where held; the free time to be computed from the first 7:00 A. M. after such written notice is sent or given. The time of movement between the hold point and destination or port of exit will not be computed against the car. The same rules and charges will apply as if held at port of transshipment.

The provisions of this item will not apply on Coal or Coke (the direct products of Coal) (R. A. 82434, S–1).

2276 *Exhibit 70*

DEMURRAGE RULES APPLICABLE TO COASTWISE AND EXPORT TRAFFIC AT NEW ORLEANS, LA., AND SUBPORTS

Item 110–A, New Orleans Freight Tariff Bureau Tariff 4–P, Agent Emerson, Jr., I. C. C. No. 292:

The provisions of this Item will not apply as follows:

(a) On export Grain or Export Soya Beans for delivery to elevators; see Item 405 or reissues.

(b) On shipments of explosives and other dangerous articles; see Item 415 or reissues.

(c) For account of the N. O. & N. E.; for rule to apply, see Item 115.

RULES

Free Time Allowed

(Applicable only on foreign export freight, also on coastwise traffic and traffic for the Pacific Coast, awaiting ships at ports, except as shown in Item 1500, Section 2.)

Section A. 1. One hundred and sixty-eight hours' (seven days) free time will be allowed. (See Note 1 below.)

2. When a car is switched from one line to another, forty-eight hours' (two days) free time will be allowed by the switching line for unloading after the same is placed or ready for placing.

3. Forty-eight hours' (two days) free time will be allowed in which to load and give disposition of cars loaded within the switching limits of New Orleans, La., and forty-eight hours' (two days) free time in addition will be allowed in which to unload such cars after placing.

4. Car demurrage charges under this section will cease upon the arrival of the vessel at the private wharf of the railroad over which the shipment is forwarded. If the owner of such wharf is unable to provide a berth for the vessel at the time such vessel is prepared to occupy such berth, car demurrage charges will cease, the same as if the vessel had been provided with berth at the time applied for.

But if the vessel leaves the port without taking the shipment, provided a berth is available for such vessel on application, car demurrage, if held on cars, or storage, if unloaded, will be assessed, commencing at 7:00 a. m. of the day following the departure of the vessel from the port; it being optional with the carrier to hold on cars.

2277 5. If a consignee has given an order, accompanied by satisfactory evidence of acceptance from the agent of the vessel, for delivery of a shipment to a vessel at a private wharf or a railroad, forty-eight hours or more prior to the departure of such vessel from such wharf, and the carrier fails to deliver such shipment within six hours of the departure of the vessel from such wharf, car demurrage charges will cease the date such order is given. (See Note 1 below.)

6. In the event that the vessel leaves the wharf before taking the cargo, car demurrage charges will be assessed and collected at the regular rate during the time car is so held.

7. When cars to which this section applies have been ordered and switched to a public wharf or private wharf other than that of a railroad for unloading, forty-eight hours' (two days) free time will be allowed from the time such cars are placed. Car demurrage will be charged on cars which are ready to be placed but cannot be placed because the tracks on which they should be placed are fully occupied by cars for the same consignee.

INSTRUCTIONS AND EXPLANATIONS.

Section A. 1. Does not apply on cars unloaded as domestic shipments where delivery is made to consignee and such shipments are subsequently exported, nor on shipments covered by export bills-of-lading when handled as domestic shipments. Cars con-

taining freight so handled will be subject to rules applying to domestic freight.

NOTE 1.—Paragraphs 1 and 5 of Section A, Item 110-A, apply only to cars while on tracks of the road by which shipment is transported to port of export, and do not apply after such cars are switched to a track on another line; the paragraphs referred to also do not apply to cars loaded within the switching limits of New Orleans, La.

2278 Item 115-A:

The provisions of this Item will not apply as follows:

(a) On Coal and/or Coke; see Item 1500, Section 2.

(b) On Export Grain or Export Soya Beans for delivery to elevators; see Item 405 or reissues.

(c) On shipments of explosives and other dangerous articles; see Item 415 or reissues.

RULES

Free Time Allowed

Section A—1. One hundred and sixty-eight hours' (seven days) free time will be allowed. (See Note 1 below.)

2. When a car is switched from one line to another, forty-eight hours' (two days) free time will be allowed by the switching line for unloading after the same is placed or ready for placing. This includes cars switched to Port Chalmette, La., by the New Orleans Terminal Company, for the New Orleans and Northeastern Railroad.

3. Forty-eight hours' (two days) free time will be allowed in which to load and give disposition of cars loaded within the switching limits of New Orleans, La., and forty-eight hours' (two days) free time in addition will be allowed in which to unload such cars after placing.

4. Car demurrage charges under this section will cease upon the arrival of the vessel at the private wharf of the railroad over which the shipment is forwarded. If the owner of such wharf is unable to provide a berth for the vessel at the time such vessel is prepared to occupy such berth, car demurrage charges will cease, the same as if the vessel had been provided with berth at the time applied for.

But if the vessel leaves the port without taking the shipment, provided a berth is available for such vessel on application, car demurrage, if held on cars, or storage, if unloaded, will be assessed, commencing at 7:00 a. m., of the day following the departure of the vessel from the port; it being optional with the carrier to hold on cars.

5. If a consignee has given an order, accompanied by satisfactory evidence of acceptance from the agent of the vessel, for delivery of a shipment to a vessel at a private wharf of a railroad, forty-eight hours or more prior to the departure of such vessel from such wharf, and the carrier fails to deliver such shipment within six hours of the departure of the vessel from such wharf, car demurrage charges will cease the date such order is given. (See Note 1 below.)

6. In the event that the vessel leaves the wharf before taking the cargo, car demurrage charges will be assessed and collected at the regular rate during the time car is held.

2279 7. When cars to which this section applies have been ordered and switched to a public wharf or private wharf other than that of a railroad for unloading, forty-eight hours' (two days) free time will be allowed from the time such cars are placed. Car demurrage will be charged on cars which are ready to be placed, but cannot be placed because the tracks on which they should be placed are fully occupied by cars for the same consignee.

INSTRUCTIONS AND EXPLANATIONS

Section A—1. The free time allowance herein provided applies on shipments moving—

(a) On domestic bills of lading exchanged at port for through export bills of lading.

(b) On domestic bills of lading marked "For Export," "For Pacific Coast, via Panama Canal," or "For Coastwise."

(c) On through export bills of lading which carry notation for party to be notified at port of exportation or any other notation which will have the effect of interrupting the through and continuous movement of shipment from interior shipping point to foreign destination.

(d) These rules are not applicable (except as provided in paragraph (c) above) on shipments moving under through export bills of lading issued on confirmation of steamship lines booking for continuous movement jointly by rail carrier and steamship line.

NOTE 1.—Paragraphs 1 and 5 of Section A, Item 115-A, apply only to cars while on tracks of the road by which shipment is transported to port of export and do not apply after such cars are switched to a track on another line; the paragraphs referred to also do not apply to cars loaded within the switching limits of New Orleans, La.

2280 Item 120-A:

CHARGE

Section A.—After the expiration of free time allowed, a charge of $1.10[1] per car per day, or fraction of a day, will be made until

[1] This charge is included in and is not in addition to the charges made in Section B.

car is released, except that all cars placed for loading and handled in intra- or inter-terminal (see Item 27 or reissues) switch movement will be subject to domestic demurrage charges as published in Agent Jones' Tariff I. C. C. 2353 (Freight Tariff 4-T), supplements thereto or successive issues thereof.

Section B—1. Refrigerator or other fully insulated cars (which have been ordered by consignor or shipper), except cars containing import freight, will be subject to the following charges after the expiration of free time allowed.

NOTE 1.—A fully insulated car is a boxcar having walls, floor, and roof insulated, not equipped with ice bunkers or ice hatchets.
NOTE 2.—This section does not apply to ordinary boxcars with temporary lining.

2. When held for loading or unloading—for the first seventy-two hours (three days), $1.10 per car per day or fraction of a day; for the succeeding seventy-two hours (three days), $3.30 per car per day or fraction of a day; for each succeeding day or fraction thereof, $5.50.

3. When held for any other purpose—for the first seventy-two hours (three days), $1.10 per car per day or fraction of a day; for each succeeding day or fraction thereof, $3.30.

4. Where track storage charges are in effect, the charge of $1.10 per car per day, as per Section A, will apply in addition to the track storage charges. The $3.30 and $5.50 charges named in Section B will not apply, but when for any day the track storage charge, plus $1.10, is less than the charge named in Section B, an additional demurrage charge will be made sufficient to make the total charge for that day equal to $3.30 or $5.50 charge, as the case may be.

5. This section shall apply to cars into which freight is loaded, or transferred in transit, for the purpose of providing necessary protection from climatic conditions.

INSTRUCTIONS AND EXPLANATIONS

(a) Charges accruing under these rules must be collected in the same manner and with the same regularity and promptness as other transportation charges, and agents will in like manner be held responsible for same.

(b) Freight upon which charges have accrued under these rules shall not be removed from railroad premises until charges thereon have been paid. When consignor or consignee refuses to pay, agent will hold freight until payment is made and continue to charge until freight is removed or, at his option, may send freight to public warehouses or yards where the same will be held subject to storage charges and all other charges.

2281 (c) When cars are detained on private or specifically designated tracks for unloading beyond the time allowed

and demurrage charges are not promptly paid agent must, upon advice to that effect from the official in charge of demurrage, after sending or giving not less than five (5) days' written notice, decline to switch cars to private or specifically designated tracks for such parties, and thereafter tender freight from public-team tracks and collect all charges before delivery, until satisfactory guaranty is given that demurrage rules will be complied with.

(d) Charges that accrue while cars are held for loading, for receipt of billing instructions, or for reconsignment or distribution orders will be collected by agents of the forwarding line when such shipments are ordered to points within the switching limits. When charges accrue on shipments ordered or destined to points beyond switching limits such charges should be collected by the agent of the forwarding line. Such charges may be billed forward as advances, providing the charges are guaranteed in writing and entered on the shipping tickets and bills of lading and exhibited on the waybills as "Demurrage Charges, Advanced and Guaranteed."

When demurrage charges accrue on cars held in transit by request of consignor or consignee, as agents can neither enter the charges on bills of lading nor obtain guarantee from consignor or consignee without unnecessary delay to the cars, the charges must either be billed forward as advances or separate bills made and charges collected from the party ordering the cars held.

2282

Exhibit 71

DEMURRAGE CHARGES AT TEXAS GULF PORTS ON EXPORT AND OUT-BOUND COASTWISE TRAFFIC

Rule 35, Texas Lines Tariff 25–J, Agent Dodge's I. C. C. No. 518:

Charges for detention of cars provided for by these rules on all cars held for unloading or any other purpose shall be computed on a basis of the average time of detention to all such cars for any one receiver and for each railroad separately released during each calendar month, such average detention to be computed as follows:

Section A—Free Time:

(1) On export cotton moving on through export bills of lading ten days of 24 hours each free time will be allowed on each car from the first 7:00 a. m. after the specified cargo receiving day as fixed in the contract for ocean carriage.

(1) Example—In computing the ten days' free time the period from arrival of car until 7:00 a. m. of the first day after the specified cargo—receiving day will not be considered.

(2) On other traffic subject to rules shown in this Section Three four days of 24 hours each free time will be allowed on each car.

Free time will commence at 7:00 A. M. on the second day following the day on which railroad notice of arrival or notice of carriers' readiness to deliver at destination or port of exit is sent by United States Mail or delivered by messenger (S. 10049—Pro. 4842).

(2) Example—A car arrives at the port or hold point at 10:00 a. m., 1st. Notice of arrival or notice of carriers' readiness to deliver is sent or delivered 5:30 p. m., 1st. Free time commences 7:00 a. m., 3rd, and expires at 7:00 a. m., 7th, a debit for the 7th will be charged if not unloaded before twelve o'clock noon (S. 10049—Pro. 4842).

2283 Section B—Credits Allowed:

(1) On export cotton moving on through export bills of lading, credits will be allowed for each car released before the tenth day of free time, as follows: Within the first day, nine days credit; second day, eight days; third day, seven days; fourth day, six days; fifth day, five days; sixth day, four days; seventh day, three days; eighth day, two days; ninth day, one day. No credit will be allowed or debit charged for cars released within the tenth day of free time.

(2) On other traffic subject to rules shown in this Section Three, a credit of three days will be allowed for each car released within the first day of free time. A credit of two days will be allowed for each car released within the second day of free time. A credit of one day will be allowed for each car released within the third day of free time. No credits will be allowed or debits charged for cars released within the fourth day of free time.

(2) Example—A car arrives at the port or hold point at 10:00 a. m., 1st. Notice of arrival is sent or delivered 5:30 p. m., 1st. If released before 7:00 a. m., 4th, three days credit will be allowed. If released between 7:00 a. m., 4th, and 7:00 a. m., 5th, two days credit will be allowed. If released between 7:00 a. m., 5th, and 7:00 a. m., 6th, one day credit will be allowed. If released between 7:00 a. m., 6th, and 12 o'clock noon, 7th, no credit will be allowed and no debit charged (S-10049—Pro. 4842).

(5) Credits cannot be earned on private cars detained on private tracks when exempt from demurrage under the provisions of Rule 32, but debits charged on such private cars while held on railroad tracks awaiting placement because of consignee's or receiver's inability to accept or because of any other condition attributable to them, may be offset by credits earned on other cars (S. 10049, Pro. 3061).

Section C—Debits:

(1) On export cotton moving on through bills of lading, a debit of one day will be charged for each day or fraction thereof for all cars detained beyond the first ten days of free time. In no case shall more than nine days credit be allowed on any one car, and in no case shall more than eight days credit be applied in cancellation of debits accruing on any one car, making a maximum of eighteen days that any one car may be held free. No exemption will be allowed for Sundays or holidays on cars held over the maximum of eighteen days.

NOTE.—Cars held over the maximum of eighteen days will be charged $1.1 per day for the nineteenth day and for each day or fraction of a day thereafter until released.

2284 (2) On other traffic subject to rules shown in this Section Three, a debit of one day will be charged for each day or fraction thereof, for all cars detained beyond the first four days of free time. In no case shall more than three days credit be allowed on any one car, and in no case shall more than eight days credit be applied in cancellation of debits accruing on any one car, making a maximum of twelve days that any one car may be held free. No exemption will be allowed for Sundays or holidays on cars held over the maximum of twelve days.

NOTE.—Cars held over the maximum of twelve days will be charged $1.10 per day for the thirteenth day and for each day or fraction of a day thereafter until released.

For exceptions, see Rule 36.

Section D—Adjustment of Debits and Credits:

At the end of each calendar month, the total number of days credited will be deducted from the total number of days debited (including credits and debits on cotton moving on through export bills of lading), and a charge of $1.10 per day made for the remainder. If the credits equal or exceed the debits, no charge will be made for detention of the cars released within the maximum of eighteen days on cotton moving on through export bills of lading and twelve days on other traffic subject to rules shown in Section Three.

No payment will be made on account of such excess credits nor shall the credits in excess of the debits of any one month be considered in computing the average detention of another month.

2285 Rule 36. Additional Free Time Allowed for Special Causes:

Additional free time will be allowed for following causes only:

When additional time is allowed under this rule, it will not affect the credit allowances provided for under Rule 35, Section B.

Section A—Weather:

When the condition of the weather for at least four hours between 8:00 a. m. and 5:00 p. m. within the four days of free time, is such as to make it impossible to work men for unloading, [illegible]

time will be extended one day for each day of free time so affected.

For the purpose of securing an extension of free time, due to weather conditions as provided for in this rule, a written statement in duplicate, stipulating that the weather conditions and the period of time had been such as to warrant an extension of free time, shall be immediately obtained by the receiver from the representative of the unloading contractor. One copy of such statement shall be promptly filed with the Demurrage Agent.

Example—A car arrives at the port 6:00 p. m., December 20, 1915. Notice of arrival served by railroad 7:30 a. m., December 21st. Free time begins 7:00 a. m., December 23rd. It rains four hours or more between 8:00 a. m. and 5:00 p. m. December 24th, and men cannot be worked to unload. December 25th is holiday and December 26th is Sunday. If released December 27th two days' credit will be allowed. If released by twelve o'clock noon, 30th, no credit will be allowed and no debit charged.

Section B—Custom House Delays:

Delays by United States Customs.

Section C—Fires, Floods, and Labor Troubles:

Detention to cars due to fire, floods, strikes, lock-outs, or stoppage of labor, on railroads or unloading tracks, or a general strike of dock labor.

Additional free time provided for in this rule will only be allowed when the causes named in Section C occur at one of the ports named in Rule 31 and at the specific port at which cars subject to demurrage are held.

Section D—Railroad Delays:

Cars not delivered to Terminal or Wharf Companies within forty-eight hours after first 7:00 a. m., after date of order from the receivers, due to railroad disability or neglect, will be allowed additional free time, to the extent of such delay, in excess of forty-eight hours. A fraction of a day will be considered as one day.

Embargoes placed by, or disability of, Terminal or Wharf Companies, or receivers, to accept cars promptly and currently, will not be considered as railroad disability or neglect.

2286 Section E—Holidays:

Sundays and the following holidays:

January 1st—New Year's Day.

July 4th—Declaration of Independence Day.

September (first Monday)—Labor Day.

November (last Thursday)—Thanksgiving Day.

December 25th—Christmas Day.

When a holiday as specified in this Section "E" falls on Sunday, the following Monday will be treated as such holiday.

2287

Exhibit 72

McGowan

Average detention on H. M. R. R. of railroad-owned cars interchanged with trunk lines

	H. M. R. R. local	Sea-train	Break bulk lines	Total, all cars	Average tons per car	
					Sea-train	Break bulk lines
	Days	*Days*	*Days*	*Days*	*Tons*	*Tons*
5 months, March-July 1929	2.78	2.46	3.71	2.60	31.7	21.2
5 months, October-December 1928	3.17	1.88	.....	2.52		
5 months, November 1935-March 1936	3.16	1.81	.....	2.51		

2288

Exhibit 73

EXCERPTS FROM RECORD IN AGWILINES, INC., ET AL. V. THE AKRON, CANTON & YOUNGSTOWN RAILWAY CO., ET AL., DOCKET NO. 27,059

OSCAR A. FRAUSON was sworn and testified as follows:

DIRECT EXAMINATION

Examiner ARCHER. Give your full name and address to the reporter, please.

The WITNESS. Oscar A. Frauson, Produce Exchange Building, 2 Broadway, New York City.

By Mr. PIERSON:

Q. Mr. Frauson, by what company, and in what capacity, are you employed?

A. I am employed by the Trustees of the Erie Railroad as Superintendent of Lighterage in New York harbor.

Q. Where are your office headquarters?

A. Produce Exchange Building, 2 Broadway, New York City.

Q. Approximately how many years' railroad experience have you had?

A. 29 years.

Q. Was all of that with the Erie Railroad?

A. Yes.

Q. Will you briefly describe the various positions you held in railroad service?

A. Approximately six years as Freight Clerk, Telegraph Operator, and Freight and Ticket Agent at various stations and Signal Towers, including various interchange points on the New

York Divisions of the Erie. I was also in the Traffic Department as Chief Clerk to the Division Freight Agent and a Freight Tariff Compiler.

2289 Upon my return from the Army in 1919, I was Relief Agent on the New York Division for over a year.

During the years 1920 to 1929, I was Freight Agent at Edgewater, New Jersey; Brooklyn, New York; 28th Street Station, New York; Inland Stations on Manhattan Island and at Jersey City.

While Freight Agent at Edgewater, New Jersey, I had direct charge of lighterage operations at that location, in addition to my other duties. As Freight Agent at Jersey City, my duties included supervision over all truck and trailer transfer operations on carload and less than carload between Jersey City and Coastwise Lines and Erie inland stations in New York; also supervision on all lighterage operations, including coastwise traffic handled through lighterage piers at Jersey City.

During the year 1929, I was appointed to my present position as Superintendent of Lighterage.

Q. Will you describe your present duties as Superintendent of lighterage?

A. I have general charge of all Erie Railroad lighterage movements in New York harbor; also certain floatage movements in the same area.

I also have general charge of the freight operations of all Erie Railroad stations in Manhattan, Bronx, and Brooklyn, New York. Am also a member of the Board of Managers of the Union Inland Freight Station, New York, and a member of the Lighterage Committee of the Trunk Line Association.

Q. Have you obtained a Railroad Terminal map issued by the Port of New York Authority showing New York Harbor and vicinity?

A. I have.

2290 Mr. PIERSON. I ask that it be marked exhibit No. 19.

Examiner ARCHER. It will be marked defendants' exhibit No. 19.

(Defendants' Exhibit #19, Witness Frauson, received in evidence.)

Q. Will you please locate on this map the pier locations of the complainant Gulf Steamship Lines?

A. The Lykes Coastwise Line and Southern Steamship Company do not operate to and from the Port of New York. The Agwilines, Inc. (Clyde-Mallory Line) uses Piers 34, 36, and 37, North River, Manhattan. The Bull Steamship Line uses Pier 39, North River, Manhattan, and Pier 22, Brooklyn, and also Port

Newark, New Jersey. Pier 22 is not used in connection with coastwise traffic. The Moore-McCormick Line uses Pier —, Jersey City, and various piers in Manhattan. The Pan-Atlantic Steamship Line now uses Pier 45, North River, and Pier 4, Hoboken. They formerly used pier at Milton and Noble Streets, Greenpoint, Brooklyn, on the East River. The Southern Pacific Line (Southern Pacific Steamship Line) use Piers 49, 50, and 51, North River, Manhattan.

Q. What Trunk Line railroads serve New York harbor?

A. Baltimore and Ohio, Central Railroad of New Jersey, Delaware, Lackawanna and Western, Erie, Lehigh Valley, New York Central, New York, Ontario & Western, Pennsylvania Railroad, and West Shore. The New York, New Haven & Hartford
2291 also serve New York Harbor, and another witness will describe their terminal and lighterage operations. Therefore, my testimony will deal with the service of the Trunk Lines previously mentioned.

Q. Do any of these railroads have a direct rail connection with piers used by the complainant boat lines?

A. Pier D, Jersey City, used by the Moore-McCormick Line, has a rail connection with the Pennsylvania Railroad. Pier 4, Hoboken, used by the Pan-Atlantic Line, has rail connection with the Hoboken Manufacturer Railroad. The pier used by Pan-Atlantic Line in Manhattan, New York, has no rail connection. None of the other Gulf Steamship Lines have track connections with any railroad.

Mr. MUCKLEY. How about the Bull Line? Is that included?

Mr. PIERSON. He referred to the service of the Bull Steamship Line at the Port of Newark, but his testimony at the moment relates to the New York harbor, exclusive of the Port of Newark; is that correct, Mr. Frauson?

The WITNESS. Yes, sir.

Q. You have stated the location of the complainants' piers in the harbor. Will you now tell us the location of the railroad lighterage terminals?

A. Eight railroads have lighterage terminals on the New Jersey shore, as follows:

2292 The West Shore at Weehawken;

The New York, Ontario & Western—lighterage operations are handled through the West Shore Terminal at Weehawken;

The Delaware, Lackawanna & Western at Hoboken;

The Erie at Weehawken and Jersey City;

The Pennsylvania Railroad at Harsimus Cove, Jersey City and Greenville, Jersey City;

The Central New Jersey at Jersey City;

The Baltimore & Ohio at Jersey City;

The Lehigh Valley at Jersey City, National Docks, Jersey City and Claremont Terminal, Jersey City. (Three separate lighterage terminals.)

The New York Central Lighterage Terminal is at 60th Street, Manhattan, and the New York, New Haven & Hartford Lighterage Terminals are at Harlem River, Bronx Borough Station, on the Harlem River——

Mr. MUCKLEY. Where is that on the map?

The WITNESS. It is shown here [indicating]. And at Pier 37, East River, Manhattan. These locations are all shown on map exhibit.

Q. You are referring to exhibit 19?

A. Yes; No. 19.

Q. Since there are no rail connections for the interchange of traffic between the gulf steamship companies and the railroads, except as previously stated, how is the interchange of traffic
2293 effected?

A. Carload traffic, generally speaking, is interchanged in lighterage service through the use of railroad-owned boats, known as barges and lighters, which are towed around the harbor by tug boats. L. C. L. traffic, generally speaking, is interchanged through the medium of motor trucks between railroad freight stations or piers and steamship piers. I will fully describe these operations later.

Q. Will you please describe the various types or classes of marine equipment, which are used in lighterage and floatage service in New York harbor?

A. A car float is a nonpropelled floating unit equipped with two or three railroad tracks on which freight cars can be placed. It holds from six cars to twenty-three cars, depending on the length of the car float and number of tracks thereon.

Lighters are nonpropelled open boats, equipped with a mast and boom, rigged to hoist freight. Either hand, gasoline, or steam power is used to operate the hoist. These units are towed around the harbor by tugs. Lighters have a capacity of 200 to 500 tons.

A canal type boat, ordinarily used for lighterage grain and other bulk commodities, is a deep boat without a deck, but fitted with hatches and suitable covers to protect cargo from weather.

A scow is an open boat quite similar to a lighter, except
2294 that it has no mast or boom for hoisting purposes.

A barge, sometimes called a covered lighter, is a nonpropelled boat with a house to protect freight loaded thereon. It has doorways through which freight is handled and is also equipped with a hatch arrangement over the doors, which can be

moved to permit hoisting of freight direct to and from the barge by use of ships' hoist and tackle.

Tugboats are boats propelled by steam or diesel power used to tow barges, lighters, scows, floats, or other nonpropelled railroad marine units around the harbor. Railroad tugboats carry a crew of six to seven men.

Self-propelled lighters are units (either open or covered) equipped for carrying freight, which have steam or diesel engines for propelling themselves. Some are equipped with a mast and boom for hoisting freight.

Q. Are any of the equiment units you have mentioned defined in the railroad tariffs?

A. Yes. For example, Rule A-15 of Erie Railroad I. C. C. No. 19451, reads as follows:

"Definition of the terms 'Lighters,' 'Barges,' and 'Floats.'

"'Lighters and barges' as the terms are used in this tariff, are boats for the transportation of merchandise unloaded from or to be loaded into cars at a given point, and 'floats' are boats fitted with tracks for the transportation of cars loaded or empty."

2295 Q. What types of marine units are most generally used in interchanging carload traffic with Gulf Steamship Lines?

A. Barges and lighters.

Q. What is meant by free lighterage service?

A. Generally speaking, it means that carload shipments of commodities, not specifically restricted by tariff and moving under a published tariff rate which includes lighterage and service will be accorded such service to or from any vessel, pier, or public or private landing place within the free lighterage limits of New York harbor without additional charge. Such limits are uniform in so far as Trunk Line railroads serving New York harbor are concerned.

Q. Who assumes the cost of loading and unloading of "lighterage free" carload freight transported on railroad barges and lighters at point of origin or point of delivery within the free lighterage limits of New York harbor?

A. Generally, on such traffic as is interchanged with Steamship Lines, either export, import, or intercoastal or coastwise, the railroad carrier assumes the cost of loading and unloading of railroad barges or lighters and also when required, assumes the expense of moving such freight to or from a location on the steamship pier, not exceeding 100 feet from the gangway of the railroad boat.

Q. What do you mean by lighterage limits; you said "lighterage limits"; what are those limits?

2296 A. The free lighterage limits are defined in all of the railroad Trunk Line tariffs——

Q. Are those limits shown on your map, exhibit 19?

A. Yes, sir.

Mr. PIERSON. That is my answer.

Mr. PIERSON. You said "railroad boat." Do you mean by that the lighter or the barge?

The WITNESS. Barges or lighters; yes, sir.

Q. I ask you what you mean by that statement. Do you mean that the railroad puts the freight on the docks from the lighter and then moves it after it unloads it onto the docks?

A. No, sir; I mean one movement from the boat to a point on the dock within 100 feet from the gangway or the spring piece.

Mr. MUCKLEY. Is that what you call the ship's tackle?

The WITNESS. Not necessarily; it may be that; it all depends on the situation——

Mr. MUCKLEY. It depends on where your lighter happens to be; is that right?

The WITNESS. Ordinarily it depends on where the steamship people want it; that is the best way I can put it.

Mr. MUCKLEY. All right.

A. On railroad traffic handled in lighterage service to or from a private or public pier or landing place, other than export, import, intercoastal or coastwise, within free lighterage limits,
2297 the consignee or consignor must load or unload the railroad lighter or barge at his expense, or, if it is desired that railroad carrier perform such loading or unloading, a tariff charge of $2\frac{1}{2}$ cents per hundredweight is assessed by the railroad against consignee or consignor for such services.

Q. Is there any provision in rail carriers tariffs, whereby lighterage service will be performed by the rail carrier on a carload shipment of a commodity not restricted from lighterage service, but upon which shipment the freight rate does not include free lighterage service?

A. Yes; rail carriers' tariffs provide lighterage service will be performed on such shipments, with certain exceptions, on payment of an additional charge of $6\frac{1}{2}$ cents per hundredweight, over and above the freight rate to or from the rail head.

Q. How are the various types of carload traffic handled in lighterage service usually described?

A. 1. Import and Export; 2. Intercoastal; 3. Coastwise; 4. Local or domestic.

Q. Are any carload shipments handled to and from the coastwise lines' piers by Trunk Line Railroad carriers in car float service?

A. No; not to my knowledge.

Q. Will you describe the operating service performed by the Erie Railroad on a carload of freight for movement via a

coastwise line from New York, from the time car arrives
2298 in the New York terminal area until the contents of the car is unloaded and the freight loaded on to a railroad barge or lighter?

A. The car would arrive in a road haul train at our Croxton, New Jersey, yard, which is about two miles west of Jersey City. The car would then be handled by a switch engine over a yard hump to a classification track.

Mr. PIERSON. Mr. Examiner, these moves can be followed on the map, exhibit 19.

A. The car would subsequently be moved in a yard haul train from Croxton to Jersey City. A switch engine at the latter point would then switch the car into a classification yard, from which yard it would subsequently be moved by a switch engine to one of our lighterage piers at Jersey City.

In the event that the carload shipment was loaded in a flat car or gondola, requiring the use of a railroad crane in order to remove the lading from the car and transfer it to a lighter, the car would not be moved from Croxton to Jersey City but would be moved in a yard haul train from Croxton direct to our Weehawken yard, a distance of approximately four miles. At the latter point, such car would be switched into a classification yard and subsequently moved by a switch engine to one of our open or uncovered lighterage piers at Weehawken Docks where crane service is available. At such point gantry or locomotive cranes
2299 operated by railroad employees are used in loading or unloading freight to or from railroad boats.

Mr. MUCKLEY. I ask you what kind of cars you are referring to there—flat and what other kind?

The WITNESS. Gondolas.

A. A light barge or lighter as required would be assigned for the handling of the particular car or cars involved. If such marine unit was not readily available at the particular lighterage pier where the car or cars were to be unloaded, it would require the use of a railroad tugboat to tow such equipment from some other lighterage pier or from some other point in the harbor where it was available.

Q. Who performs the service of unloading and tallying the freight from the car to the lighter or barge?

A. Erie Railroad labor performs this service, and in addition, Erie Railroad crane service is used at Weehawken Docks, if required.

Q. Is the rail service from Croxton Yard to the lighterage pier on a carload of coastwise freight from a continuous series of movements?

A. That all depends on the sailing schedule of the vessel involved. If the operation and schedule permit, the car would be held in our classification yard in Jersey City or Weehawken for the possibility of accumulating other cars that might subse-
2300 quently arrive for the same coastwise pier or vessel, thereby conserving use of railroad lighterage equipment and tug power.

On the other hand, if the space of time between arrival of car and sailing schedule of vessel is limited, the yard movement, handling, and lightering of the freight is ordinarily expedited to protect connection with steamer. This frequently results in a lightly loaded railroad boat, and obviously, the same marine expense as would be incurred if the lighter or barge were loaded to capacity. It is a common occurrence to have instances where only one carload of freight is available for lighterage movement to a coastwise steamship line.

Furthermore, instances are experienced where two cars are available for the same coastwise line but for two separate vessels close to sailing schedule, sailing from two adjacent piers, two separate railroad barges or lighters being required in order to protect connection with each sailing. An example of this would be a carload of freight for movement via Steamer A of a coastwise line, and another for movement via Steamer B of the same line, for two different coastwise ports, the former being handled at one steamship pier, and the latter through an adjacent steamship pier. Often both sailings are at practically the same hour of the same day, and in an endeavor to insure connections with each vessel, contents of each of the two cars must be loaded on a separate barge or lighter.

2301 Q. Do all of the harbor railroads have substantially the same classification and switching service from the break-up yard to the water front?

A. Yes; except that some of the railroads handle all of their lighterage operations through one lighterage terminal, and some railroads have their break-up yard for switching road haul trains situated more distant from the water front than others.

Q. What railroad employees are employed on railroad lighters and barges operated in the harbor?

A. The railroad employs a Captain on every lighter and barge operated in lighterage service and in addition an engineer is maintained on steam hoist lighters.

Q. After the lighter or barge has been loaded at the railroad lighterage terminal, what is the next operation?

A. A railroad tug boat is assigned to tow the loaded boat from the railroad lighterage terminal to the pier of the specific coastwise steamship line involved.

Q. What action is taken to notify steamship line representative of arrival of the railroad boat at the steamship pier?

A. The Captain of the railroad boat delivers his manifest and freight bills covering the freight on his boat to the receiving clerk at the steamship line.

Q. Please explain the manner in which the unloading of lighters or barges at coastwise steamship piers is handled.

2302 A. Freight lightered from railroad termini for outward movement via the coastwise lines, is generally held on the lighter or barge at the steamship pier until such time as it is possible to handle the freight direct from the railroad boat into the vessel in one stevedore operation.

In a majority of instances the freight is handled direct from the barge or lighter into the vessel by steamship stevedores in one stevedoring operation. In some instances this operation involves the handling of the freight from the railroad boat directly across the dock into the vessel; in other instances, the railroad boat is placed alongside of the vessel and the freight handled or hoisted directly off of the railroad boat into a coastwise vessel.

Q. Who assumes the expense of unloading the freight from the railroad boat to the Steamship pier?

A. The railroad does.

Q. In the event freight is handled direct from lighter or barge over the side of vessel, who assumes expense of moving freight on the lighter or barge and making it available to vessels' slings or tackle?

A. The railroad does.

Q. At page 185 of the transcript, Witness Simmons testified as follows:

"The rule of the harbor is that lighterage deliveries and freight received for lighterage must be loaded onto or 2303 loaded from the dock, to which the lighter goes. The rail lines in New York harbor generally prefer to have the steamship lines furnish the labor to unload these lighters, which is done, and they get some compensation for it, for service which otherwise the railroad owning the lighter would have to perform itself."

Do you wish to comment on this statement?

A. The railroads do assume the expense of loading and unloading lighterage free freight at steamship piers. They do not assume such expense on local domestic freight, except on assessment of an additional charge.

The railroad pays its stevedore contractor for the performance of all loading and unloading of railroad boats, which it, the railroad, is required to perform at the steamship piers. If the steamship line or steamship stevedores desire as a matter of convenience or desirability to themselves, to perform such loading or unloading of railroad boats for which service they are paid by the railroad stevedores, it results in no particular advantage to the railroad.

Q. What is the additional charge on domestic freight in cents per hundred pounds?

A. 2¾ cents.

Mr. MUCKLEY. May I ask what you mean by "domestic freight"?

The WITNESS. Local domestic freight, something not going beyond New York by water, generally speaking.

2304 Mr. MUCKLEY. And you say that on that kind of freight you don't assume what?

The WITNESS. The loading and unloading expense, without the assessment of an additional charge.

Q. Suppose it goes by rail, what happens then?

A. I am trying to visualize such a movement.

Q. You are speaking about freight originating at or destined to New York not going beyond New York by either water or rail?

A. Not going beyond New York by water, sir.

Mr. MUCKLEY. You mean that on a shipment coming in on the Erie and going to a destination on Manhattan Island, within the free lighterage limits, that you would not assume the cost of loading or unloading the lighter?

The WITNESS. That is what I mean, sir, except on the assessment of an additional charge.

Mr. MUCKLEY. How much of a charge would that be?

The WITNESS. 2¾ cents per hundredweight.

Q. After the lighter or barge is made light at the steamship pier, what is the next move on the part of the railroad?

A. A railroad tug is dispatched to tow the light boat away from the steamship pier back to the lighterage terminal or to a point elsewhere in the harbor as required for other loadings.

Q. Could not such light railroad boats be utilized for loading freight in lighterage service from the coastwise lines for outward movement via the railroad and thus eliminate the

2305 necessity of moving a light boat?

A. They could and are, under certain conditions, however, in the vast majority of cases this is not possible. The freight for outward railroad movement would have to be available for lighterage movement at or about the time the lighter or barge was made light, and further, the railroad boat which had been made light would have to be one which would be adaptable to the

commodity to be handled. For example, if a lighter of inbound railroad freight had been made light at steamship pier, it would not be adaptable to handling freight for outward railroad movement which required use of a barge or vice versa. Further, there are numerous instances when a commodity offered for outbound railroad lighterage movement from a coastwise line is of such a nature that a boat has to be utilized which cannot be used for all classes of service. One of the outstanding examples is the movement of hides; obviously boats carrying this commodity can only carry certain other commodities, and it is the general practice to confine loading of hides to certain barges set aside for such purposes.

Q. Please explain how the loading of barges or lighters with outbound railroad freight is handled at coastwise steamship piers?

A. Prior to arrival of coastwise steamer at New York, representative of the steamship line ordinarily orders through
2306 the railroad's lighterage department, light barges, or lighters as required, to be placed at the particular steamship pier involved, in advance, or concurrent with the discharge of the vessel so that the freight for outward movement by rail carrier can be handled in one stevedoring operation from the vessel direct to the lighter or the barge. Generally, such operations are conducted by steamship stevedores handling the freight direct out of the vessel across the dock into the railroad lighter or barge, or else by having the lighter or barge placed alongside the coastwise vessel and handling or hoisting the freight direct out of the vessel into barge or lighter.

The railroad boats dispatcher must select a suitable boat from the nearest available point in the harbor and arrange for a railroad tug to move the boat from the point where it is located to the steamship pier where required.

Q. What is the next operation?

A. As the freight is unloaded from the steamer, the railroad assumes the expense of handling it from the end of the ship's tackle on to the barge or lighter or for handling it from the pier to the barge or lighter. After loading of railroad boat is completed, the Captain for the railroad boat receipts to the steamship delivery clerk for the freight and then reports his boat as being loaded and ready for towing. The railroad dispatcher then
2307 dispatches a railroad tug to tow the boat from the steamship pier to the railroad lighterage terminal.

Q. What operation takes place at the lighterage terminal?

A. A switch engine places a suitable car [illegible] the out-bound movement and the car is cleaned and prepared for loading of freight. To obtain a suitable car it often involves considerable

switching to secure a car of proper type, size, et cetera, in our particular case it sometimes requires movement of empty cars from Croxton to Jersey City or Weehawken for use in loading West-bound lighterage railroad freight at our lighterage piers at Jersey City or Weehawken.

Railroad labor unloads and tallys the freight from the railroad boat into the car.

In case of the Erie Railroad, a switch engine handles the car from the pier to Jersey City Yard, where it is then switched onto a classification track. It is then moved in a yard haul train from Jersey City to Croxton Yard. A switch engine at the latter point then classifies it for a road haul train.

Q. From your testimony, as I understand it, the pier floor at the coastwise piers are not generally utilized to accommodate or store freight which the railroad has delivered in lighterage service or is to pick up the outward railroad lighterage service. Is this generally correct?

A. It is. Generally speaking, the railroad boat deliver-
2308 ing lighterage freight to the Coastwise steamship line is held under load until the steamship line is ready to handle the freight directly into their vessels; on the outward railroad lighterage operations the freight is handled, generally speaking, direct from vessel to the lighter.

Q. Are you familiar with the lighterage service of other Trunk Line railroads in the harbor?

A. Generally, yes.

Q. Would you say that the service you have described with respect to the Erie Railroad is generally applicable to the other Trunk Line roads serving the harbor?

A. Yes.

Q. You mentioned previously regarding railroads manning every lighter and barge with a Captain. Have these Captains regularly assigned hours?

A. Yes. Ordinarily, their working day is from 8 a. m. to 5 p. m., daily except Sunday.

Q. Are they ever required to work beyond those hours?

A. Yes. In instances where steamship lines desire loading or unloading of railroad barges or lighters at their piers, after assigned hours, the Captain is required to remain aboard to check freight unloaded from or delivered to his boat.

Q. Who assumes the overtime expense of the railroad Captain's salary in such cases?

A. The railroad does.

2309 Q. Does this overtime represent a substantial sum of money?

A. Yes; it does. The Erie Railroad alone paid out approximately $26,000 in overtime payments to barge and lighter captains alone in the year 1938.

Mr. MUCKLEY. That was not applicable to coastwise traffic, was it?

The WITNESS. No, sir.

Q. The interchange service you have just described relates to the handling of carload traffic. How is the l. c. l. traffic moving from the Erie Railroad to the Gulf Steamship Lines in New York Harbor handled?

A. Under Erie operation, a proportion of the in-bound l. c. l. traffic for coastwise lines is loaded into straight coastwise merchandise cars at stations and transfers west of New York Terminal territory. Such cars after arrival at Croxton, New Jersey, Yard in road haul trains are handled in the same general manner as described previously in connection with carload traffic between Croxton and Jersey City. A portion of the in-bound l. c. l. coastwise traffic is also received in mixed merchandise cars scheduled to break-bulk at Croxton Transfer, New Jersey. Such cars after arrival in road haul trains are handled by a switch engine over a hump into Croxton classification tracks. They are subsequently handled by another switch engine from such track to tracks at Croxton Transfer Merchandise platforms. After placement
2310 of such cars at that facility, railroad forces unload the merchandise and transfer it to empty cars which have been previously placed for loading. Insofar as coastwise merchandise is concerned, it is reloaded to cars destined to our station at 28th Street, Manhattan, New York. The merchandise cars after being loaded at Croxton Transfer for 28th Street, New York, are switched by a switch engine to classification tracks in Croxton Yard. The movement from Croxton Yard to Jersey City would be in the same general manner as described previously.

After arrival of such merchandise cars at Jersey City in a yard haul train they are classified by a switch engine and subsequently moved and loaded on to a car float at our electric float bridges at Jersey City, such car float having been previously moved to the float bridge by a railroad boat. The car float, after being loaded with freight cars, is towed by a railroad tug from Jersey City to an Erie float bridge located at 28th Street and North River, Manhattan. The cars are then switched off of the car float by a railroad switch engine and placed at our freight house located at 28th Street and 11th Avenue, Manhattan.

The individual shipments are then unloaded and tallied by railroad labor from the freight car through the freight house to highway trucks or trailers which are placed at freight house by a trucking contractor. Separate trucks or trailers are assigned

2311 for handling traffic for each pier handling outward cargo of each of the coastwise lines, thus necessitating our separating shipments accordingly. In other words, if Coastwise Line A has a sailing at Pier A for one port and at Pier B for another port, railroad forces must make proper separation to two different trailers. The trucking contractor then arranges for movement of the trucks or trailers from our 28th Street Station to the individual piers involved.

Q. How is west-bound less carload traffic from the coastwise lines moving over the Erie Railroad handled?

A. The merchandise is transferred from the coastwise lines by their contract truckmen, and sometimes on barges or lighters owned and operated by the Coastwise Lines, and delivered by them to our railroad freight station at Pier 20-21, North River, Manhattan. This freight is then loaded and tallied by railroad employees into freight cars standing on car floats, together with other less carload merchandise freight.

After such merchandise cars are loaded, the car float is towed by a railroad tug from Piers 20-21, Manhattan, to our float bridges at Jersey City. At that point, the cars are moved off of the float by a switch engine and classified in Jersey City yard for subsequent movement in a yard haul train from Jersey City to Croxton. If merchandise car is destined for a break-bulk transfer, west of our New York terminal territory, after arrival at 2312 Croxton, a switch engine classifies the car for subsequent movement west in a road haul train.

If merchandise car is for break-bulk service at Croxton Transfer; after arrival at Croxton it is switched to Croxton Transfer Platform. The merchandise is then unloaded from the cars and transferred to scheduled outbound merchandise cars which previously have been placed empty at Croxton Transfer. When freight-handling operations have been completed, the outbound cars are pulled from Croxton Transfer by a switch engine and classified for westbound movement in a road haul train.

Q. Is the l. c. l. coastwise traffic of other New York Harbor lines handled in substantially the same manner?

A. Generally speaking, yes, with certain modifications. For example, the Delaware, Lackawanna and Western Railroad, for operating reasons, truck their inbound l. c. l. shipments for coastwise lines from their Hoboken station across the North River to the coastwise piers. Also, the merchandise loading schedule of the different railroads vary with their operations; for example, inward cars to Manhattan stations or piers of some railroads have coastwise l. c. l. merchandise and other than coastwise l. c. l. merchandise in the same car.

Q. Does the lighterage service on carload freight vary in any manner according to the line haul railroad rate charged? In other words, would the same character of service be ac-
2313 corded on a commodity taking a railroad rate of 15 cents as one taking a rate of 60 cents, for example?

A. It does not vary, the lighterage service would be the same.

Q. From an operating standpoint, would you say that the interchange service on carload traffic between the rail carriers and the complainant steamship lines is an average lighterage harbor service. Is the interchange service more or less burdensome than the average?

A. All things considered, I believe lighterage service to and from the coastwise lines represents an average lighterage service. I feel that it is just as burdensome as the average lighterage service.

Q. From an operating standpoint, is the floating and freight handling operations you have described in connection with handling l. c. l. coastwise merchandise any less burdensome than similar service accorded other l. c. l. merchandise traffic?

A. There is no substantial difference.

Q. Earlier in your testimony, you testified that railroad endeavored to load lighters and barges as heavily as possible. Why is this done?

A. One of the most important factors in connection with an economical lighterage operation is to conserve the use of barges and lighters, by loading them as heavily as possible. From time to time, conditions require railroads to supplement their
2314 own fleet of barges or lighters by going out into the open market and chartering, at their expense, additional equipment to protect movements involved. Heavier loading naturally reduces the number of such instances, or else reduces the number of outside boats which might otherwise be required.

Further, when excess railroad equipment exists, barges and lighters are taken out of service and this eliminates the expense of maintaining a captain or other employees on such layed-up equipment. The number of railroad tugs in service on various shifts throughout the day is dependent on the requirements for such service. Under the circumstances, it is obvious that heavier loading of barges and lighters, reducing the number of such units to be towed loaded and light around the harbor, has a direct relation to the number of railroad tugs required. Incidentally, from time to time, conditions arise where the work to be performed is in excess of that which can be handled by the railroad's own tug boats and in those instances it is necessary to hire outside or private tugs to perform a portion of the work.

Q. Can you make any comparison as to average tons per lighter or barges on freight handled to and from coastwise lines as compared with the other lighterage traffic in the harbor?

A. Yes. In the case of the Erie Railroad, the average tons per barge or lighter to and from complainant coastwise lines is less than the average of other lighterage traffic.

2315 For example, in December 1937, our average tons per loaded railroad boat on traffic to and from complainant Gulf Lines was 30 tons as compared with 56 tons per average railroad boat for all other lighterage traffic; in March 1938, our average tons per loaded railroad boat on traffic to and from complainant Gulf lines was 26.5 tons as against an average boat load of 39.3 tons for all other lighterage traffic. The same situation prevails with regard to other New York harbor roads.

Q. How do you account for the lighter loading of boats handling freight to and from complainant steamship lines?

A. The coastwise lines involved who handle most of the lighterage traffic have frequently sailings, some of their services involving two or three sailings per week and in order to connect with such a schedule, it is frequently necessary to dispatch lightly loaded boats. On other lighterage freight for steamship lines with less frequent sailings and for domestic lighterage delivery, generally speaking, more freight is available and greater opportunity for concentration of heavier loads exists. Not infrequently, lighters making deliveries to other than coastwise steamers are loaded to full or near capacity. This situation increases the average tons per boat and reduces the number of barges and lighters required and naturally also decreases tugs service required.

2316 Q. Are there any facts or circumstances which are more favorable to the railroads in connection with lighterage service involving the handling of local domestic traffic at New York than in connection with handling shipments to and from the coastwise steamship lines?

A. Yes. First, as I have previously stated, Trunk Line railroads assume the expense of loading and unloading barges or lighters at steamship piers. On local domestic freight, such service is not performed at the expense of the railroad, except on payment of an additional charge by shipper or consignee.

Second, on all lighterage traffic, except that handled to or from coastwise steamship lines on through rates, where packages or pieces weighing over 3 tons each are involved, the Trunk Line New York Harbor railroads assess accessorial heavy lift charges as provided in tariffs ranging from 55 cents per ton on steamship traffic (other than coastwise) and $1.05 per ton upward on local domestic traffic.

Third, boat demurrage charges on barges and lighters ranging from $22.00 per day upward are assessed and collected under tariff provisions against all lighterage traffic, with the general exception of coastwise lines, in instances where such barges or lighters are detained beyond a forty-eight-hour free time period. Demurrage charges computed by the Erie Railroad under above-
mentioned tariff rules, against coastwise lines, but not
2317 collected for the three years, 1936, 1937, 1938, totalled
$8,036.00.

This demurrage is not only a substantial amount for the smaller lines, like the Erie, Lehigh Valley and Delaware, Lackawanna and Western Railroad, but is of great importance to the larger New York harbor roads such as the Pennsylvania Railroad and New York Central Railroad.

For example, the Pennsylvania Railroad assessment against one coastwise line for a twenty month period in 1937–1938 totalled approximately $9,500 in boat demurrage, of which amount no part was collected. Likewise, the New York Central, have assessed against another coastwise line, from January 1937 to April 1st, 1939, boat demurrage charges aggregating $14,700, of which amount nothing has been collected.

At this point, I might mention the fact that coastwise lines publish demurrage charges for detention of their lighterage equipment along the same general lines as Trunk Line carriers.

Fourth, on domestic lighterage traffic, handled in outbound carload lighterage service, on which the railroad is required to perform blocking and bracing service in the freight car at their lighterage terminal, a tariff charge ranging from $6.60 per car upward is assessed by the Trunk Line railroad for expense of
blocking and bracing. No such charge for similar blocking
2318 and bracing service is assessable on a movement handled
from coastwise lines in railroad lighterage service, where a through rate is in effect.

Q. I have one more question, Mr. Frauson. Is the movement of freight between Croxton, New Jersey yard, and the water front hampered or restricted in any way by passenger train operations?

A. In some instances, yes.

Q. Do you know how many passenger trains operate through the Bergen cut each day, approximately?

A. I can only guess, sir; I would say in the neighborhood of
200.

Q. Are these switching movements performed during the commuter rush hours in the morning and late in the afternoon?

A. They are performed during the entire 24-hour period.

Q. Does the operation of passenger trains make the freight service the more burdensome and complicated?

A. It does. There are numerous instances where the movement of freight necessarily has to wait on the passenger movement. In other words, the movement of a freight train is held up until a passenger train moves on. We have some movements—I have one in mind right now—where during the commuter run there are some moves that absolutely cannot be made during the commuter rush.

Q. Generally speaking, what are the commutation rush hours—about 7 to 9 in the morning and about 4:30 to 7:30 in the
2319 afternoon?

A. Thereabouts, yes, sir.

Mr. PIERSON. I believe that's all on direct.

Examiner ARCHER. Cross-examine.

Cross-examination by Mr. MUCKLEY:

Q. Mr. Frauson, the Bull line reaches Newark, does it not?

A. Yes, sir.

Q. Why did you eliminate the Bull Line operation from your discussions of the interchange situation?

A. I am not too familiar with the operations at the Port of Newark.

Q. Isn't the Port of Newark reached by rail line direct?

A. It is.

Q. The same as the Pan-Atlantic dock at Hoboken?

A. The operations in and out of the Port of Newark never involved any lighterage movements via the railroads.

Q. That is what I thought; you eliminated that line when you referred to certain steamship lines where no lighterage was required. You mentioned, I think, the Moore-McCormick Line, and also, I think, the Pan-Atlantic Line, but you did not mention the Bull Line.

A. I forgot, sir, until today, that the Bull Line went into the Port of Newark.

Q. Well, the Bull Line does reach there, doesn't it?

2320 A. Yes, sir.

Q. And is there no lighterage involved so far as the West Shore Railroad is concerned?

A. Not unless it was requested; it is not within the free lighterage limits.

Q. Do you have any figures as to how many tons the Erie handled in lighterage service in 1938?

A. I have, but not here.

Q. How many tons was it?

Mr. PIERSON. He said he didn't have the figures available.

Mr. MUCKLEY. He said he didn't have the figures here.

Q. You don't recall what they are?

A. Not for the year; no, sir.

Q. Have you any idea what they were, in round numbers?

A. I think so.

Q. What was it?

A. I will have to do a little rapid calculating here. Somewhere in the neighborhood of 75,000 and 800,000 tons.

Q. How much of that went to the coastwise lines involved in this case?

A. I couldn't answer that, sir, for the year 1938.

Q. Can you answer for any year, or for any period?

A. Yes, sir.

Q. Let us have a comparison between your total lighter-
2321 age service by tons for any period and the coastwise lines involved?

A. I haven't got it in tons; I have it in percentages. In the month of March, 1938, it averaged in the neighborhood of 7 percent for all the coastwise lines.

Q. Seven percent of the total?

A. That is correct.

Q. Do you know how many tons you handled in March, in lighterage service?

A. A little over 50,000 tons.

Q. Now, what lines did you include in your designations as coastwise lines?

A. In getting the percentage on all the coastwise lines, sir?

Q. Yes; did you include the South Atlantic port lines?

A. Yes, sir.

Q. What other Coastwise lines, besides the Gulf lines, which are complainants here, and the South Atlantic port lines, did you include? Did you also include the lines which run from New York to New England?

A. You mean in this 7 percent or a little to one side of 7 percent?

Q. Have you got the figure exact?

A. I have the figure exactly for the Gulf Lines, but not for all the Coast lines.

Q. What is that figure?

A. 2,812 tons.

2322 Q. 2,812 tons out of 50,000 tons?

A. Yes, sir.

Q. And that is for the Gulf Lines alone?

A. Yes; just for those mentioned in this particular case.

Q. Do you know how many of those tons went to the port of New Orleans, and how many came from New Orleans and how many went through the South Atlantic ports of Florida?

A. No, sir.

Q. The Clyde-Mallory line, the Pan-Atlantic, the Bull Line, and the Mooremack Gulf Line, they all operate to and from the Florida ports, do they not?

A. Yes, sir.

Q. And those 2,812 tons include that traffic as well as the traffic through the Gulf ports, do they not?

A. The 2,812 tons includes all of the Morgan Line and it includes all of the Clyde-Mallory Line, and it includes the Pan-Atlantic; we handle nothing with the Bull Line and nothing with the Mooremack Line.

Q. Then, so far as the Clyde-Mallory Line and the Pan-Atlantic are concerned, there would be some tonnage in there going to ports other than ports involved in this case—such as the Florida ports, would there not?

A. That is correct.

Q. And that includes both northbound and southbound tonnage?

A. Yes, sir.

2323 Q. You don't know what proportion of the 2,812 tons would be Florida traffic?

A. I do not, sir; I would say, offhand, that it would be a small proportion, but I couldn't be definite.

Q. Why do you say that?

A. Most of our tonnage with the Morgan Line and the Clyde-Mallory Line, taken as a whole, I know from experience that most of it is in and out of the Gulf ports.

Q. What experience tells you that?

A. Seeing the freight bills and handling the movements.

Q. Have you got the Morgan Line tonnage separately for the month of March?

A. No, sir.

Q. Can you give us those figures?

A. I can get it, sir.

Mr. PIERSON. I think that information is available to you; they are your own figures.

Mr. MUCKLEY. Yes; but Mr. Frauson has that information here——

The WITNESS. No; I have not got it here, sir.

Q. You have the figures that were taken off for the month of March; did you take the figures off separately for the different coastwise lines?

A. Yes; but I have not got the break-down here.

Q. But when you took those figures off you took them off

2324 separately for the three steamship lines that you mentioned?

A. Yes, sir.

Q. Can you supply us with that information for the three different lines?

A. Yes, sir.

Mr. MUCKLEY. May we have those figures, Mr. Examiner, within ten days before the close of the hearing?

Examiner ARCHER. Yes, sir; will you state exactly what it is that you want?

Mr. MUCKLEY. The 2,812 tons separated as between the Morgan Line, the Clyde-Mallory Line, and the Pan-Atlantic Steamship Line for the month of March, 1938.

Examiner ARCHER. That may be done before the close of the hearing.

Q. March is a comparatively small month, isn't it, Mr. Frauson?

A. No; it is not.

Q. Would you say it was a representative month as to the movement of traffic?

A. The heavier months were those December figures that I gave you.

Q. As I understand it the total lighterage performed in 1938 was 750,000 tons?

A. Yes, sir.

Q. And you handled about 50,000 tons in March?

2325 A. That is correct.

Q. So that, the movement for the month of March would be less than the average, would it not?

A. That is obvious.

Q. Your description of the lighterage operations of the Erie included service for the Coastwise lines operating to and from the South Atlantic ports?

A. Yes, sir.

Q. And you perform the same sort of service for those lines, or in connection with those lines, that you do for the Gulf lines?

A. Yes, sir.

Q. How about the lines running north of New York?

A. We would, if we had some traffic for them.

Q. You don't have any traffic for them?

A. Very little, sir.

Q. Do you have any stations—off-land stations—on Manhattan Island?

A. Off-land stations?

Q. Yes; you don't reach Manhattan Island with your own rails, do you?

A. No, sir.

Q. Do you have any inland stations on Manhattan?

A. Yes, sir.

Q. And you deliver and receive freight at those inland stations?

2326 A. We do.

Q. And you say that you make an additional charge for any lighterage or for loading or unloading that traffic?

A. No, sir.

Q. Then you do have some traffic where you don't charge the $2\frac{3}{4}$ cents for loading or unloading the lighter—domestic traffic?.

A. I don't quite get that question, sir.

Q. I understood you to say that on local domestic traffic——

A. Lighterage traffic.

Q. Lighterage traffic, you made a charge for loading or unloading the lighter of $2\frac{3}{4}$ cents a hundred pounds; is that correct?

A. Yes, sir.

Mr. PIERSON. But you are talking about floating service now.

Q. Do you make deliveries or receive traffic at your inland station on Manhattan Island where that charge is not made?

A. Yes.

Q. On what character of traffic? How is it handled to and from Manhattan Island?

A. It is floated.

Q. Floated?

A. Yes; it is floated or trucked.

Q. Floated or trucked? Where are your inland stations

2327 on Manhattan Island?

A. Do I understand that when you are speaking of an inland station you are speaking of any station on Manhattan Island?

Q. Any of the Erie stations in Manhattan designated in your tariff where you receive or deliver freight.

A. Inland?

Q. Yes, any inland station—any station that is off of your rails, across the river. You understand what I mean.

A. Well, we have stations that we call inland stations in Manhattan, that are designated as inland stations; and then we have other than inland stations in Manhattan Island——

Q. Tell us what the other than inland stations are.

A. We have, for example, the Duane Street Station, which is at piers 20 to 21, North River, New York City, which is a pier station.

Q. Do you handle all kinds of traffic there or do you handle only perishables at that station?

A. Perishables and merchandise.

Q. Now, on traffic going to that pier, do you handle that traffic on your own floats or lighters?

A. On our own floats.

Q. And do you unload the car onto the pier?

A. Yes, sir.

Q. That is, you take the car off the float and put it on the pier?

2328 A. No; we leave the car on the float but we take the freight out of the car.

Q. Do you make a separate charge for unloading that car onto the pier?

A. No, sir.

Q. Do you receive traffic at that pier station also?

A. Yes, sir.

Q. And do you make a charge for loading the car that is on the car float?

A. No, sir.

Q. All right, let us have another station.

A. There is the 28th Street station.

Q. Is that where you receive and deliver dry freight, you might say, as compared to perishable freight?

A. It has a team track and a freight house.

Q. Do you receive and deliver freight there?

A. We do.

Q. By what means?

A. The freight, as I described in my testimony before, goes over on a car float and the cars are pulled off our float by a switch engine located at that terminal.

Q. Is there any charge made in addition to the rate for that service?

A. No, sir.

Q. What other stations do you have?

2329 A. The Harlem station.

Q. Is that station similar to the other one?

A. It is just the same as the 28th Street station.

Q. Now, what are these inland stations?

A. Well, there is the Hubert Street station, the Greenwich Street station and the Watts Street station.

Q. And on any traffic handled to or from Manhattan Island at any of your stations, where you use your own floats or trucks, there is no additional charge on domestic local traffic?

A. There is no charge over and above the New York rate.

Q. Do you have much of this lighterage traffic where the shipper pays 2¾ cent a hundred pounds for loading or unloading the lighter?

A. At times.

Q. What character of traffic is it?

A. It is freight to and from private warehouses, like building supplies.

Q. How does that volume of traffic compare with the traffic where you deliver and receive the freight without an additional charge?

A. In the case of the Erie, unquestionably, it is about the smallest of any of them.

Q. How many tons was it in the month of March?

A. In March it was approximately 7½ percent for the Erie.

Q. That is about 2,800 tons, isn't it?

2330 A. Around that; yes, sir.

Q. Now, is there any difference in the way you handle traffic going to and from the export and import lines and the Coastwise lines, as far as the service is concerned?

A. Generally, no.

Q. How about the intercoastal lines, such as the Luckenbach and those lines?

A. It is generally about the same.

Q. Would you say that the service, the physical service was about the same to the export and import lines and to the intercoastal lines as to the Gulf Coastwise lines?

A. I would say it was generally about the same; yes, sir.

Q. You have mentioned the shipments that involve the flat and the gondola cars, and I understood that you handle those differently and through a different lighterage station?

A. A different lighterage terminal.

Q. Than the traffic in other equipment, is that correct?

A. Yes, sir.

Q. I mean with the coastwise lines.

A. Yes.

Q. What character of traffic do you interchange with the coastwise lines that go in flat or gondola cars?

A. Pipe and machinery.

Q. Pipe and machinery—just those two?

A. Those are the only two that I can think of at the moment.

2331 Q. Does the Erie——

A. Except that there might be some boxed automobiles, at times. I think we had a movement of a lot of boxed automobiles from the Morgan Line.

Q. Is the tonnage so interchanged between the Erie and the Coastwise lines a substantial proportion of the interchanged traffic?

A. I don't understand the question.

Q. What proportion of the traffic interchanged between the Erie and the Coastwise lines moves in flat or gondola cars?

A. A rather small proportion.

Q. Is that service that the Erie performs on that character of traffic more burdensome or less burdensome than the traffic that is handled through your lighterage terminal at Jersey City?

A. Why, the movement to Weehawken is a little bit longer than the movement from Jersey City, and at Weehawken on that type of traffic freight trains are required.

A. And you think, therefore, that it is more burdensome than the general run of traffic; is that right?

A. Yes; to the extent that trains are required.

Q. How far is it, Mr. Frauson, from your Jersey City lighterage terminal to the Morgan Line docks, for example?

A. I think we term it as two zones, sir.

Q. It isn't more than a couple of inches on the map, is it?

A. Which map?

2332 Q. Your exhibit 19?

A. No; I guess 2 inches on the map would cover it.

Q. It wouldn't be much over a mile, would it?

A. No.

Q. How long does it take to get a lighter from your station over to the Morgan line, about?

A. That depends very much on the conditions that exist at the time, both at the lighterage terminal and at the Morgan Line pier.

Q. I mean how long would it take from the time that the lighter was loaded until the time you got it to the pier? About 15 minutes, isn't that all it would take?

A. On a straight run, that is, if everything is open so that they can pick a boat at the lighterage terminal and the boat can move right up to the Morgan Line pier without any interference, I think 15 minutes, or 20 minutes, would cover it, but we can put it this way: It takes 15 to 20 minutes to get from one place to another, and then it takes 40 minutes to do what you have to do after you get there.

Q. I am not talking about that. I will talk about that later. When you go to the Clyde Mallory Line—that's just across the river, isn't it?

A. Yes, sir.

Q. How long does that take you? How far is it?

A. That is a 15-minute run, provided everything is clear 2333 on both ends.

Q. You lighter traffic all over New York Harbor, don't you?

A. Yes, sir.

Q. How far does that extend?

A. The lighterage limits extend to the point shown on the map.

There are different lighterage limits; on steamship freight there is one limit——

Q. Well, what is the limit on steamship freight?

A. All around the harbor.

Q. What is the longest lighterage service that you have to perform in connection with the coastwise lines, the most burdensome as far as distance and time are concerned?

A. Right now, I would say the Morgan Line, which is at pier 50. The Pan-Atlantic, up at Milton and Noble; those are about the furthest we have, but they are not operating there now.

Q. They are now at pier 45, which is almost directly across the river from you, isn't that right?

A. Directly across from the Erie; yes, sir.

Q. I am talking about the Erie now. How far does your other lighterage service on your other traffic extend?

A. Do you want the limits all around the harbor?

Q. I want you to give me the greatest distance that you lighter traffic which is included in the lighterage operations that you have described here.

2334 A. The greatest distance is down in Brooklyn around the Army base.

Q. How far is that?

A. That is in what they call the fifth, sixth, seventh, and eighth zones, and a zone is a nautical mile.

Q. Would that be five, six, seven, and eight nautical miles from your Jersey City lighterage terminal?

A. No; that is from Weehawken.

Q. And how far is it from the Jersey City terminal? It isn't so much, is it?

A. It is three, four, five, and six.

Q. That is, three, four, five, and six nautical miles?

A. Yes, sir.

Q. How far north up the Hudson do your freight lighterage limits extend?

A. For steamship freight it goes to the Fort Lee ferry on the Jersey side and to 135th Street on the New York side. All the steamship piers go up around pier 90 or 92, that is, 50th or 52nd Street.

Q. How about the other traffic that isn't steamship freight—how far north do you go on that?

A. As far as the George Washington Bridge; that is, the limit but there is actually no movement there.

Q. What is the northernmost movement that you have?

A. Up to the Fort Lee ferry.

2335 Q. Where is that on your map, exhibit 19?

A. That is right opposite 125th Street.

Q. Do you lighter freight from the Edgewater terminal south?

A. You mean down to Jersey City?

Q. Yes.

A. We do, sir.

Q. Is that a considerable lighterage movement in distance and congestion, et cetera?

A. Why, the congestion is no greater, and, in fact, it is not as great as it is in other parts of the harbor.

Q. It is not as great as what?

A. As it is in other parts of the harbor; there is not much congestion around Edgewater.

Q. Not right at that point, but you have to go past those piers, don't you?

A. We go by the Jersey shore and there is nothing there.

Q. There is nothing on the Jersey shore?

A. Not until you get around Weehawken.

Q. How much of a haul is that?

A. That is roughly about five land miles.

Q. What is the heaviest commodity that you lighter, Mr. Frauson?

A. Possibly boxed automobiles.

Q. Do you lighter more of those than any other kind of freight?

A. That is a substantial portion of the movement.

2336 Q. Where do they go to?

A. All over the world.

Q. What is your lighterage operation on that traffic?

A. The cars go up to the Weehawken docks and are lightered from there to the steamship lines around the harbor.

Q. What steamship lines? What movements are involved in handling that commodity? I understand that you bring them into the Weehawken lighterage terminal?

A. Yes, sir.

Q. Where do you take them from there?

A. To the different piers on the North River.

Q. To what piers on the North River do you take them?

A. Well, automobiles are handled by almost every oceangoing line from New York for export.

Q. You are speaking of export lines?

A. Yes, sir.

Q. Where are their piers generally located?

A. It is easier to tell you where they——

Q. Are they uptown on the River?

A. They are uptown on the River and in Brooklyn, but most of them are up there on the North River and over on the East River just up from the Battery.

Q. And a lot of them are down around Brooklyn?

A. Yes, sir.

Q. What is the next commodity; next to the automobiles?

2337 A. Crude rubber, west-bound.

Q. Crude rubber, west-bound?

A. Yes.

Q. Where does that originate?

A. Some of it comes from the piers in Brooklyn; it originates mainly in Brooklyn.

Q. Where do you take it to?

A. Jersey City and Weehawken.

Q. It is west-bound and you take it from the piers in Brooklyn over to Jersey City or Weehawken—either one?

A. Well, usually to Jersey City.

Q. Do you handle coal?

A. Not in lighterage service.

Q. How do you handle coal?

A. Coal goes up to our Edgewater docks, that is, the N. Y. S. & W. Railroad, and it is handled from there by the consignees or the owners themselves.

Q. You don't perform any lighterage service on coal?

A. No, sir; we do not.

Q. Do you absorb anything for that, do you pay the shipper for taking delivery of it at Weehawken?

A. We charge him for loading the boat and that ends our——

Q. That ends your service?

A. Yes, sir.

Q. Do you have any other commodities that move in

2338 heavy volume, generally, in your lighterage operations?

A. Agricultural implements.

Q. Where do they come from?

A. And there are a number of other commodities——

Q. I am talking only about the important ones.

A. Agricultural implements are important.

Q. Where do they come from?

A. They move about the same way that automobiles do.

Q. You mean for export, mostly?

A. Yes; it is practically all export.

Q. Do you lighter boxed automobiles or agricultural implements to the Coastwise break-bulk line?

A. Very little of it; if my memory serves me correctly, we had a very heavy movement at one time to the Morgan Line.

Q. How long ago was that?

A. That was within the past three or four years.

Q. But, generally speaking, you don't have that character of traffic now, do you?

A. That is correct.

Q. The character of the traffic that you handle for the Coastwise Line, to and from the Coastwise Line, is what? Would it be manufactured articles, south-bound?

A. We have general commodities south-bound.

Q. And what is it north-bound?

A. Cotton, grapefruit juice——

2339 Q. You mean canned goods?

A. Some canned goods; yes. On the south-bound movement we have a lot of empty tin cans.

Q. With the break-bulk lines?

A. Yes, sir; boxed and crated, and we have an awful lot of hides north-bound.

Q. That requires a special lighter, does it? A special barge?

A. A special barge; yes, sir.

Q. Do you ever receive freight by lighter from the steamship lines using their own lighters?

A. We do, sir.

Q. Do you pay anything for that; do you make an allowance to the steamship lines for that service?

A. Why, the only movement that we have is this l. c. l. freight in our particular line, that they transfer at our New York station, but the specific answer to your question is, no.

Q. Then the steamship lines, as far as the Erie is concerned, do not perform any lighterage service?

A. Only with rare and occasional exceptions.

Q. But when they do, do you pay them for it?

A. The movement that we had from the Coastwise Lines went on a through billing, and I am not familiar with how the divisions were handled; they are very, very rare.

Q. But do you know whether you paid them anything
2340 or not, and if so, how much?

A. No, and as I say, the instances are exceptionally rare.

Q. You said the services that you described for the Erie were approximately the same for the other roads. Does the Central of Vermont have any lighterage service?

A. They do, sir.

Q. Do they use the service in interchanging with the break-bulk lines—speaking of the coastwise lines?

A. I am afraid I can't answer that, sir.

Q. Do you know whether or not the break-bulk lines, particularly the Morgan Line, performs lighterage service to and from other railroads, besides the Erie, in any substantial quantity?

A. I know that they perform lighterage service around the harbor, but I rather doubt that it is of any substantial quantity to the railroads.

Q. You do not know what arrangements the other railroads made with the Morgan Line, or what they pay the Morgan Line for performing the lighterage service which the railroads include in their rates, do you?

A. No, sir.

Q. The railroads hire a stevedoring contractor to perform this loading and unloading of these lighters?

A. Yes, sir.

Q. What is his name?

2341 A. William Spencer & Son.

Q. What do you pay them for performing that service?

A. 35.9 cents a ton on the south-bound and 48.9——

Q. What do you mean by south-bound?

A. I mean south-bound; that is, your south-bound.

Q. And you pay him what?

A. 35.9 cents a ton.

Q. What do you pay him on the north-bound?

A. 48.9 cents.

Q. Why do you pay him more for the north than for the south?

A. Generally speaking, there is more service for a contractor getting west-bound freight—that is the railroad west-bound freight—than east-bound.

Q. I don't understand that, Mr. Franson.

A. I say, generally speaking, it is considered more difficult for the stevedore handling west-bound freight.

Q. You mean north-bound?

A. Your north-bound; yes sir.

Q. More difficult than east-bound?

A. Yes; more difficult than the railroad east-bound——

Q. Why?

A. For one thing, a greater portion of the east-bound freight goes direct to the steamers or the vessels, whereas on the west-bound freight a good portion is picked up from the pier proper, and as these rates were established long before my

2342 time, it is my general understanding that when they were originally established east-bound loads to a given point predominated. What I mean by that is this: That frequently, on east-bound freight, the stevedore sends a gang of men there, or a given number of men, to unload and they usually have a heavy volume of freight to handle; but in the case of the west-bound freight, in a great many instances, it consists of smaller lots.

Q. Do you know whether this contractor of yours ever sends any men to the docks of the waterlines or whether he employs the water lines' stevedore himself to perform his services?

A. I know that generally he employs the water lines themselves, but I do know that there are instances where he sends his own men.

Q. But it is generally the other way around, isn't it?

A. Yes, sir.

Q. Do you know what he pays the water lines for that service?

A. I have heard, sir.

Q. What does he pay them?

A. I believe it is 35 cents on the west-bound traffic——

Q. And what does he pay on the east-bound?

A. I am not sure what he pays on the east-bound, but if you will tell me what it is, I can tell you whether——

Mr. PIERSON. If you don't know, don't answer the question.

2343 Q. Is it less than 35 cents on the east-bound, or on what is our south-bound traffic?

A. Yes; the east-bound is lower than the west-bound, but I don't know the exact amount.

Q. So you pay this Spencer firm 48.9 cents for performing a service for which he pays the break bulk line stevedores 35 cents; is that right?

A. If that is the rate he pays; yes, sir.

Q. Why don't you employ the stevedores of the water lines direct and pay them 35 cents, instead of paying Spencer 48.9?

A. We have a contract with this stevedoring concern covering all of our operations in the harbor at one contract rate.

Q. Does he perform similar services for you at other points where you deliver and receive freight?

A. He does it all over the harbor.

Q. But you could get it cheaper if you hired the water lines' stevedores to perform this service on their interchange, couldn't you?

A. I don't know, sir.

Q. That might increase the cost on your other lighterage but it would reduce it on the steamship lighterage, wouldn't it?

A. I am not prepared to say, sir.

Q. How long have these rates been in effect—the rates that you pay this Spencer firm?

A. They have been changed from time to time.

2344 Q. When was the last change made?

A. I couldn't say offhand.

Q. How long have the rates which you have mentioned been in effect, so far as you know?

A. A year or two.

Q. You don't know what they were prior to that, do you?

A. I did know, but I don't know right now.

Q. How long has this charge of $2\frac{3}{4}$ cents for loading and unloading the lighter been in effect on domestic local traffic or on New York domestic traffic?

A. I guess for about four or five years.

Q. Since the decision of the Commission in the lighterage case?

A. Yes; subsequent to that decision.

Q. What does that charge cover?

A. It covers the charge for the loading or the unloading of the boat at the ultimate destination or at the point of origin.

Q. It covers just loading or unloading?

A. Yes, sir.

Q. It does not include loading the lighter from the railroad car and unloading it at the other side?

A. It only includes the service at the ultimate destination——

Q. Of loading and unloading?

A. Or at the point of origin in the harbor.

Q. Whichever the case may be?

Yes, sir.

2345 Q. Do you know whether the lighter loads are heavier on north-bound traffic than on south-bound on the interchange with the steamship lines?

A. No; I do not, offhand.

Q. You said that the loads are light because you have to get traffic over to the water line for scheduled sailings?

A. Yes, sir.

Q. And that is on the south-bound traffic, I assume?

A. Yes, sir.

Q. On the north-bound traffic, all the traffic for the Erie would come to you all off one boat, wouldn't it?

A. Oh, no.

Q. You said that just prior to the arrival of the boat the steamship line notified the Erie Lighterage Department that they had some traffic for the Erie and you would send a lighter over for it; isn't that right?

A. Yes; that is correct.

Q. And all the traffic on that one boat for the Erie would be available for that lighter, would it not?

A. Ordinarily; yes, sir.

Q. Would you say that the average load was heavier on the north-bound coastwise movement than on the south-bound because of that fact?

A. Really, I couldn't tell, sir, without checking.

Q. Is there a charge made for the l. c. l. transfer that you

2346 described here with the Coastwise lines?

A. In our particular case there is a transfer charge made in the tariff; yes.

Q. How much is it?

A. There are various rates; one of the most commonly used is 9 cents——

Q. That is a charge which is in addition to the rate, is it not, for that segregation and transfer service which you described in the record? That is a charge which somebody pays to you?

A. I don't understand that question, sir. We get the service——

Q. Who performs the service and who makes the charge?

A. A contract truckman performs the service.

Q. I thought you described it as your service, where you had to segregate the traffic and transfer the l. c. l.

A. What we do is, as we unload the freight from the car, we segregate it to different trailers of the contract truckman.

Q. Do you make any charge for that service?

A. No, sir.

Q. Who is the contract truckman?

A. In our case, the U. S. Trucking Company.

Q. He is your agent, is he?

A. For that particular movement; yes, sir.

Q. And you pay him these amounts that you have mentioned?

A. He is paid those amounts.

2347 Q. By whom?

A. Through the accounting department of the railroad.

Q. Is he paid these amounts by the railroad?

A. He is paid these transfer charges that are named in the tariff by the railroad.

Mr. PIERSON. Mr. Frauson, do you understand that Mr. Muckley's question relates to the trucking service between the railroad station, for instance, and 28th Street, and the Coastwise pier; is that your understanding of what he is referring to?

The WITNESS. Yes; I understand that, sir.

Mr. PIERSON. That expense is not borne by the railroad company, is it?

The WITNESS. I didn't say it was borne, sir.

Q. Who bears it?

A. I can only answer that it is someone other than the Trunk Line Railroad. Pardon me, when I said that it was paid through the accounting department of the railroad I meant that the railroad actually physically makes the payment. I am not talking about who assumes it.

Q. Now, don't you have certain territory within 75 miles of the port, say where you don't assume any lighterage on any traffic or perform any lighterage free?

A. We perform lighterage free on any freight on which so-called lighterage free is assessed.

2348 Q. But don't you have limits within which you will not give that free lighterage service? Don't you have to get a certain amount of revenue——

A. All I can answer is that we will lighter freight to and from any point on which the New York lighterage freight rate is assessed.

Q. But you don't have other rates that are not lighterage free?

A. Yes; there are a number of them.

Q. Are the confined, generally, to a short area around the port?

A. No, sir.

Q. Those nonlighterage rates?

A. No, sir.

Q. Are some of your rates higher that include lighterage from the same point than the rates that do not include lighterage?

A. Yes, sir.

Q. What is the difference between the rates?

A. I couldn't answer that, sir.

(Whereupon at 5:15 o'clock P. M., the hearing was adjourned until 9:30 o'clock A. M., Tuesday morning, April 18th, 1939.)

2349 OSCAR A. FRAUSON resumed the stand, and having been previously sworn, testified further as follows:

Cross-examination (continued) by Mr. MUCKLEY:

Q. Mr. Frauson, on what do you base your statement that the Erie lighterage service is representative of the other rail lines so far as the interchange between the water lines and the rail lines in New York are concerned?

A. That the general operation of all trunk lines is about the same.

Q. Are you thinking of the physical service?

A. Mainly; yes.

Q. Do you know what the interchange, relatively, is between the Erie as compared with other New York harbor lines with the water lines?

A. In some instances; yes.

Q. How does it compare with the interchange of the New York Central with the water lines in volume?

A. I would say that the New York Central is greater.

Q. How much greater, two or three times as much?

A. I would say considerably greater.

Q. How about the Pennsylvania?

2350 A. Is greater.

Q. And New Haven?

A. Very much smaller.

Q. Smaller than the Erie?

A. Yes.

Q. In the cases where the interchange is greater, do you think the service would be comparable so far as volume per lighterage—average load per lighter and so forth?

A. Every load would vary more or less on that.

Q. Where the volume is greater, there is more opportunity to get more than one car per lighter, is there not?

A. It all depends on what freight is available at one particular time.

Q. Well, if the interchange of the Erie with the Morgan Line was about 21,000 tons, or 20,000 tons, and that of the New York Central was 50,000 tons a year, would you say that the New York Central would have more opportunity to increase the average lighter load than the Erie would?

A. Yes; it would be quite likely.

Q. Now, do the New York Harbor lines put on a lighter more than—shipments for more than one pier or do they define lighterage operations as just one interchange?

A. It would all depend upon the circumstances.

Q. Do you do that?

A. Occasionally. Not generally.

2351 Q. Not generally. Do you handle more than one lighter with one truck?

A. Yes, sir; at times.

Q. At times. Not always. You don't know how often that happens?

A. No, sir.

Q. But you frequently put freight on a lighter, say, for the Morgan Line, and also on the same lighter for the Mallory Line?

A. We do not; no, sir.

Q. You don't. Do you use your lighters on the north-bound traffic to pick up freight at the Mallory Line and also at the Morgan Line together, over to your lighter terminal?

A. That would depend entirely on the set up and the commodity to be moved, the time that it was to be moved, relationship of the time between one boat was made light and when the other was wanted for your so-called north-bound movement.

Q. Don't you do that? Don't you use one lighter to serve more than one interchange in a number of cases?

A. No; we do not. If we have a shipment for the Morgan Line we do not put a Mallory Line on the same boat.

Q. You are speaking now of the Erie or of all the New York Harbor Lines?

A. I am talking of the Erie and generally. I am talking about the general rule, not the exceptions.

2352 Q. Do you use your marine equipment for interchange between the rail lines?

A. Yes, sir.

Q. What rail lines?

A. Long Island Railroad, New York Central Railroad.

Q. You spoke of overtime that you had to pay the lighter captains. Do you have particular reference to the interchange with the water lines or just general?

A. Generally, including the water lines.

Q. When overtime is paid, lighter captains on shipments interchanged with the water lines, do you pay the overtime or do the water lines pay the overtime?

A. The railroad pays the overtime.

Q. You are certain about that, are you?

A. Yes, sir.

Mr. MUCKLEY. That's all I have.

By Mr. QUIRK:

Q. You referred to some demurrage items.

A. Yes, sir.

Q. Would you characterize those items as uncollected or uncollectible? How did you characterize them?

A. It is hard for me to draw the distinction between the two. We did not collect them.

Q. Well, does the Erie Railroad regard the amount that you mentioned with respect to the Erie as the amount that was due from any of these coastwise lines?

2353 A. They have so regarded it; yes, sir.

Q. Well, if it is due, and you are right about it, you collect it, I take it, would you not?

A. I can only say this, that we tried to collect it.

Q. Well, it is due to the railroads or it isn't, isn't that a fact?

A. Obviously.

Q. There is some dispute about it, isn't there?

A. Yes, sir.

Q. So if it isn't due to the railroads, you can't collect. If it is not due legally, you can't collect it?

A. Not very well.

Q. So in either event you can collect it. If you do, what is the point about it?

Mr. PIERSON. The point is it shows the expense incurred by the railroad. It is an item of expense.

Mr. QUIRK. In demurrage?

Mr. PIERSON. Yes. Our equipment is being detained.

Mr. QUIRK. Well, if the demurrage was paid, you would be satisfied, I take it.

Mr. PIERSON. Certainly.

By Mr. QUIRK:

Q. How did you arrive at the amount of the demurrage? Did you determine it on the basis of detention of 48 hours and demurrage of $22.00 per day per lighter or did you arrive at it on an agreement—average agreement basis?

2354 A. We arrived at it on a straight demurrage basis. But just to satisfy myself I took one pretty heavy month that went up, oh, it was something more than a thousand dollars, I don't recall the amount, and under the average agreement that particular bill would have been reduced either 40 or 60 dollars, I have forgotten which.

Mr. QUIRK. That's all I have.

By Mr. McCOLLESTER:

Q. In answer to one of the last questions of Mr. Muckley, you stated that the railroads used marine equipment in interchanging freight between each other. Is that between, for example, the New York Central and the Long Island? That marine equipment is car floats, is that not correct?

A. That's correct.

Q. The interchange by means of car floats between railroads does not involve taking the freight out of the car and placing it on a lighter and then taking it from the lighter and placing it on the pier, does it?

A. That is true. The amount of freight that is carried on a car float is way over and above any that could be carried on a barge or a lighter.

Q. And the car, itself, is put right on the float without handling of the freight to or from the car?

A. That's correct.

Mr. McCOLLESTER. That's all.

2355 Examiner ARCHER. Any other cross?

(No response.)

Examiner ARCHER. Any redirect?

Mr. PIERSON. I have a few questions.

Redirect examination by Mr. PIERSON:

Q. Yesterday, Mr. Frauson, you referred to 2,812 tons lightered by the Erie during the month of March, 1938. You were asked by Mr. Muckley to furnish a break-down of that figure between the Clyde Mallory Line, the Morgan Line, and the Pan Atlantic. Have you obtained that break-down?

A. I have.

Q. Will you please state what the facts are?

A. Morgan Line, 1,689; Clyde-Mallory, 889; Pan Atlantic, 234.

Q. Will you please name and explain the difference between the Erie Railroad pier, or water-front stations in Manhattan and others than pier stations? I think the record is perhaps slightly confused on that point?

A. Our so-called pier stations in Manhattan are located at Pier 20-21, North River, Pier 67, North River, and Pier 7, East River. At these stations cars on car floats are moved from our float bridges at the Jersey shore to these stations and vice versa. The cars remain on the car floats and the freight is handled by the railroad labor from the cars to the pier itself and vice versa.

2356 I have forgotten the rest of your question.

Q. I wanted you to refer to the stations other than pier stations.

A. Other than pier stations on Manhattan are 28th Street station and stations at Greenwich Street, Watt Street, and Huber Street.

Q. How is freight handled to and from the three stations you have just mentioned?

A. At 28th Street station cars are moved on car floats from our float bridges at Jersey City to our float bridge at 28th Street and vice versa. At the 28th Street float bridge the movement from the float bridge to our yard is made by use of a switching engine. At 28th Street we have a freight house, team tracks, and private sidings. Freight placed on the team track is unloaded by the consignee or in reverse direction, out-bound, cars are loaded by the shipper. On freight handled through out freight house, cars are loaded or unloaded by the railroad. At the three other stations mentioned, that is, Greenwich Street, Watt Street, and Hubert Street, the freight is unloaded from the car at Jersey City on to railroad trailers and the trailers are moved to these particular stations and the freight unloaded by the railroad employees on the freight station floor or vice versa in a reverse movement.

Q. Why should the railroads load and unload freight at

2357 their pier stations?

A. In order to get the freight out of cars and make it available on the piers for the consignees. These floats either are returned light to Jersey City or else the cars are loaded with westbound freight and it would be practically an impossibility to handle it in any other way.

Q. Would there be any danger to the past patrons in obtaining and delivering their freight at the piers?

A. Yes; there would be danger and there would be no semblance of order. For example, a car float would come into one of our stations with 16 cars on. All or part of which would be needed for outbound movement. If it was handled any other way those

cars would not be available for outbound movement nor would the car floats be available for other movements in the harbor until the consignee finally decided to come down and unload the freight, if that were possible.

Q. You referred to team track loading and unloading at 28th Street. Who bears the expense of loading and unloading cars on the team track?

A. The consignee unloads the cars on the team track at 28th Street and also on the private sidings and they bear the expense the same as they would on any other railroad point out in the country.

Q. Does the shipper bear the expense of loading the cars?

A. He does.

2358 Q. Is there any considerable amount of team track freight handled at 28th Street?

A. Yes; there is quite a considerable amount.

Q. Yesterday in your testimony you referred to various zones. Will you please tell us what you mean by that term?

A. A zone is the term ordinarily used in New York Harbor for a nautical mile of 6,085 feet.

Q. You testified yesterday that the distance between the Erie at Jersey City and the Clyde-Mallory and Morgan Lines was one and two zones. Is there any other railroad whose lighterage terminals are located as close to these piers as the Erie lighterage terminals?

A. Yes; the D. L. and W. is about in the same relative position as the Erie.

Q. Is my understanding correct that the Morgan Line is at Pier 50 and the Clyde-Mallory at Pier 57?

A. The Mallory Line is at 34, 36 and 37, the Morgan Line at 49, 50 and 51, North River.

Q. What is the distance from the west shore lighterage terminal to the Morgan and Clyde-Mallory——

A. Three zones.

Q. By that you mean three nautical miles?

A. Nautical miles.

Q. How about the New York Central at 60th Street?

A. Two nautical miles.

2359 Q. The Erie at Weekawken.

A. Two nautical miles.

Q. P. R. R. at Jersey City?

A. One and two nautical miles.

Mr. MUCKLEY. What do you mean "one and two"?

The WITNESS. One to Pier 36, North River, and two to Pier 50, North River.

By Mr. PIERSON:

Q. P. R. R. at Greenville?

A. Five nautical miles to Pier 36, North River and six zones to Pier 50, North River.

Q. Is there any considerable amount of lighterage business handled at the Pennsylvania's Greenville terminal?

A. There is.

Q. The Lehigh Valley at Jersey City.

A. One zone, one nautical mile to Pier 36 and two to 50.

Q. Claremont terminal of the Lehigh Valley?

A. Five nautical miles to Pier 36 and six to Pier 50.

Q. Central Railroad of New Jersey?

A. Two nautical miles to Pier 36 and three nautical miles to Pier 50.

Q. How many miles from the New Haven's Harlem River terminal?

A. Ten nautical miles to Pier 36, North River, and eleven nautical miles to Pier 50, North River.

Pier 50, North River.

Q. And how about their Pier 37?

A. Four nautical miles to each of the piers.

2360 Q. Am I correct in my understanding that you testified yesterday that from the Erie terminal at Jersey City to Brooklyn ranged from three to six zones? Is that substantially correct?

A. Yes; substantially.

Q. What is the relationship of the Lehigh Valley, Claremont terminal, and the Greenville terminal of the Pennsylvania Railroad with respect to the Brooklyn deliveries?

A. They are very much closer.

Q. How about the Central Railroad of New Jersey?

A. They are much closer.

Q. Yesterday you referred to the actual running time of the Erie tugs between the Jersey City terminal and the Clyde-Mallory and Morgan Line piers. How does the actual running time compare in importance with the time consumed at the lighterage terminals and at the steamship piers?

A. The running time is frequently less of a factor than is the detention or the time consumed, we will call it digging boats out. It is really switching boats out from a location and getting them into another location, either at the steamship piers or at the lighterage terminal.

Q. Can you explain that a little more fully, what that operation is that causes the detention?

A. Well, when barges and lighters are loaded they are sometimes loaded several deep, that is, one outside of the other

2361 and if the boat could be towed as, we will say, one of the inner boats, it is necessary to move certain boats out of the way to get the particular boat that is to be towed and then replace the other boats that have been taken out of position and the same thing applies at times at the other side of the haul or movement; that is, that the movement has to be moved in to some particular point. Other times, when a boat is taken to a pier where there is considerable congestion it is not infrequent that the tug captain is told to take the boat to some other adjacent pier and leave it at some point other than that for which it is intended.

Q. Well, is this lighterage service between the Erie terminal at Jersey City and the steamship piers in the nature of a ferry service operating back and forth across the river?

A. Not by any means. Light boats, for example, that are required for loading at a particular pier may have to be procured from some other distant point in the harbor wherever boats might be available. This picture changes from day to day. What I have in mind is this: That a boat is required, we will assume for loading at Pier "X." It may be necessary to go several miles to get a boat and tow it up to Pier "X" for this loading.

Q. Do these tugs have idle time?

A. They have idle time. They naturally have to spend
2362 a certain amount of their running light. What I mean by that is a tug boat will go from one point to another in the harbor to secure a loaded boat. At other times a boat will be towed from one point to another point in the harbor and there will be nothing for the return movement so the tug must run light.

Q. What do you consider a normal number of operations per hour?

A. Practically all the roads in the harbor strive to make an average of a movement on one unit. That is, on a car float a lighter or a barge an hour. It is very rare that they are able to strike that average. I might say, incidentally, our average runs about three-quarters of a movement per hour—per tug hour.

Q. If the Gulf Steamship Lines did have any slight advantage in distance with relation to the location of the railroad lighterage terminal would that be offset, in your opinion, by any other factors?

A. It would. It would be a case of the average tons per boat being offset by the fact that no demurrage is collected, so that the time feature is not watched as it is at other piers where barges and lighters are under demurrage and an attempt is made to release them so as to prevent such demurrage and we have the use of the equipment.

Q. Are any of the eastbound boats of the railroad released by unloading on the pier?

2363 A. At the coastwise lines, as I testified yesterday, generally speaking, they are not, they are held under load at the coastwise piers until a direct movement can be made from the boat to the vessel.

Q. Is that for the convenience of the railroad or the steamship company?

A. It is not for the convenience of the railroad, but, obviously, it is for the convenience of the steamship company.

Q Now, on the west-bound freight, do you have to place empty barges and lighters?

A. We do.

Q. You have to obtain them from any part of the harbor where they are available?

A. That is true, wherever the boats happen to be available, and that picture is not constant by any means. Sometimes we have to go down to a Brooklyn pier to get lighters or barges for use at North River piers and vice versa.

Q. Mr. Muckley, in one of his questions, attempted to indicate that possibly the New York Central lighter might be more heavily loaded because of their substantial volume of business. Do you have any figures showing a comparison of the loading of New York Central lighters, or barges, on the Coastwise traffic compared with their general average on all lighterage traffic?

A. I have for the month of March 1938.

Q. Will you give us those figures, if they are available?

2364 Mr. MUCKLEY. If you have them, why not give them for all the roads.

Mr. PIERSON. I am asking about the New York Central.

A. New York Central, the average tons per boat between the complainant Gulf lines is 39, for all other lighterage traffic 43.8 tons per boat.

Mr. QUIRK. 43——

The WITNESS. 43.8.

By Mr. PIERSON:

Q. Yesterday on cross-examination you referred to a contract price with Spenser for loading and unloading lighters and barges of the railroad companies. Do you know whether or not that contract price resulted from competitive bidding?

A. I know that it was.

Mr. PIERSON. I think that's all I have, Mr. Examiner.

By Mr. ESHELMAN:

Q. Mr. Frauson, what is the topography of the ground between the Croxton Yard and your Jersey City yard? Is it level ground between? For instance, as you proceed east from the Croxton

Yard you are in what they sometimes call the Hackensack Meadows?

A. The Hackensack Meadows and then we run into the Palisades.

Q. And the Palisades, is that part of what they call the Bergen Hills?

A. Yes; that's right.

Q. Jersey City, at that point, is situated on high ground?

2365 A. Part is, and part is on low ground.

Q. Well, there is the high ground before you get down to the low ground, is that right?

A. Yes, sir. We go through a tunnel to get from the Croxton Yard to Jersey City.

Q. Your freight lines, then, operating from Croxton to Jersey City, have to go through a tunnel under the Bergen Hills?

A. Yes. They come out of the freight yards and they cross main line passenger tracks and then go through a tunnel.

Mr. ESHELMAN. Thank you.

Examiner KEPHART. Any other redirect?

By Mr. ESHELMAN:

Q. Might I just ask, is that also true of some of the other Jersey lines that have terminals on the Hudson River on the Jersey side, such as the West Shore and the Lackawanna?

A. Yes, sir; it is.

By Mr. KING:

Q. You have been discussing car float service and lighterage service. What is the distinction between the two?

A. A car float is a unit equipped with railroad tracks and that unit is placed at a float bridge to connect up with the land tracks so that an engine can push cars right on to this unit, push the freight car itself and then the car float is taken out of the float bridge to whatever point it is destined in the harbor.

2366 Barges and lighters are units not equipped with tracks and freight moved on such units are unloaded from the cars, placed on the barges and lighters and necessarily unloaded at the end of the journey.

Q. So you have loading and unloading in the lighterage service that you don't have in a car float service?

A. We do, yes, sir.

Re-cross-examination by Mr. MUCKLEY:

Q. When was that competitive bidding with Spenser, Mr. Frauson?

A. Approximately two years ago.

Q. Was the contract before that competitive, also?

A. I don't know, sir; that was long before my time.

Q. Does the Erie have any lighterage operations as much as 18, 19 or 20 miles?

A. No, sir.

Q. What is your longest operation, approximately?

A. Well, I mentioned yesterday down to Brooklyn.

Q. About eight nautical miles?

A. I think I testified up to——

Mr. PIERSON (interposing). Three to six.

A. Around six zones. That is getting down around the Bush dock territory.

By Mr. MUCKLEY:

Q. That is as far as you go, about?

A. Yes; that's right, Bush dock territory.

2367 Q. Is your lighterage operation efficient, in your opinion?

A. I hope so.

Q. You mentioned the Morgan Line lighters and tugs. You said they were all over the harbor. You have seen them up there, have you?

A. I have seen them; yes, sir.

Q. Do you think that their lighterage operations are as efficient as yours or yours as efficient as theirs?

A. I haven't the slightest idea, sir.

Q. Do you think you have more tonnage than they do?

A. I couldn't answer that.

Q. You don't have any opinion as to whether your lighterage operations are as efficient as theirs?

A. I know what we have—I couldn't answer.

Q. You say yours are efficient?

A. I say I hope they are.

Q. Why, Mr. Frauson, did you pick the month of December 1937 and March 1938 for your statement as to average load per lighter?

A. March 1938 was selected as being somewhat of an average month of most of the railroads.

Q. Why do you say "average"? As to interchange with the water lines or what?

A. In a conference or meeting that we held, the discussion brought out that March 1938 was more or less an average
2368 month for the majority of the roads involved for these particular times. In our case, it was an exceptionally low month and I of my own accord, picked December 1937, which was more nearer what we would call one of our average months.

Q. How many months did you handle in 1937 in December?

A. In the neighborhood of 86,000 tons.

Q. What was your yearly figure for 1937?
A. I don't know.
Q. You say 80,000 tons. Is that your total lighterage?
A. Yes, sir. That is in round figures, 80,000 tons.
Q. What was your interchange with the water lines?
A. 2,032 tons.
Q. That was less interchange with the water lines out of 80,000 total than you had in March 1938 out of 50,000?
A. Yes, sir.
Q. Would you say that that was representative of the interchange with the water lines, December 1937, where you only had 2,000 tons?
A. I say December 1937 was more representative of our general lighterage business.
Q. Yes; but it was less representative of your lighterage business with the water lines?
A. I have so testified.
Q. Yes. Could you give us the average load per lighter as to any other railroad besides the Erie and the New York
2369 Central?
A. I can.
Q. Will you give them to us please?
A. For March 1938?
Q. Whatever you have there.
A. D. L. & W., Gulf Lines, 34.1; other lighterage traffic 46.8. Pennsylvania, Gulf Lines, 54.8; Pennsylvania Railroad, 47.2.
Q. What do you mean by that?
A. All other lighterage traffic 47.2. The Erie you have.
Q. Yes.
A. B. & O., C. N. J. combined, Gulf Lines, 41.6; all other lighterage 37.1. New Haven, Gulf Lines 24.6; all other 30.5. Lehigh Valley, Gulf Lines, 40 tons per boat, all other lighterage traffic 52 tons per boat.
Q. That's all of it, is it?
A. Yes, sir.
Mr. MUCKLEY. That's all—just a minute.

By Mr. MUCKLEY:

Q. Isn't March 1938 about as low a month as the railroads have had for some time as far as traffic is concerned—general traffic?
A. In our particular case, that is of the Erie: yes. The other roads were of the opinion—generally of the opinion—that that was an average month for them for these particular
2370 times.
Q. Were any figures presented as to showing the number of tons handled then as compared with other months?

A. Not to me.
Q. What?
A. Not to me.
Q. You don't think it representative for the Erie?
A. It is rather low for the Erie.
Q. Do you think it is representative for the other lines?
A. I do.
Q. What do you base that statement on?
A. Checking some of our movements that we ordinarily have. We did not have them in the month of March.
Q. I didn't mean that. I mean, what do you base your statement on that the month of March is representative for the other New York Harbor rail lines?
A. By men that were qualified for the railroads so stated.
Q. Stated to you. That's all.
Examiner ARCHER. Any further questions?
Mr. PIERSON. I have just one.
Mr. QUIRK. Let me carry out that idea, just one second.

By Mr. QUIRK:

Q. Have you ever examined the Interstate Commerce Commission reports that show tons handled and revenue for the Eastern lines and other railroads by quarters and by months?
2371 A. I have, but not recently, sir.
Q. Have you seen the reports of the Commission as to tons carried? Revenue and net railway operating income for the months, say, January, February, and March, 1938, compared with '39?
A. No, sir.
Q. You don't know anything about it?
A. No, sir; I do not.
Mr. PIERSON. What is the explanation for the relatively heavy loading of the Pennsylvania and B. & O., Central of New Jersey lighters and barges on the traffic to and from the complainant steamship lines as compared with their general averages?
The WITNESS. They carry over their railroad and handle in lighterage service a considerable quantity of iron pipe and iron and steel articles which generally are not handled in any such quantity by the other railroads—other Trunk Line railroads.
Mr. PIERSON. That's all I have.

By Mr. MUCKLEY:

Q. You don't have any average lighter loads for any other months, have you?
A. No, sir.
Mr. MUCKLEY. That's all.

Examiner ARCHER. Any further questions of this witness?
(No response.)

2372 *Exhibit 74*

Witness Kendall

Detention at New York on cars loaded with coastwise traffic, break-bulk lines

	June 1939			July 1939			August 1939			Total		
	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average
Clyde Mallory	46	39	0.8	43	43	1.0	44	28	0.6	133	110	0.8
Morgan Line	52	40	.8	53	50	.9	58	55	.9	167	145	.9
Pan Atlantic	10	2	.2	9	8	.9	12	14	1.2	31	24	.8
Ocean S. S. Co	28	13	.5	21	15	.7	26	8	.3	75	36	.5
Eastern S. S. Co	6	0	.0	16	1	.1	9	7	.8	31	8	.3
Old Dominion	5	2	.4	5	0	0	19	15	.8	29	17	.6
New Tex	13	9	.7	18	20	1.1	17	34	2.0	48	63	1.3
Total	160	105	.7	169	137	.8	185	161	.9	514	403	.8

NOTE.—Railroads included: CNJ, DL&W, Erie, LV, NYNH&H, PRR, NYC.
Period checked: June 12-17, inclusive, 1939; July 10-15, inclusive, 1939; Aug. 14-19, inclusive, 1939

2373 *Received in evidence as revised exhibit 74, October 26, 1940*

HANDLING OF CARS AT NEW YORK LOADED WITH COASTWISE TRAFFIC FOR STEAMSHIP BREAK BULK LINES

On pages 1329 to 1333, witness was asked to revise Exhibit 74 to show period of car movements in per diem days. Other questions were asked in connection with exhibit which are answered in this memorandum to the extent practicable, based on records which are available.

Attached is revised Exhibit 74. This exhibit covers the time from the arrival of the car in the break up yard until it is released at the lighterage pier. It will be noted that there are 484 cars included in the revised exhibit against a total of 514 in the one filed at the time of the hearing. The difference is accounted for by the inability of the investigators to complete the record on 30 of the cars and they were, therefore, dropped from this compilation.

Question was raised as to the handling of cars under load with traffic for the break bulk lines, with particular reference to their movement from the time of arrival in New York terminals to placement at the piers, and request was made for information as to movements and time spent in such movements from one yard to another in the process of handling the car to the lighterage piers. This has been reviewed and the revised Exhibit 74 has been compiled to include any inter-yard movement which may have taken place with any car. Of the seven railroads bringing coastwise traffic into New York, the movement of cars is direct from the break up yard (where trains arrive) to the lighterage pier.

except in three instances. In those three, there is a movement direct from the break up yard to the yard serving the lighterage piers. In the case of the other railroads, trains are so classified in advance that they are handled direct to the lighterage yard. The revised statement includes all of the time cars containing freight for break bulk lines are in New York area from arrival to release at lighterage pier.

Witness was asked as to use made of cars subsequent to release at lighterage pier. Generally speaking, no book record is maintained of movement of empty cars within the New York Terminal. For this reason it is not possible to give a complete answer to the question. A study develops the following:

2374 That cars released of freight for break bulk lines are pulled from the piers immediately upon release if there are other cars awaiting similar unloading. When unloading of all cars on hand for the pier is completed, such cars as are needed for outbound loading are retained, and others are returned to yards for forwarding to owners empty, or for such distribution for loading as may be directed. Again, as many railroads do not maintain movement records of system empties, it is practically impossible to tell when system cars may have been moved from yards to line points for loading. The next subsequent movement of a car in the car accountant's books would show when it was loaded. To determine the movements of these empty cars the only possible way would be to examine yard and train conductors' reports of cars handled, which would be an interminable task.

To obtain data which would illustrate the movement of these cars, records of 40 cars handled by the Erie Railroad in coastwise service during the months of June, July, and August 1940 were checked for disposition, with the following result:

Cars moved out empty in home route or delivered to owners in New York District	11	
Cars loaded west same day as unloaded	10	
Cars loaded west day following release	5	
Cars loaded west 2d day following release	5	
Cars loaded west 3d day following release	4	
Cars loaded west 9th day following release	1	total 36
No record available	4	total 40

7 of the 11 cars listed as disposed of empty were NYC gondola cars unloaded at Weehawken and delivered empty to owners at that point same date as unloaded. 2 were refrigerator cars which were unwanted at the pier and promptly returned to perishable service. One was a system box car (Erie), and the other a DL&W box moving to owner at Croxton.

It will be noted that 25, or 69%, of the cars for which complete records were available were reloaded in the New York Terminal—

10, or 40%, of the 25 being reloaded same date as released. These 16 cars were reloaded at Dock 8, Jersey City, after having been unloaded at that point.

Fifteen cars loaded subsequent to date of release were loaded at various stations in the New York Terminal area.

2375 Loaded movement upon which this summary is based was not necessarily the first use made of the car subsequent to release, but was the first movement of car beyond the New York Terminal area. Records are not available to indicate what handling may have been accorded cars locally within the terminal.

On page 1331 of the record question was raised as to cars being held short of destination at the request of steamship company, or shipper, or consignee. A careful investigation indicates that no cars were held at any point at the request of steamship company, or shipper, or consignee. An examination of the movement of all of the cars included in Exhibit 74 indicates that they were handled promptly from the date of billing at the point of origin until arrival at New York. In rare instances were there apparent slight delays, and in such cases investigation indicates that cars were set out for minor repairs or because of their routing moved through various yards and junction points, causing delays which would not accrue to cars moving in direct route. Examples:

PRR 825040, from Allenport, Pa., June 10, arrived New York 1:13 A. M., June 14. Car was shopped en route at Altoona.

PRR 100974 from Zanesville, June 8, arrived New York June 15. Car was handled via an indirect route and caught a two-day over Sunday delay at a little used point in interchange.

Question was asked if any of the cars shown in Exhibit 74 were handled by floats to steamship piers: The answer is "none." They were all released at lighterage piers.

2376 *Revised Exhibit 74*

Witness Kendall

Detention at New York on cars loaded with coastwise traffic, break-bulk lines

	June 1939			July 1939			August 1939			Total		
	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average
Clyde Mallory	46	37	0.81	39	36	0.92	44	41	0.93	129	114	0.88
Morgan Line	51	37	.73	57	50	.88	55	39	.71	163	126	.77
Pan Atlantic	11	4	.36	8	8	1.00	11	7	.64	30	19	.63
Ocean S. S. Co.	25	18	.72	17	13	.80	21	15	.71	63	46	.73
Eastern S. S. Co.	11	4	.36	21	9	.42	11	11	1.00	43	24	.56
Old Dominion	1	0	.00	1	0	.00	17	2	.12	19	2	.11
New Tex	9	9	1.00	16	11	.69	12	15	1.20	37	35	.95
Total	154	109	.71	159	127	.80	171	130	.76	484	366	.76

NOTE.—Railroads included: CNJ, DL&W, Erie, LV, NYC, H&H, PRR.
Period checked: June 12-17, inclusive, 1939; July 10-15, inclusive, 1939; Aug. 14-19, inclusive, 1939.

Exhibit 75

Witness Kendall

Detention at New Orleans, La., on cars loaded with traffic destined to coastwise water carriers

Steamship lines	January 1939			February 1939			March 1939			April 1939			May 1939			June 1939			Total		
	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average
Clyde Mallory	83	1	0.01	83	1	0.01	54	0	0.00	90	4	0.04	85	3	0.04	80	1	0.01	475	10	0.02
Coast Trans	17	0	.00	19	0	.00	19	0	.00	24	1	.04	28	0	.00	20	0	.00	127	1	.008
Moore-MacCormack	37	14	.38	54	16	.30	29	0	.00	32	1	.03	20	1	.05	16	9	.56	188	41	.22
Morgan Line	117	18	.15	82	24	.29	120	12	.10	82	15	.18	97	21	.22	94	28	.30	592	118	.20
Pan Atlantic	310	30	.10	272	27	.10	229	23	.10	182	182	1.0	219	107	.49	221	79	.36	1,433	448	.31
Totals	564	63	.11	510	68	.13	451	35	.08	410	203	.50	449	132	.29	431	117	.27	2,815	618	.22

Roads checked: GM&N, IC, L&A, L&N, MoP, Sou, TNO, T&P.

2378 *Received in evidence as revised exhibit 75, October 26, 1940*

HANDLING OF CARS CONTAINING TRAFFIC FOR BREAK BULK STEAMSHIP LINES AT NEW ORLEANS, DOCKETS 25728 AND 25878

In response to Mr. McCollester's request, pages 1331 to 1353 of the record, the data shown on Exhibit 75 has been re-examined and a new statement prepared, copy attached, in accordance with request made.

Exhibit 75 included information as to cars delivered break bulk lines at New Orleans for the six months—January 1939 to June 1939, inclusive. It is stated in the record that time was figured on the basis of per diem days, but the witness was in doubt after hearing other testimony as to whether the time as shown included period cars were in the possession of the switching lines from the time of delivery by the trunk lines and stated that a recheck would be made. It was understood by the witness that the request originally made upon the field force of the Car Service Division was to include the time expressed in per diem days between arrival of cars at New Orleans Terminal and delivery to steamship pier.

The records were re-examined for the months of January, March, and May 1939. It has been developed that the data included in Exhibit 75 showed time only from arrival at New Orleans until delivery to switching lines serving the break bulk lines. This time, in per diem days, was shown to have been, for the break bulk lines as a whole:

	Days
January	0.11
March	.08
May	.29

In rechecking delivery of cars to switching lines, no attempt has been made to include any of the cars delivered by the Missouri Pacific or the Texas & Pacific, although data as to cars delivered by these two trunk lines to the switching lines is included in statements of (1) time on switching lines to release, (2) subsequent to release, and (3) total time until cars are returned to trunk lines.

Revised Exhibit 75 shows time cars were on road haul lines prior to delivery to switching lines, when destined to break bulk steamship lines—Clyde Mallory, Moore MacCormack, Morgan,
2378-A Pan Atlantic, for the months of January, March and May, 1939, such deliveries being made by the Gulf, Mobile & Northern, Illinois Central, Louisiana & Arkansas,

L&N, Southern, Texas and New Orleans. The average time, figured on a basis of per diem days, cars were on road haul lines was:

	Days
January	0.11
March	.12
May	.39
Average for the 3 months	.19

Time in per diem days on switching lines to release by break bulk lines, and including cars delivered to such switching lines by the MP and T&P, was, respectively:

	Days
January	1.02
March	.77
May	.86
Average for the 3 months	.89

Time in per diem days cars were on switching lines after release by break bulk lines, and including cars delivered to switching lines by the MP and T&P was, respectively:

	Days
January	1.07
March	1.80
May	1.75
Average for the 3 months	1.50

Total time in per diem days cars were on switching lines, that is, from time of receipt from road haul lines until return to such lines:

	Days
January	2.09
March	2.57
May	2.61
Average for the 3 months	2.39

A large number of cars delivered to break bulk lines were used for return loading to truck line connections. Under the rules per diem switching reclaims are figured on the basis of loaded cars interchanged. At New Orleans, for instance, the switching reclaim is an arbitrary of 2.46 days. On cars delivered to switching lines under load and returned to trunk line under load would be given two arbitraries representing a total time of 4.92 days. Many of the cars included in statement attached showing deliveries to break bulk lines for the months of January,
2379 March, and May, 1939, were loaded in both directions and were, therefore, subject to the double arbitrary reclaim. In this revised exhibit the time shown on switching lines as 2.39 per diem days represents the actual average time that the 1,417

cars were on switching lines serving the break bulk steamship lines, and covers the period from the time cars were delivered by road haul carrier to switching line until cars were delivered back to road haul carriers, either loaded or empty. As a number of these cars were returned loaded, a good part of the 2.39 per diem days, namely 1.50 days, is in no way chargeable to break bulk lines. As shown by page 1276 of the record, witness McGowan testified that where cars were returned loaded he counted two cars instead of one as in our computation.

It should be emphasized that there was no delay to cars for break bulk water carriers on switching lines or on trunk line connections due to any inability or failure of steamship lines to accept delivery. The time hereinbefore referred to and shown as periods cars spent on switching lines or trunk lines in New Orleans (and which times were the averages for all cars included in the study), is merely the time required by the rail carriers in the handling of cars under actual operation.

The detention of cars for Seatrain is of an entirely different character. It was testified that this averaged, on trunk lines, 3.46 days per car. Cars for Seatrain are held by trunk lines until Seatrain orders cars, or advises they will be accepted. In addition to the 3.46 days, there is an item of .54 days per car while in possession of the switching line serving Seatrain.

Revised exhibit 75

Witness Kendall

Time spent at New Orleans, La., on cars loaded with traffic destined to coastwise water carriers

Steamship lines	Time in per diem days, on delivering lines												Time in per diem days, on switching lines to release											
	January 1939			March 1939			May 1939			Total			January 1939			March 1939			May 1939			Total		
	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average
Clyde Mallory	163	1	0.02	72	1	0.01	70	3	0.04	305	5	0.02	63	49	0.78	72	49	0.67	70	54	0.77	205	151	0.74
	19			7			9			35			9	6	.67	7	8	1.14	9	11	1.22	25	25	1.00
Moore-McCormack	126	11	.42	13	1	.08	14	1	.07	53	13	.25	26	36	1.38	13	8	.62	14	17	1.21	53	61	1.15
	10			12			5			27			10	10	1.00	12	19	1.58	5	8	1.60	27	37	1.37
Morgan	109	10	.09	112	12	.11	75	19	.25	296	41	.14	109	72	.66	112	36	.50	75	52	.69	296	180	.61
	24			9			23			56			24	24	1.00	9	9	1.00	23	17	.74	56	50	.89
Pan-Atlantic	277	30	.11	193	31	.16	177	109	.62	647	170	.26	277	326	1.18	193	171	.89	177	167	.94	647	664	1.03
	34			31			43			108			34	38	1.12	31	27	.87	43	30	.70	108	97	.88
Total	475	52	.11	390	45	.12	336	132	.39	1,201	229	.19	475	483	1.02	390	293	.75	336	290	.86	1,201	1,056	.88
	77			56			80			216			77	78	1.01	59	63	1.07	80	66	.83	216	207	.96
Grand total	552			449			416			1,417			552	561	1.02	449	346	.77	416	356	.86	1,417	1,263	.89

Witness Kendall—Continued

Time spent at New Orleans, La., on cars loaded with traffic destined to coastwise water carriers—Continued

Steamship lines	Time in per diem days on switching lines after release												Total time in per diem days on switching lines											
	January 1939			March 1939			May 1939			Total			January 1939			March 1939			May 1939			Total		
	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average	Cars	Days	Average
Clyde Mallory	[1] 63	147	2 33	72	179	2 49	70	181	2 59	205	507	2 47	63	[2] 196	3 11	72	227	3 15	70	235	3 36	205	658	3 21
Moore-McCormack	[1] 9	10	1 11	7	13	1 86	9	38	4 22	25	61	2 44	9	16	1 78	7	21	3 00	9	49	5 44	25	86	3 44
Morgan	[1] 26	36	1 38	13	31	2 38	14	12	86	53	79	1 49	26	72	2 77	13	39	3 00	14	29	2 07	53	140	2 64
	[1] 10	5	50	12	30	1 58	5	2	40	27	36	86	10	15	1 50	12	38	3 17	5	10	2 00	27	63	2 33
Pan Atlantic	[1] 108	33	30	112	213	1 90	75	129	1 72	296	375	1 27	109	[2] 105	96	112	260	2 40	75	181	2 41	296	555	1 87
	[1] 24	9	38	9	8	89	23	21	91	56	38	68	24	33	1 38	9	17	1 89	23	38	1 65	56	88	1 57
Total	[1] 277	326	1 18	193	318	1 65	177	304	1 72	647	948	1 47	277	652	2 35	193	489	2 53	177	471	2 66	647	1,612	2 49
	[1] 34	25	74	31	26	84	43	43	1 00	108	94	87	34	63	1 85	31	53	1 71	43	73	1 70	108	189	1 75
Grand total	[1] 475	562	1 14	380	741	1 30	336	626	1 86	1,289	1,969	1 59	475	1,025	2 16	380	1,024	2 63	336	916	2 73	1,201	2,965	2 47
	[1] 77	49	64	59	66	1 12	80	104	1 30	216	219	1 01	77	127	1 65	59	129	2 19	80	170	2 13	216	426	1 97
	552	591	1 07	439	807	1 80	416	730	1 75	1,417	2,128	1 50	552	1,152	2 09	449	1,153	2 57	416	1,086	2 61	1,417	3,391	2 39

[1] GM&N, IC, L&A, L&N, Sou, TNO.
[2] MOP, T&P.

2381 *Received in evidence as Supplemental Exhibit 76, October 26, 1940*

PERIOD OF LIGHTER SERVICE FOR WHICH RAILROADS ARE RESPONSIBLE—NEW YORK HARBOR FOR DELIVERY TO PAN ATLANTIC, CLYDE MALLORY, MORGAN LINE

Following the presentation of testimony as to time of lighters in delivery service at Pan Atlantic, Clyde Mallory and Morgan Line piers which for the six months February to July, 1940, inclusive for the Pan Atlantic averaged 25 hours; the six months January to June, 1940, inclusive for Clyde Mallory 23.5 hours; and the six months January to June, 1940, for the Morgan Line 28.37 hours (Exhibit 76), request was made of the witness to determine the periods of time lighters were engaged in this service for which the railroads were responsible.

The records for these six-month periods, and for movements to the three steamship lines referred to, have been re-examined. It has been developed that time for which railroads were responsible averaged for the Pan Atlantic 18.9 hours; for Clyde Mallory 16 hours; for Morgan 16.4 hours. These averages are the periods from the time the lighter begins to receive its load until the lighter is alongside steamship pier and the water carrier is ready to receive the lighter. A lighter may receive several lots of freight which is loaded at different times. Further, the lighter may arrive at the steamship pier at 2:00 A. M., but in such case does not report until 8:00 A. M.; that is, the hour of reporting is that time when the steamship line is ready to accept the freight. Any intervening dead or idle time awaiting acceptance of freight by steamship line has been charged to railroads.

2382 SUPPLEMENTAL TO STATEMENT OF TIME CARS HANDLING FREIGHT FOR BREAK BULK LINES AT NEW ORLEANS ARE IN POSSESSION OF TRUNK LINES PRIOR TO DELIVERY TO SWITCHING LINES

Witness McDermott for the Missouri Pacific and Witness Long for the Texas and Pacific stated that detention on cars delivered was 1.14 and 1.67 days, respectively. These figures compare with .19 days average for the three months January, March and May, 1939, as shown on revised Exhibit 75, for the GM&N, IC, L&A, L&N, Southern and TNO (SP).

On page 1291 of the record, Witness McDermott built up a detention on cars delivered by MoPac to break bulk lines of 6.60 or 6.20 days. To the 1.14 average on Missouri Pacific he adds the 2.46 days arbitrary reclaim to reach a total of 4 days. It is not

clear how he arrives at the addition to 6.60 or 6.20 days, especially as Witness Long testified for the T&P that their total detention was 4.13 days, when TP detention exceeds that of MoP (page 1300 of the record.)

Data included in revised Exhibit 75 are the result of careful checking of all cars delivered by the MP for account of Moore MacCormack, Clyde Mallory, Morgan and Pan Atlantic for the months January to July, inclusive. This detention was determined to be an average of 2.36 days, of which 1.38 days constituted the average time until cars were released at shipside.

It will be noted that Mr. McDermott's figure of 2.46 was an average arbitrary, which includes all cars delivered switching lines, including domestic and export traffic, while the 1.38 figure was determined to be the actual time from delivery to switching lines to release on coastwide traffic to Atlantic Ports.

It will be recalled that no part of the 1.38 days was due to any inability or failure of steamship line to receive, but was all a part of normal operations.

2383 DETENTION OF CARS HANDLED BETWEEN TRUNK LINE CONNECTIONS AND BREAK BULK LINES (LARGELY, IF NOT ENTIRELY, PAN ATLANTIC)

Under this caption Mr. McCollester advises the Commission, in letter dated September 25, as to break down in figures between freight delivered to and received from break bulk lines on traffic interchanged by the Hoboken Manufacturers with trunk line connections.

It is shown that east-bound—that is, delivered to steamship—11 cars were handled at an average detention of 2.27 days; west-bound—freight received from steamship—617 cars were handled with average detention 3.74 days. As there were 11 cars in-bound to the Hoboken during the six-month period March to July 1940, inclusive, the number handled is so insignificant that comment is unwarranted. It is understood that the Pan Atlantic received practically no freight at the pier served by the Hoboken but that its steamships dock at this pier for distributing their cargo and then move to the opposite shore for taking an out-bound cargo. Witness McGowan's statement in the record and accompanying Exhibit (72) supplemented by Mr. McCollester's letter of September 25, shows an average detention of 3.74 days to 617 cars, stated to be "Largely, if not entirely, Pan Atlantic."

As it is customary to load in-bound freight from piers to cars and forward such cars promptly, an investigation has been made to ascertain, if possible, an explanation as to the apparent excessive

detention indicated of 3.74 days per car. It has been possible to identify 532 out 617 cars loaded with freight from the Pan Atlantic Line and forwarded by the Hoboken to trunk line connections during the five-month period. Such investigations shows that figured on a per diem basis an average of 2.28 days elapsed between the time that the ship docked until the cars were delivered to connections under load with Pan Atlantic freight by the Hoboken. It was not practicable to determine the time cars were actually placed for this loading, and therefore the time from the date that the ship docked was compiled. No explanation is available as to how Mr. McGowan may have arrived at his average detention figure of 3.74. Our investigation shows that the Hoboken picks up 2384 equipment on its line for placing at the Pan-Atlantic pier to provide for loading of in-bound coastwise traffic. In a minority of cases the Hoboken may place cars for Pan Atlantic loading which have been ordered empty from trunk line connections for return loading. Of the cars so ordered, some may be used for Pan Atlantic loading, some for Seatrain, and others for any traffic from warehouses located on the Hoboken for off-line movement to various railroads. We have records of cars which were in the possession of the Hoboken varying lengths of time up to 69 days which were used for loading of Pan American freight. One such car, PRR 51386, received by the Hoboken under load February 2, 1940, was used for loading freight brought in by Pan Atlantic Line boat which docked April 8, and which car moved off line April 11. Other cars used for handling of freight from this same docking were in the possession of the Hoboken 58, 50, 38, 15, 14, 11, 10, etc., days. 20 of the 24 cars used for loading Pan Atlantic freight from the boat which docked April 8 were received by the Hoboken under load.

For the boat which docked April 22, 26 out of 39 cars were received under load, one of which had been held by the Hoboken 82 days, another 70, another 54, another 30, and others for lesser lengths of time. These cases are illustrative of the results of all checks made on loadings of in-bound freight from the Pan-Atlantic.

Obviously it would be incorrect to charge car detention to Pan Atlantic traffic when the cars were received under load by the Hoboken for movement via Seatrain or release at industries served by the Hoboken. Likewise, it would be unfair to charge detention account Pan-Atlantic business to cars which were ordered from connections empty for return loading when such cars were accepted to be available for any loading which might originate on the Hoboken.

2385

Exhibit 76

Pan-Atlantic Line, February to July 1940, inclusive

	Total lighters	Total tons	Average tons per lighter	Total hours detention	Average hours per lighter
C. N. J.					
D. L. & W.	20	744	37.2	744	37.2
Erie	47	1,432	30.5	1,019	21.7
L. V.	16	336	21.0	312½	19.5
N. H.	20	423	21.2	330½	16.6
N. Y. C.	40	1,088	27.2	631	15.8
P. R. R.	107	3,811	35.6	2,906	27.2
	21	560	26.7	840½	40.0
Total	271	8,394	31.0	6,783½	25.0

2386 *Summary showing totals of all connecting line lighters and averages, giving number of lighters, tons, hours—for period Jan. 1, 1940, to June 30, 1940, inclusive*

SOUTHBOUND—CLYDE MALLORY

Connecting line	Number of lighters	Number of tons	Number of hours		Average per lighter	
			Hours	Minutes	Tons	Hours
Baltimore & Ohio R. R.						
Central R. R. Co. of New Jersey	70	2,712	1,371	40	38.74	19.5
Delaware, Lackawanna & Western R. R.	81	2,455	1,557	38	30.3	19.22
Erie Railroad Co.	167	4,673	3,618	9	34.98	27.98
Lehigh Valley R. R. Co.	116	3,195	2,917	26	27.54	25.14
New York Central R. R. Co.	64	2,641	754	15	41.28	11.78
New York, New Haven & H. R. R. Co.	304	9,534	9,213	1	31.36	30.22
Pennsylvania R. R. Co.	123	3,681	2,165	55	29.92	17.6
	225	8,094	5,433	21	35.95	24.14
Grand total	1,150	36,985	27,031	25	32.1	23.5

2387 *I. C. C. Docket No. 25728—Summary showing total of all connecting line lighters and averages giving number of lighters, tons, hours—lighters detained for 6 months period Jan. 1, 1940—June 30, 1940*

SOUTH-BOUND—MALLORY, YEAR 1940

Connecting lines	Number lighters	Number hours	Number tons	Average per lighter	
				Hours	Tons
Central R. R. of N. J.					
Delaware, Lackawanna & West. R. R.	99	3,050	2,770	30.81	27.98
Erie Railroad	142	3,517	6,727	24.77	47.37
Lehigh Valley R. R.	175	4,539	6,295	25.94	35.46
New York Central R. R. Co.	149	4,862	11,771	32.63	79.00
Pennsylvania R. R.	304	8,547	15,283	28.11	50.27
Baltimore & Ohio R. R.	262	7,572	16,818	28.90	64.19
N. Y., N. H. & Hartford R. R. Co.	104	3,430	3,833	32.98	36.86
	85	1,938	3,366	22.80	37.72
Total	1,320	37,445	66,613		
Averages, 1940 (6 months)				28.37	50.46

2388 *Exhibit 77*

Excerpts from Amended Answer of Hoboken Manufacturers Railroad Company in Civil Action 6-414 in the United States District Court, Southern District of New York, entitled "The Pennsylvania Railroad Company, Plaintiff, against Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Company, Defendants."

* * * * * * *

"Defendant Hoboken Manufacturers Railroad Company, by its attorneys, Lord, Day & Lord, as to its amended answer to the complaint herein, upon information and belief:"

* * * * * * *

"FOR AN ELEVENTH SEPARATE AND COMPLETE DEFENSE TO THE FIRST CAUSE OF ACTION

"Seventeenth: Alleges that the question of the right of plaintiff by agreement or otherwise to refuse permission for the delivery of its cars by this defendant to defendant Seatrain in the performance of through transportation and the question of the amount of compensation which plaintiff is entitled to demand and receive on its cars, if any, so delivered are questions which, under the provisions of the Interstate Commerce Act, are to be determined by the Interstate Commerce Commission and are not within the primary jurisdiction of this Court.

"Eighteenth: Alleges that the aforesaid questions are now awaiting determination in a proceeding pending before the Interstate Commerce Commission, to which plaintiff and both defendants are parties, to wit: Hoboken Manufacturers Railroad Company *v.* Abilene & Southern Railway Company et al., Docket No. 25728 on the docket of the Commission, and therefore this Court is without jurisdiction of this suit.

* * * * * * *

"LORD, DAY & LORD,

"*Attorneys for defendant, Hoboken Manufacturers Railroad Company, Office and Post Office Address, 25 Broadway, Borough of Manhattan, City of New York.*

"PARKER MCCOLLESTER,

"*Of Counsel.*"

2389

Exhibit No. 78

Excerpts from Amended Answer of Seatrain Lines, Inc., in Civil Action 6-414 in the United States District Court, Southern District of New York, entitled The Pennsylvania Railroad Company, Plaintiff, against Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Company, Defendants.

* * * * * *

"Defendant Seatrain Lines, Inc., by its attorneys, Lord, Day & Lord, as its amended answer to the complaint herein upon information and belief:

* * * * * *

"FOR A TENTH SEPARATE AND COMPLETE DEFENSE TO THE FIRST CAUSE OF ACTION

"Twenty-ninth: Alleges that the question of the right of plaintiff by agreement with defendant Hoboken or otherwise to refuse permission for the delivery of its cars to this defendant in the performance of through transportation and the question of the amount of compensation which plaintiff is entitled to demand and receive on its cars, if any, so delivered are questions which, under the provisions of the Interstate Commerce Act, are to be determined by the Interstate Commerce Commission and are not within the primary jurisdiction of this Court; and further alleges

"Thirtieth: That the aforesaid questions are now awaiting determination in a proceeding pending before the Interstate Commerce Commission, to which plaintiff and both defendants are parties, to wit: Hoboken Manufacturers Railroad Company *v.* Abilene & Southern Railway Company et al., Docket No. 25728 on the docket of the Commission, and therefore this Court is without jurisdiction of this suit.

* * * * * *

"LORD, DAY & LORD,

"*Attorneys for Defendant, Seatrain Lines, Inc., Office and Post Office Address, 25 Broadway, Borough of Manhattan, City of New York.*

"PARKER MCCOLLESTER,

"*Of Counsel.*"

2390

Exhibit 79

Witness Eyre

Summary of per diem reports submitted by Hoboken Manufacturers Railroad Company to the Pennsylvania Railroad Company showing the number of car days detention to Pennsylvania Railroad freight cars

Month	Number of car-days	Month	Number of car-days
Year 1932—September	144	Year 1937—January	1,978
October	173	February	2,250
November	274	March	2,170
December	327	April	2,628
Year 1933—January	383	May	2,330
February	444	June	2,649
March	500	July	2,124
April	421	August	2,560
May	600	September	1,984
June	831	October	1,808
July	728	November	2,331
August	857	December	2,546
September	827	Year 1938—January	2,495
October	838	February	2,152
November	706	March	2,850
December	905	April	3,308
Year 1934—January	971	May	3,120
February	703	June	2,548
March	802	July	2,319
April	1,056	August	2,395
May	1,386	September	2,051
June	1,248	October	1,814
July	1,374	November	1,884
August	1,107	December	2,513
September	1,399	Year 1939—January	2,724
October	1,660	February	2,770
November	1,446	March	2,892
December	1,065	April	2,360
Year 1935—January	2,012	May	2,517
February	1,883	June	2,508
March	2,030	July	2,409
April	1,[illegible]	August	2,152
May	1,[illegible]	September	2,365
June	1,935	October	3,687
July	1,882	November	3,175
August	1,802	December	2,548
September	1,626	Year 1940—January	2,791
October	1,607	February	3,148
November	1,174	March	2,693
December	1,041	April	1,735
Year 1936—January	1,574	May	1,506
February	1,804	June	1,650
March	1,610	July	2,046
April	1,604		
May	2,032		
June	1,622		
July	1,587		
August	1,962		
September	1,762		
October	1,802		
November	1,503		
December	1,491		

Total car-days detention from September 1932 to July 1940, both inclusive 167,058

2391

Exhibit 80

Summary of per diem reclaim reports submitted by Hoboken Manufacturers Railroad Company to the Pennsylvania Railroad Company showing the amounts claimed therein by Hoboken Manufacturers Railroad Company as due from the Pennsylvania Railroad Company

Month	Amount of reclaim	Month	Amount of reclaim
Year 1932—August	$27 00	Year 1935—January	$424 18
September	284 22	February	361 16
October	296 92	March	487 68
November	267 88	April	439 42
December	343 78	May	342 80
Year 1933—January	271 52	June	391 16
February	355 32	July	457 20
March	379 10	August	439 42
April	359 94	September	401 32
May	422 52	October	429 30
June	448 76	November	401 32
July	516 16	December	390 52
August	399 30	Year 1936—January	474 98
September	363 22	February	546 10
October	342 90	March	474 98
November	299 72	April	508 16
December	261 62	May	485 30
Year 1934—January	383 54	June	416 94
February	271 78	July	408 94
March	363 22	August	429 30
April	403 86	September	402 28
May	434 34	October	408 94
June	406 40	November	396 24
July	477 52	December	447 04
August	396 24		
September	406 40		
October	474 98		
November	393 22		
December	398 30		

SUMMARY

1932 (August to December 1932, inclusive)	$1,209 50
1933	4,219 98
1934	4,749 80
1935	4,955 54
1936	5,466 18
Total	20,600 50

2392

Exhibit 81

LORD, DAY & LORD

25 Broadway, Cunard Building

NEW YORK, *September 25, 1940*

Hoboken Manufacturers Railroad Co. v. Abilene & Southern Ry. Co. et al., Docket No. 25728; New Orleans & Lower Coast R. R. Co. v. Akron, Canton & Youngstown Ry. Co. et al., Docket No. 25878

INTERSTATE COMMERCE COMMISSION,

Washington, D. C.

GENTLEMEN: During the course of the hearing in the above case, it was testified that the New York Harbor trunk lines, be-

sides delivering freight to Seatrain in cars via the switching service of Hoboken Manufacturers Railroad, also deliver a considerable volume of freight to Seatrain's vessels by lighter in the same way that they lighter freight to the vessels of the break-bulk lines. Request was made that we furnish the number of tons of freight interchanged with Seatrain's vessels by lighter. In response to this request, I have ascertained that during the period of four months from April to July 1940, which I am informed is a representative period, the trunk line railroads delivered by lighter to the vessels of Seatrain 2,340 tons of freight.

We offered in evidence Exhibit 72, showing for the five months, March to July 1940, inclusive, an average detention on the Hoboken Manufacturers Railroad of railroad-owned cars interchanged with the trunk lines of 2.40 days for cars delivered to or received from Seatrain and 3.71 days for cars delivered
2393 to or received from the break-bulk lines. We were asked to furnish a break-down of these figures as between freight delivered to and freight received from the respective water carriers. In response to this request, I furnish the following figures, supplied to me by Mr. Macgowan, who identified the exhibit:

Detention on H. M. R. R. of Cars of Freight Handled between Trunk Line Connections and Seatrain Lines, Inc.

East-bound (delivered to Seatrain), 1,394 cars. Average Detention, 3.76 days.

West-bound (received from Seatrain), 1,185 cars. Average Detention, .81 days.

Total, 2,579 cars. Average Detention, 2.40 days.

Detention of Cars handled between Trunk Line Connections and Break-Bulk Lines (Largely, if not entirely, Pan-Atlantic)

East-bound (delivered to steamship), 11 cars. Average Detention, 2.27 days.

West-bound (received from steamship), 617 cars. Average Detention, 3.74 days.

Total, 628 cars. Average Detention, 3.71 days.

Very truly yours,

s. PARKER McCOLLESTER.

PMcC/WEL.

c/c H. W. Archer, Examiner, Interstate Commerce Commission; M. J. Walsh, Examiner, Interstate Commerce Commission; Toll R. Ware, Missouri Pacific Bldg., St. Louis, Missouri; T. P. Healy, 466 Lexington Ave., New York, N. Y.; W. T. Pierson, Erie Rail-

road, Midland Bldg., Cleveland, Ohio; F. R. Cross, Baltimore & Ohio Railroad, Baltimore, Maryland; J. F. Eshelman, 1740 Broad Street Station Bldg., Philadelphia, Pa.; J. Carter Fort, Transportation Bldg., Washington, D. C.; G. H. Muckley, 205 Transportation Bldg., Washington, D. C.; W. N. McGehee, Southern Railway Bldg., Washington, D. C.; William C. Burger, 908 West Broadway, Louisville, Kentucky.

2394

MISSOURI PACIFIC LINES

Guy A. Thompson, Trustee

MISSOURI PACIFIC RAILROAD COMPANY

GULF COAST LINES

INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY

LAW DEPARTMENT

2008 Missouri Pacific Building

SAINT LOUIS, MISSOURI, *November 5, 1940.*

I. C. C. 25728, I. C. C. 25878—Seatrain Car Service Cases

MR. J. CARTER FORT,
Gen. Csl., Association of American Railroads,
Transportation Building, Washington, D. C.

DEAR MR. FORT: Pursuant to your request made upon the Chief Examiner, Mr. McDermott has broken down his average detention figure of 1.14 days so as to show the average detention days per car for each water carrier operating in competition with the Seatrain.

A copy of the exhibit is enclosed to you herewith. Two copies have been sent to the Secretary of the Commission, and a copy to each of the parties of record.

Yours very truly,

Assistant Interstate Commerce Counsel

cc—Mr. W. P. Bartel, Secretary, Interstate Commerce Commission, Washington, D. C.
cc—All parties of record.

2395 *Exhibit 82*

Recapitulation of statement showing cars moved into New Orleans via Mo Pac. Railroad and delivered to New Orleans Public Belt Railway for delivery by that line to Steamship Lines for coastwise movement, January to July 1940, inclusive

Steamship company	January		February		March		April		May		June		July		Total		Average days per car
	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	
Pan Atlantic	152	143	26	35	16	5	43	71	100	39	71	14	99	52	507	359	0.71
Morgan Line	10	15	15	4	27	10	20	3	22	2	18	0	11	6	123	40	.33
Clyde-Mallory	12	5	19	3	1	0	6	0	4	0	0	0	0	0	42	8	.19
Coast Transp. Co	0	0	1	0	1	0	1	0	1	1	1	0	0	0	5	1	.20
Moore-McCormack	1	0	0	0	2	0	0	0	0	0	0	0	0	0	3	0	.00
Norton Lilly	0	0	6	34	14	50	12	32	10	52	2	3	6	3	50	174	3.48
Luckenbach Gulf	12	19	9	133	18	60	9	45	9	22	7	37	3	9	67	325	4.81
Total	187	182	76	209	79	125	91	151	146	116	99	54	119	70	797	907	1.14

2396 *Recapitulation of statement showing cars moved into New Orleans via Mo. Pac. Railroad and delivered to New Orleans Public Belt Railway for delivery by that line to Pan Atlantic, Morgan Line, Clyde-Mallory, Coast Transp. Company, and Moore-McCormack Steamship Lines for coastwise movement January to July 1940, inclusive*

Steamship company	January		February		March		April		May		June		July		Total		Average days per car
	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	
Pan Atlantic	152	143	26	35	16	5	43	71	100	39	71	14	99	52	507	359	0.71
Morgan Line	10	15	15	4	27	10	20	3	22	2	18	0	11	6	123	40	.33
Clyde-Mallory	12	5	19	3	1	0	6	0	4	0	0	0	0	0	42	8	.19
Coast Transp. Co	0	0	1	0	1	0	1	0	1	1	1	0	0	0	5	1	.20
Moore-McCormack	1	0	0	0	2	0	0	0	0	0	0	0	0	0	3	0	.00
Total	175	163	61	42	47	15	70	74	127	42	90	14	110	58	680	408	.06

2397 *Recapitulation of statement showing cars moved into New Orleans via Mo. Pac. Railroad and delivered to New Orleans Public Belt Railway for delivery by that line to Norton Lilly and Luckenbach Gulf Steamship Companies for coastwise movement January to July 1940, inclusive*

Steamship company	January		February		March		April		May		June		July		Total		Average days per car
	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	
Norton Lilly	0	0	6	34	14	50	12	32	10	52	2	3	6	3	50	174	3.48
Luckenbach Gulf	12	19	9	133	18	60	9	45	9	22	7	37	3	9	67	325	4.81
Total	12	19	15	167	32	110	21	77	19	74	9	40	9	12	117	499	4.26

2398 *Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Clyde Mallory Steamship line for coastwise movement, period January to July 1946*

JANUARY

Initial	Number	Contents	Arrived	Delivered	Days
MP	46118	Paper	1-11	1-11	0
NYC	15102	do	1-12	1-12	0
O	118214	do	1-12	1-12	0
Wab	78408	do	1-12	1-12	0
CNW	121894	do	1-12	1-12	0
Wab	78351	do	1-12	1-12	0
MP	94500	do	1-13	1-13	0
AT	129995	do	1-13	1-13	0
MP	84461	Oil	1-12	1-14	2
Do	85693	Meal	1-17	1-17	0
Do	89102	do	1-28	1-28	0
Do	85192	do	1-27	1-28	1
			1-27	1-28	2

FEBRUARY

Mila	271907	Meal	2-4	2-4	0
UP	75857	Beans	2-5	2-5	0
SMP	46105	Paper	2-5	2-5	0
Efie	68139	do	2-7	2-7	0
MP	85174	do	2-10	2-10	0
Do	98264	do	2-10	2-10	0
Do	91149	do	2-11	2-11	0
Do	91085	do	2-14	2-14	0
Do	85523	Meal	2-14	2-14	0
Pa	95516	Paper	2-15	2-15	0
Soo L	62486	do	2-18	2-19	1
WLE	276681	do	2-18	2-18	0
O	25030	do	2-18	2-18	1
MP	85879	Meal	2-20	2-20	0
Do	89078	do	2-19	2-19	0
Do	85147	do	2-19	2-19	0
Do	90762	do	2-22	2-22	3
Do	85417	do	2-23	2-23	0
AT	65533	Oil	2-28	2-28	0

MARCH

StLB&M	3914	Paper	3-28	3-28	0

APRIL

StLB&M	30229	Paper	4-1	4-1	0
MP	85870	Meal	4-12	4-12	0
Do	85891	do	4-14	4-14	0
Do	87667	do	4-18	4-18	0
Do	94979	Paper	4-29	4-29	0
Do	85291	Meal	4-30	4-30	0

MAY

NOTM	12459	Paper	5-1	5-1	0
Do	2700	do	5-1	5-1	0
MP	85531	Meal	5-1	5-1	0
Do	86673	do	5-4	5-4	4

2386 *State of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Coast Transportation Steamship Company for coastwise movement, period January to July 1940*

FEBRUARY

Initial	Number	Contents	Arrived	Delivered	Days
SF	161331	Glass	2-18	2-18	0

MARCH

SF	161423	Flour	3-1	3-1	0

APRIL

SF	161821	Glass	4-10	4-10	0

MAY

SF	126716	Glass	5-7	5-8	1

JUNE

SF	100[illegible]	Paper	6-27	6-27	0

2387 *Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Luckenback Gulf Steamship Company for coastwise movement, period January to July 1940*

JANUARY

Initial	Number	Contents	Arrived	Delivered	Days
NO	39[illegible]4	Steel	1-1	1-1	0
CBI	6[illegible]72	Ore	1-1	1-1	0
IGN	6[illegible]8	do	1-5	1-8	3
SLBM	20[illegible]6	do	1-8	1-9	1
Co	82[illegible]5	Steel	1-12	1-12	0
Do	9[illegible]7	do	1-15	1-15	0
Do	82[illegible]5	do	1-15	1-15	0
Do	20[illegible]4	do	1-15	1-15	0
MP	94[illegible]6	do	1-11	1-16	5
Do	94[illegible]2	do	1-14	1-16	2
Po	50[illegible]7	do	1-27	1-27	0
C	6[illegible]1	do	1-28	1-31	8

FEBRUARY

RIF	31[illegible]1	Steel	1-25	2-16	22
NKF	71[illegible]7	do	1-23	2-16	23
FIF	31[illegible]1	do	1-25	2-16	22
CO	7[illegible]1	do	1-23	2-15	23
NWX	20[illegible]7	Wire	2-23	2-24	1
MP	82[illegible]2	Ore	2-4	2-13	9
Do	41[illegible]0	Oil	2-12	2-21	9
GN	42[illegible]8	do	2-11	2-23	12
TNO	58[illegible]7	do	2-11	2-23	12

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Luckenback Gulf Steamship Company for coastwise movement, period January to July 1940—Continued

MARCH

Initial	Number	Contents	Arrived	Delivered	Days
MP	82850	Lbr	3-9	3-9	0
Do	89107	do	3-2	3-9	7
Do	120401	Bolts	3-8	3-9	1
EJE	88050	Steel	3-9	3-9	0
Do	131688	do	3-9	3-9	0
MP	78067	Lbr	3-9	3-9	0
Do	83245	do	3-12	3-12	0
StLBM	26374	do	3-13	3-13	0
MP	94178	do	3-7	3-12	5
Do	82858	do	3-15	3-16	1
ITC	3022	Steel	3-17	3-19	2
Pa	348402	do	3-8	3-25	17
Do	346729	do	3-19	3-26	7
EJE	31654	do	3-19	3-26	7
NWX	11249	Ties	3-22	3-26	4
Pa	384218	Steel	3-19	3-19	0
MP	46475	Lbr	3-24	3-27	3
Do	84337	do	3-24	3-27	3
			3-24	3-27	3

APRIL

CO	9704	Steel	4-4	4-4	0
Do	9665	do	4-4	4-4	0
MP	70418	Lbr	3-30	4-9	10
CO	29664	Steel	4-7	4-13	6
CO	29646	do	4-7	4-13	6
MP	78284	Dunnage	4-14	4-16	2
Do	48116	Lbr	4-4	4-18	14
Do	82643	do	4-11	4-18	7
CO	7757	Steel	4-20	4-20	0

MAY

CO	29649	Steel	5-4	5-4	0
Do	29673	do	5-5	5-5	0
Do	29048	do	5-5	5-5	0
Do	29672	do	5-3	5-4	1
NYC	94279	Wire	5-6	5-6	0
MP	129861	Lbr	5-2	5-7	5
Do	129843	do	4-27	5-7	10
Pa	822280	Steel	5-14	5-18	4
MP	77011	Lbr	5-19	5-21	2

JUNE

Pa	347735	Pipe	5-28	6-5	8
Do	54455	Black	6-12	6-17	5
DLW	48210	Lbr	6-16	6-26	10
MP	95121	do	6-16	6-25	9
Do	78156	do	6-28	6-28	2
Do	76356	do	6-26	6-28	2
SF	129264	Bolts	6-15	6-18	3

JULY

WP	95982	Steel	7-5	7-15	10
MP	265561	do	7-6	7-15	9
EJE	86379	do	7-15	7-15	0

2401 *Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Moore-McCormack Steamship Company for coastwise movement, period January to July 1950*

JANUARY

Initial	Number	Contents	Arrived	Delivered	Days
IGN	9863	Hides	1-2	1-2	0
MARCH					
MP	90195	Hides	3-13	3-13	0
Do	93749	do	3-15	3-15	0

2402 *Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Norton Lilly Company for coastwise movement, period January to July 1950*

FEBRUARY

Initial	Number	Contents	Arrived	Delivered	Days
MP	121486	Oil	1-29	2-5	7
Do	31980	Lbr	1-30	2-5	6
Do	85250	Bags	2-5	2-8	3
NKP	9224	Bottles	2-3	2-9	6
MP	94222	Lbr	2-9	2-12	3
Do	93772	do	2-5	2-14	9
MARCH					
MP	42384	Lbr	3-2	3-7	5
Do	81145	do	3-2	3-7	5
Do	90092	do	3-3	3-7	4
Do	30128	do	3-2	3-7	5
TP	50804	do	3-1	3-7	6
MP	94221	do	3-3	3-7	4
Do	30164	do	3-7	3-12	5
Do	90125	do	3-6	3-11	5
Do	90254	do	3-6	3-11	5
AT	136351	do	3-16	3-21	5
MP	93739	do	3-22	3-22	0
Do	91086	do	3-22	3-22	0
IC	340237	Oil	3-29	3-30	1
MP	48568	Lbr	3-31	3-31	0
APRIL					
MP	82030	Lbr	3-31	4-1	1
AT	129445	do	3-31	4-1	1
MP	47374	do	3-31	4-2	2
Do	78261	do	4-3	4-5	2
Do	121097	Oil	4-15	4-15	0
Do	41567	Lbr	4-13	4-16	3
NOTM	17392	do	4-14	4-16	2
MP	47411	do	4-12	4-16	4
Do	42201	do	4-12	4-16	4
Do	30802	do	4-25	4-29	4
Do	48109	do	4-25	4-29	4
Do	30403	do	4-24	4-29	5

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Norton Lilly Company for coastwise movement, period January to July 1950—Continued

MAY

Initial	Number	Contents	Arrived	Delivered	Days
Erie	75780	Oil	5-10	5-12	2
MP	82744	Lbr	4-27	5-6	9
Do	94039	do	4-28	5-14	16
Do	31189	do	4-28	5-14	16
IGN	17959	Paper	5-15	5-15	0
MP	31410	Lbr	5-14	5-15	1
Do	76344	Paper	5-25	5-27	2
Do	79306	Lbr	5-25	5-27	2
Do	78102	do	5-26	5-27	1
Do	84947	do	5-8	5-8	0

JUNE

MP	93659	Lbr	6-8	6-10	2
IGN	6251	do	6-9	6-10	1

JULY

MH	716970	Lbr	7-8	7-8	0
Q	28133	do	7-8	7-8	0
TNO	31446	do	7-8	7-8	0
L&N	11911	do	7-8	7-8	0
B&O	226432	do	7-9	7-9	0
SouL	28800	do	7-9	7-9	0
			7-9	7-9	0

2463 *Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered by the New Orleans Public Belt Railway for delivery by that line to Morgan Line for coastwise movement, period January to July 1950*

JANUARY

Initial	Number	Contents	Arrived	Delivered	Days
MP	79317	Cotton	1-5	1-11	6
Do	81390	do	1-5	1-11	6
Do	81792	Linters	1-4	1-11	7
UP	42899	Rice	1-4	1-4	0
StLBM	187656	do	1-4	1-4	0
SF	3204	C. Black	1-12	1-12	0
MP	168884	do	1-18	1-18	0
SouL	46289	do	1-18	1-19	1
IGN	130184	Cotton	1-18	1-19	1
	14243	Linters	1-22	1-23	1
			1-25	1-25	0

FEBRUARY

MP	31413	Rice	2-3	2-3	0
Do	90380	L. Oil	2-3	2-3	0
TNO	85239	C. Black	2-4	2-4	0
MP	59130	do	2-9	2-9	0
Do	98266	C. P. Goods	2-12	2-12	0
Do	82705	Linters	2-14	2-14	0
Do	94416	C. Black	2-14	2-15	1
Do	94780	do	2-15	2-15	0
Do	31386	Rice	2-21	2-22	1
Do	47456	C. P. Goods	2-28	2-28	0
Do	85745	C. Black	2-10	2-10	0
Do	85719	do	2-9	2-9	0
Do	85305	do	2-9	2-9	0
Do	85295	do	2-9	2-9	0
Do	85643	do	2-9	2-9	0
			2-6	2-8	2

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Morgan Line for coastwise movement, period January to July 1940—Continued

MARCH

Initial	Number	Contents	Arrived	Delivered	Days
MP	41188	Paper	3-2	3-2	0
Do	79415	do	3-2	3-2	0
Do	80817	do	3-2	3-2	0
Do	48053	do	3-2	3-2	0
Do	90871	do	3-2	3-3	1
Do	84188	Cotton	3-4	3-4	0
Do	83183	do	3-4	3-4	0
SP	151422	do	3-6	3-6	0
RI	166560	do	3-11	3-12	1
MP	80028	Car Black	3-14	3-14	0
Do	93749	Salt	3-15	3-15	0
IC	194219	Cotton	3-15	3-15	0
*IGN	16106	C. Black	3-16	3-16	0
MP	49783	Paper	3-16	3-16	0
Do	48462	Paper	3-16	3-16	0
Do	48322	do	3-16	3-16	0
Do	90283	do	3-16	3-18	2
Wab	47937	Cotton	3-18	3-18	0
MP	49024	Paper	3-17	3-18	1
Wab	47347	Linters	3-25	3-25	0
MP	83088	do	3-25	3-25	0
Do	47193	Paper	3-27	3-28	1
Do	48119	do	3-27	3-28	1
IGN	9618	do	3-27	3-28	1
Do	14132	Linters	3-27	3-28	1
MP	93829	Paper	3-30	3-30	0
Do	93810	do	3-31	4-1	1

APRIL

MP	79027	Cotton	4-3	4-3	0
NOTM	2614	Paper	4-4	4-4	0
Sou	200024	do	4-4	4-4	0
MP	83221	Cotton	4-6	4-6	0
Do	84389	do	4-5	4-5	0
IC	166798	do	4-8	4-8	0
IGN	14529	do	4-7	4-7	0
MP	83000	do	4-7	4-7	0
IC	194650	do	4-6	4-6	0
MP	44699	Carbon	4-7	4-7	0
Do	46879	do	4-12	4-14	1
SP	150112	Cotton	4-15	4-15	0
MP	77473	C. Blk	4-18	4-18	0
Do	91074	do	4-18	4-18	0
Do	78105	Cotton	4-22	4-22	0
Do	42533	do	4-21	4-21	0
204	82097	Cotton	4-25	4-27	2
Do	82604	do	4-26	4-26	0
Q	151311	Paper	4-26	4-26	0
StLBM	[illegible]	Rice	4-28	4-28	0

MAY

SP	87074	Paper	5-20	5-20	0
MP	83617	do	5-20	5-20	0
Do	83761	do	5-20	5-20	0
Do	83104	do	5-20	5-20	0
StLBM	2923	do	5-16	5-17	1
IGN	9611	do	5-17	5-17	0
NOTM	[illegible]	do	5-16	5-17	1
IGN	9670	do	5-15	5-15	0
NOTM	2411	do	5-15	5-15	0
Do	9488	do	5-11	5-11	0
IGN	6353	do	5-4	5-4	0
NOTM	2566	do	5-4	5-4	0
StLBM	26613	do	5-4	5-4	0
NOTM	2536	do	5-1	5-1	0

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Morgan Line for coastwise movement, period January to July 1940—Continued

MAY—Continued

Initial	Number	Contents	Arrived	Delivered	Days
MP	47075	C. Black	5-30	5-30	0
NOTM	2544	Paper	5-31	5-31	0
MP	81728	do	5-31	5-31	0
Do	45149	Car. Blk	5-27	5-27	0
Do	47679	Paper	5-24	5-24	0
NOTM	2514	do	5-23	5-23	0
MP	47817	do	5-23	5-23	0
Do	89051	do	5-22	5-22	0

JUNE

MP	82747	Paper	6-27	6-27	0
PLE	36[illegible]	do	6-27	6-27	0
MP	47204	do	6-21	6-21	0
Do	46086	do	6-21	6-21	0
Sou	161290	do	6-21	6-21	0
AT	121391	do	6-21	6-21	0
Mil	703299	do	6-21	6-21	0
SP	30897	Car. Blk	6-15	6-15	0
SSW	37615	Paper	6-15	6-15	0
MC	87[illegible]	do	6-13	6-13	0
MP	81[illegible]	do	6-9	6-9	0
SSW	37648	do	6-8	6-8	0
SP	148166	do	6-7	6-7	0
StLBM	3115	do	6-6	6-7	0
B&O	268580	Car. Blk	6-6	6-7	0
MP	48015	Paper	6-5	6-5	0
Mil	159897	do	6-2	6-2	0
SP	161349	Car. Blk	6-1	6-1	0

JULY

MP	83034	Linters	7-30	7-30	0
Do	82630	Cotton	7-30	7-30	0
Do	93217	Car. Blk	7-31	7-31	0
SSW	36815	Paper	7-25	7-25	0
MP	81053	C. Block	7-20	7-20	0
Do	93902	do	7-19	7-19	0
Do	81114	C. P. Gds	7-17	7-17	0
Pa	77884	do	7-11	7-11	0
BO	301	Cotton	7-9	7-15	6
Pa	98179	do	7-7	7-7	0
CNW	103826	C. Block	7-1	7-1	0

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for coastwise movement, period January to July 1940

JANUARY

Initial	Number	Contents	Arrived	Delivered	Days
B&O	270658	Paper	12-30	1-1	2
MP	47629	do	12-31	1-1	1
Do	47971	do	12-31	1-1	1
Do	48428	do	12-31	1-1	1
Do	94126	do	12-31	1-1	1
Do	48164	do	12-31	1-1	1
Do	31161	Rice	12-31	1-1	1
BO	132077	Paper	12-31	1-1	1
	267647	do	12-30	1-1	2

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for coastwise movement, period January to July 1940—Continued

JANUARY—Continued

Initial	Number	Contents	Arrived	Delivered	Days
MP	95222	Paper	1-2	1-2	0
Do	47400	do	1-2	1-2	0
IGN	16121	do	1-2	1-2	0
SF	145919	do	1-2	1-2	0
MP	48356	do	1-2	1-2	0
StLBM	20385	do	1-2	1-2	0
TNO	51587	do	1-2	1-2	0
MP	41725	do	1-2	1-2	0
CNW	144986	do	1-2	1-2	0
TP	50634	do	1-2	1-2	0
MP	48415	do	1-2	1-2	0
Do	94856	do	1-3	1-3	0
Do	81304	do	1-3	1-3	0
AT	7993	do	1-3	1-3	0
IC	17431	do	1-3	1-3	0
MP	85987	do	1-3	1-3	0
Do	94708	do	1-4	1-4	0
KCS	17035	do	1-5	1-5	0
NYC	132899	do	1-6	1-6	0
MP	83174	do	1-4	1-6	2
StLB&M	20198	do	1-5	1-7	2
Do	20224	do	1-5	1-7	2
Do	20336	do	1-5	1-7	2
Do	3,856	do	1-5	1-7	2
MP	42989	do	1-5	1-7	2
Do	94746	do	1-5	1-7	2
Do	93443	do	1-5	1-7	2
Do	94815	do	1-5	1-7	2
Do	94723	do	1-5	1-7	2
Do	93921	do	1-5	1-7	2
Do	79326	do	1-7	1-7	0
Do	16153	do	1-8	1-8	0
Do	9766	do	1-8	1-8	0
SF	127580	do	1-8	1-8	0
NC	16404	do	1-8	1-8	0
BO	269126	do	1-8	1-8	0
MP	90083	do	1-8	1-8	0
SP	13337	do	1-8	1-9	1
Pa	123889	do	1-8	1-9	1
Mil	718533	do	1-8	1-9	1
SF	130404	do	1-8	1-9	1
CNW	121697	do	1-8	1-9	1
MP	120170	do	1-8	1-9	1
Do	45137	do	1-10	1-10	0
Do	94771	do	1-10	1-10	0
Do	47617	do	1-10	1-10	0
Do	45229	do	1-10	1-10	0
StLBM	3538	Rice	1-10	1-10	0
IGN	3649	Paper	1-11	1-11	0
MP	8869	Lbr	1-10	1-12	2
Do	79435	Paper	1-12	1-12	0
NOTM	3706	do	1-12	1-12	0
MP	83623	do	1-12	1-13	1
Do	78196	do	1-12	1-13	1
Do	77349	do	1-12	1-13	1
Do	42259	do	1-11	1-11	0
SF	126780	do	1-11	1-11	0
IGN	6705	do	1-11	1-11	0
MP	47025	do	1-11	1-11	0
IGN	16218	do	1-13	1-14	1
MP	41539	do	1-13	1-14	1
IGN	16171	do	1-13	1-14	1
AT	129222	do	1-13	1-14	1
MP	46432	do	1-14	1-14	0
StLBM	3240	do	1-14	1-14	0
MP	120192	do	1-13	1-14	1
Do	94308	do	1-13	1-14	1
Do	48191	do	1-13	1-14	1
SF	127726	do	1-13	1-14	1
MP	120510	do	1-13	1-14	1
Do	121036	do	1-13	1-14	1

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for coastwise movement..period January to July 1940—Continued

JANUARY—Continued

Initial	Number	Contents	Arrived	Delivered	Days
Pa	94532	Paper	1-13	1-14	1
IGN	16151	do	1-13	1-14	1
SF	162501	do	1-13	1-14	1
MP	47660	do	1-13	1-14	1
F	71032	do	1-13	1-14	1
TP	40376	do	1-14	1-14	0
MP	41691	do	1-14	1-14	0
AT	125365	do	1-14	1-14	0
NYC	97560	do	1-14	1-14	0
MP	121464	do	1-13	1-14	1
O	208.23	do	1-12	1-14	2
StLBM	3123	do	1-12	1-14	2
MP	42520	do	1-12	1-14	2
NOTM	17315	do	1-12	1-14	2
RJ	46544	do	1-15	1-15	0
NYC	52828	do	1-15	1-15	0
MP	120878	do	1-15	1-15	0
Do	40243	do	1-15	1-15	0
Do	93844	do	1-15	1-15	0
IGN	9671	do	1-15	1-15	0
MP	47374	do	1-17	1-17	0
Do	79338	do	1-17	1-17	0
SF	126735	do	1-17	1-17	0
MP	81410	Pulp board	1-17	1-17	0
Do	84345	do	1-17	1-17	0
NOTM	8113	Lumber	1-11	1-17	6
MP	8808	do	1-11	1-17	6
Do	9024	do	1-11	1-17	6
Do	8662	do	1-13	1-17	4
Do	9153	do	1-13	1-17	4
Do	8614	do	1-13	1-17	4
Do	93486	Rice	1-18	1-18	0
Do	8747	Lumber	1-18	1-19	1
Do	8988	do	1-18	1-19	1
Do	8749	do	1-18	1-19	1
TNO	53219	Paper	1-18	1-19	1
O	130269	do	1-18	1-19	1
CNW	40776	do	1-18	1-19	1
MP	47561	do	1-18	1-19	1
TP	40305	do	1-18	1-19	1
IGN	6305	do	1-18	1-19	1
MP	91035	do	1-18	1-19	1
StLBM	340079	do	1-18	1-19	1
IGN	16283	do	1-18	1-19	1
SF	160113	do	1-18	1-19	1
SP	15484	do	1-18	1-19	1
MP	42336	do	1-18	1-19	1
Do	91204	do	1-18	1-19	1
Do	42384	do	1-18	1-19	1
SSW	36660	do	1-18	1-19	1
MP	41519	do	1-18	1-19	1
Do	78070	do	1-18	1-19	1
Do	95104	do	1-19	1-19	0
NOTM	3665	do	1-19	1-19	0
SP	26804	do	1-19	1-19	0
SSW	31623	do	1-19	1-19	0
Do	36163	do	1-19	1-19	0
MP	83054	do	1-19	1-20	1
AT	124768	do	1-19	1-20	1
MP	91231	do	1-20	1-20	0
IGN	9594	do	1-20	1-20	0
LA	15055	do	1-20	1-20	0
MP	48631	do	1-24	1-25	1
Do	8810	Lumber	1-18	1-26	8
Do	8722	do	1-18	1-26	8
Do	46621	Paper	1-26	1-26	0
Do	46250	do	1-26	1-26	0
Do	41795	do	1-28	1-30	2
Do	48439	do	1-31	1-31	0
Do	95136	do	1-31	1-31	0
Do	48568	do	1-31	1-31	0

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for coastwise movement, period January to July 1950—Continued

2405			FEBRUARY			
MP		94898	Paper	2-1	2-1	0
	Do	9091	Lumber	1-30	2-1	2
	Do	8084	do	1-30	2-1	2
	Do	8855	do	1-30	2-1	2
SP		39589	do	1-30	2-1	2
MP		85581	Paper	2-4	2-4	0
	Do	79369	Pulp Bd	2-3	2-3	0
IGN		9511	Paper	2-10	2-10	0
MP		45084	do	2-10	2-10	0
	Do	93845	do	2-10	2-10	0
	Do	9892	Lumber	2-3	2-7	4
	Do	8908	do	2-3	2-7	4
	Do	8893	do	2-1	2-7	6
	Do	8774	do	2-1	2-7	6
SSW		38527	Paper	2-11	2-11	0
	Do	36557	do	2-11	2-11	0
MP		46023	do	2-15	2-18	3
SSW		37988	do	2-16	2-16	0
MP		48730	do	2-15	2-15	0
	Do	82969	do	2-8	2-8	0
IGN		16230	do	2-21	2-21	0
MP		46092	do	2-9	2-11	2
	Do	48363	do	2-9	2-11	2
	Do	48385	do	2-22	2-22	0
	Do	48312	do	2-23	2-23	0
	Do	42413	do	2-23	2-23	0
			MARCH			
MP		45041	Paper	3-2	3-7	5
ISG		9503	do	3-1	3-1	0
MP		85192	Meal	3-2	3-2	0
	Do	85059	do	3-4	3-4	0
	Do	85826	do	3-4	3-4	0
	Do	48106	Paper	3-7	3-7	0
	Do	78287	do	3-8	3-8	0
	Do	85856	Meal	3-11	3-11	0
	Do	84570	Paper	3-14	3-14	0
	Do	90640	do	3-14	3-14	0
SSW		37775	do	3-14	3-14	0
	Do	36070	do	3-15	3-15	0
AT		126837	do	3-23	3-23	0
MP		91052	do	3-22	3-22	0
	Do	90220	do	3-30	3-30	0
B&O		270381	Ties	3-26	3-26	0
			APRIL			
SW		37055	Paper	4-1	4-1	0
MP		85227	Meal	4-3	4-3	0
	Do	46025	Paper	4-3	4-4	1
	Do	86123	do	4-4	4-4	0
	Do	121725	do	4-4	4-4	0
	Do	120764	do	4-5	4-5	0
	Do	47161	do	4-5	4-5	0
	Do	42414	do	4-5	4-5	0
	Do	90501	do	4-8	4-8	0
SW		36836	do	4-11	4-11	0
	Do	38327	do	4-11	4-11	0
MP		90966	do	4-12	4-12	0
	Do	47357	do	4-8	4-14	6
StLB&M		3113	do	4-8	4-14	6
MP		95175	do	4-8	4-14	6
	Do	47473	do	4-8	4-14	6
	Do	47384	do	4-8	4-14	6
	Do	46386	do	4-8	4-14	6
	Do	47543	do	4-10	4-14	4
	Do	90124	do	4-8	4-14	6
	Do	47193	do	4-8	4-14	6
	Do	94803	do	4-8	4-14	6

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for coastwise movement, period January to July 1940—Continued

APRIL—Continued

Initial	Number	Contents	Arrived	Delivered	Days
MP	46940	Paper	4-10	4-14	4
Do	47337	do	4-8	4-14	6
Do	90569	Lard	4-18	4-18	0
Do	81012	Paper	4-18	4-18	0
Do	43450	do	4-18	4-18	0
Do	83074	do	4-18	4-18	0
2406 Do	42394	do	4-18	4-18	0
Do	79437	Pulp board	4-18	4-18	0
Do	93615	Paper	4-18	4-19	1
Do	81911	Pulp board	4-19	4-19	0
Do	41715	Spinach	4-19	4-19	0
Do	90888	Paper	4-23	4-23	0
E	48236	do	4-24	4-24	0
MP	70958	do	4-24	4-24	0
Do	84036	do	4-24	4-24	0
IGN	42343	do	4-24	4-24	0
MP	9692	do	4-25	4-25	0
CNW	94477	do	4-25	4-25	0
DMTR	86702	do	4-26	4-26	0
MP	3133	do	4-26	4-26	0
	94789	do	4-27	4-28	1
			4-30	4-30	0

MAY

MP	41229	Paper			
CGW	87080	do	5-10	5-10	0
SSW	37030	do	5-10	5-10	0
MP	90531	do	5-10	5-10	0
B/4	48516	do	5-10	5-10	0
SF	148057	do	5-9	5-10	1
SSW	90228	do	5-10	5-11	1
MP	32432	do	5-12	5-12	0
Do	47908	do	5-13	5-13	0
TNO	36389	do	5-12	5-12	0
SULBM	2981	do	5-12	5-12	0
MP	46677	do	5-12	5-12	0
CO	8739	do	5-11	5-11	0
AT	126285	do	5-11	5-12	1
MP	46205	do	5-11	5-12	1
Do	47821	do	5-14	5-14	0
SAL	11202	do	5-14	5-14	0
IGN	9639	do	5-15	5-15	0
MF	46473	do	5-15	5-15	0
Do	121463	do	5-15	5-15	0
Do	43085	do	5-15	5-15	0
Do	32837	do	5-15	5-15	0
IGN	9703	do	5-15	5-15	0
MP	48629	do	5-15	5-15	0
Do	85033	do	5-15	5-15	0
SSW	37766	do	5-15	5-15	0
SULBM	2975	do	5-15	5-16	1
MP	47448	do	5-16	5-17	1
PM	71189	do	5-16	5-16	0
MP	47072	do	5-18	5-18	0
SF	161565	do	5-20	5-20	0
MP	47344	do	5-20	5-20	0
Do	41715	do	5-22	5-22	0
Do	126520	do	5-22	5-22	0
Do	41148	do	5-22	5-22	0
B&O	177092	do	5-22	5-22	0
SF	162753	do	5-22	5-22	0
MP	48154	do	5-22	5-22	0
SF	161261	do	5-23	5-23	0
MP	47602	do	5-23	5-23	0
Do	83609	do	5-23	5-23	0
Do	93357	do	5-25	5-25	0
Do	90533	do	5-25	5-25	0
Do	47924	do	5-24	5-24	0
NP	89025	Meal	5-24	5-24	0

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for coastwise movement, period January to July 1940—Continued

MAY—Continued

Initial	Number	Contents	Arrived	Delivered	Days
NOTM	3698	Paper	5-26	5-26	0
StLBM	3224	do	5-26	5-26	0
MP	93209	do	5-26	5-26	0
StLBM	3007	do	5-26	5-26	0
Sou	11300	do	5-26	5-26	0
StLBM	3349	do	5-26	5-26	0
MP	48677	do	5-26	5-26	0
NOTM	17486	do	5-25	5-25	0
B&O	276744	do	5-25	5-25	0
MP	90974	do	5-25	5-25	0
Do	48229	do	5-25	5-25	0
NOTM	2604	do	5-25	5-25	0
Do	2451	do	5-27	5-27	0
2407 MP	41359	do	5-27	5-27	0
Do	41037	do	5-27	5-27	0
IGN	6608	do	5-29	5-29	0
Do	9764	do	5-1	5-5	4
Pa	94789	do	5-1	5-1	0
IGN	17083	Rice	5-1	5-1	0
MP	85273	Meal	5-1	5-1	0
Do	93764	Paper	5-1	5-1	0
SSW	38124	do	5-1	5-1	0
MP	42127	do	5-1	5-1	0
SSW	38130	do	5-1	5-1	0
ART	17259	Spinach	5-1	5-2	1
NOTM	2588	Paper	5-2	5-4	2
MP	45104	do	5-2	5-4	2
Do	94510	do	5-2	5-4	2
IGN	6640	do	5-2	5-4	2
MP	41129	do	5-2	5-2	0
NOTM	2552	do	5-2	5-4	2
MP	41162	do	5-2	5-4	2
Do	42082	do	5-2	5-4	2
Do	47383	do	5-2	5-4	2
MeC	5124	do	5-2	5-2	0
MP	48335	do	5-2	5-2	0
Do	47884	do	5-2	5-2	0
Do	47368	do	5-2	5-2	0
Pa	91812	do	5-3	5-4	1
MP	46657	do	5-3	5-4	1
MC	82856	do	5-2	5-2	0
IGN	17010	do	5-2	5-2	0
MP	90211	do	5-3	5-12	9
Do	85137	Meal	5-3	5-4	1
Do	41359	Paper	5-7	5-7	0
StLBM	3306	do	5-7	5-7	0
Do	3341	do	5-7	5-7	0
MP	47692	do	5-6	5-6	0
Sou	10851	do	5-7	5-7	0
StLBM	3186	do	5-7	5-7	0
SF	160902	do	5-6	5-6	0
MA	9088	do	5-9	5-9	0
MP	93600	do	5-9	5-9	0
MH	710623	do	5-9	5-9	0
NOTM	2871	do	5-9	5-9	0

JUNE

MP	85744	Meal	5-31	5-31	0
StLBM	3243	Paper	6-6	6-6	0
NOTM	2593	do	6-6	6-6	0
SF	147764	do	6-6	6-6	0
NOTM	2851	do	6-6	6-6	0
StLBM	3176	do	6-8	6-9	1
Q	44512	do	6-7	6-7	0
B&O	275469	do	6-10	6-10	0
SSW	39184	do	6-10	6-10	0
MP	90197	do	6-1	6-2	1
TNO	53922	do	6-5	6-5	0

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for coastwise movement, period January to July 1940—Continued

JUNE—Continued

Initial	Number	Contents	Arrived	Delivered	Days
MH	701787	Paper	6- 5	6- 5	0
NYC	93005	do	6-12	6-12	0
MP	85534	Pulp Bd	6-12	6-12	0
Do	94954	Paper	6-12	6-12	0
Do	81775	do	6-12	6-12	0
Do	95252	do	6-13	6-13	0
AT	125386	do	6-13	6-13	0
Q	131371	do	6-13	6-13	0
IC	17173	do	6-13	6-13	0
MP	94296	do	6-15	6-13	0
Do	93714	Pulp Bd	6-13	6-13	0
IC	162206	do	6-13	6-13	0
GN	9707	Paper	6-13	6-13	0
TNO	52807	do	6-13	6-13	0
MP	93577	do	6-13	6-13	0
TP	40092	do	6-14	6-14	0
Pa	101665	do	6-14	6-14	0
RI	140502	do	6-17	6-17	0
MP	47505	do	6-17	6-17	0
KCS	16410	do	6-17	6-17	0
2408 Do	48612	do	6-17	6-17	0
Do	46834	do	6-17	6-17	0
CNW	140881	do	6-17	6-17	0
PM	88702	do	6-17	6-17	0
LA	12186	do	6-17	6-17	0
ORC	681463	do	6-17	6-17	0
GN	985	do	6-17	6-17	0
Wab	79166	do	6-17	6-18	1
SP	127254	do	6- 2	6- 2	0
MP	46876	do	6-20	6-28	8
Do	47610	do	6-19	6-19	0
B&O	274033	do	6-19	6-19	0
MP	48246	do	6-19	6-19	0
NYC	18149	do	6-19	6-19	0
MP	85080	do	6-19	6-19	0
CO	7202	do	6-19	6-19	0
PM	82589	do	6-19	6-19	0
E	76246	do	6-20	6-20	0
SSW	50072	do	6-20	6-20	0
MP	48518	do	6-20	6-20	0
Do	76306	do	6-20	6-20	0
SSW	37704	do	6-20	6-20	0
Do	38591	do	6-20	6-20	0
SLSFM	2496	do	6-20	6-20	0
MP	41656	do	6-21	6-21	0
SP	38485	do	6-21	6-21	0
MP	85947	Meat	6-21	6-21	0
Do	81949	Paper	6-21	6-21	0
CV	41208	do	6-27	6-27	0
SSW	36540	do	6-27	6-27	0
SP	127545	do	6-29	6-29	0
MP	85353	do	6-24	6-24	0
Do	48197	do	6-30	6-30	0
Do	120565	do	6-30	6-30	0
Do	41782	do	6-30	6-30	0
Do	502169	do	6-30	6-30	0
Do	94451	do	6-30	6-30	0
NOTM	2654	do	6-27	6-28	1
CNW	146880	do	6-29	6-30	1
MP	46859	do	6-22	6-23	1

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for coastwise movement, period January to July 1940—Continued

JULY

Initial	Number	Contents	Arrived	Delivered	Days
CNW	60450	Paper	7-1	7-1	0
SP	15081	do	7-1	7-1	0
SF	162431	do	7-2	7-2	0
NYC	128723	do	7-2	7-2	0
NP	35853	do	7-2	7-2	0
SAL	16406	do	7-2	7-2	0
Q	15561	do	7-2	7-2	0
AT	119529	do	7-3	7-3	0
MP	30097	do	7-3	7-3	0
Do	41532	do	7-3	7-3	0
NYC	242824	do	7-3	7-3	0
Wab	47861	do	7-3	7-3	0
DRGW	61231	do	7-4	7-4	0
Q	109248	do	7-5	7-5	0
Do	41857	do	7-7	7-7	0
MP	83284	Wool	7-9	7-10	1
KCS	12108	Paper	7-8	7-10	2
SP	28459	do	7-10	7-10	0
MP	47922	do	7-10	7-10	0
MC	57641	do	7-10	7-10	0
Mil	708109	do	7-10	7-10	0
SF	157486	do	7-11	7-11	0
AJ	134627	do	7-11	7-11	0
CNO	53655	do	7-11	7-11	0
NYC	176032	do	7-11	7-11	0
CGW	87442	do	7-11	7-11	0
SLBM	20105	do	7-11	7-11	0
NKP	22145	do	7-11	7-11	0
CNW	102620	do	7-11	7-11	0
Sou	158085	do	7-12	7-12	0
SSW	56759	do	7-4	7-12	8
Do	56261	do	7-5	7-12	7
Sou	270641	do	7-13	7-14	1
2499 RI	153864	do	7-13	7-14	1
IGN	6275	do	7-13	7-14	1
SSW	45265	do	7-12	7-14	2
AT	135058	do	7-12	7-14	2
SP	38858	do	7-12	7-14	2
UP	188881	do	7-12	7-14	2
Wab	17285	do	7-12	7-14	2
SF	147808	do	7-12	7-14	2
MP	78722	do	7-12	7-14	2
SF	35105	do	7-12	7-14	2
FM	88157	do	7-14	7-14	0
Pa	41559	do	7-14	7-14	0
Mil	18865	do	7-14	7-14	0
MP	85145	Meal	7-16	7-16	0
Pa	123897	Paper	7-17	7-17	0
MP	45243	do	7-17	7-17	0
FM	88089	do	7-17	7-17	0
MP	41167	do	7-18	7-18	0
IGN	16224	do	7-18	7-18	0
Do	6824	do	7-18	7-18	0
CO	3220	do	7-10	7-18	8
IGN	16436	do	7-18	7-18	0
MP	46162	do	7-18	7-18	0
NP	5842	Pulp	7-19	7-19	0
SSW	37819	Paper	7-19	7-19	0
MP	83448	do	7-20	7-20	0
UP	76648	do	7-20	7-20	0
SF	32394	do	7-20	7-20	0
Mil	18898	do	7-19	7-19	0

Statement of cars moved into New Orleans via Mo. Pac. Railroad and delivered to the New Orleans Public Belt Railway for delivery by that line to Pan Atlantic Steamship Company for constwise movement, period January to July 1940—Continued

JULY—Continued

Initial	Number	Contents	Arrived	Delivered	Days
Pa	573242	Paper	7-21	7-21	0
CNW	141874	do	7-21	7-21	0
MP	48157	do	7-21	7-21	0
IGN	6337	do	7-21	7-21	0
BC	265202	do	7-22	7-22	0
MP	85536	do	7-22	7-22	0
Do	47359	do	7-22	7-22	0
SSW	37712	do	7-24	7-24	0
AT	127156	do	7-25	7-25	0
Do	125143	do	7-25	7-25	0
Mil	712649	do	7-25	7-25	0
BO	200689	do	7-26	7-26	0
CGW	89824	do	7-27	7-27	0
UP	182184	do	7-27	7-27	0
MP	47051	do	7-27	7-27	0
Pa	502907	do	7-27	7-27	0
M	94719	do	7-26	7-27	1
StLBM	3333	do	7-26	7-27	1
Do	3124	do	7-26	7-27	1
Wab	48320	do	7-26	7-27	1
SF	163594	do	7-26	7-27	1
MP	49998	do	7-26	7-27	1
IGN	9798	do	7-26	7-27	1
Mil	705892	do	7-28	7-28	0
UP	15232	do	7-28	7-28	0
Pa	102847	do	7-28	7-28	0
Wab	48265	do	7-28	7-28	0
Pa	62076	do	7-29	7-29	0
Mil	200603	do	7-29	7-29	0
T&P	80282	do	7-29	7-29	0
CNW	46158	do	7-29	7-29	0
GBN	13628	do	7-29	7-29	0
IGN	9437	do	7-31	7-31	0
T&P	70308	do	7-31	7-31	0
MP	85433	Pulp	7-31	7-31	0
Do	85589	do	7-31	7-31	0
DRGW	61442	do	7-31	7-31	0

2410

Exhibit 83

LORD, DAY & LORD

25 BROADWAY, CUNARD BUILDING

NEW YORK, *November 8, 1940.*

Docket Nos. 25728 and 25878

Car Service Cases

J. CARTER FORT, Esq.

Association of American Railroads,

Transportation Building, Washington, D. C.

DEAR MR. FORT: In response to your request of October 25th, Mr. Long, of the Texas & Pacific Railway, has furnished me, through Mr. Thompson, with the following detail of the detention of the 874 cars concerning which he testified:

	Number cars	Days delay	Average delay per car
Clyde-Mallory Lines	57	13	0.23
Coast Transportation	16	6	.38
Luckenbach Lines	23	105	4.57
Richard Meyer Co	2	17	8.5
Morgan Line Steamers	69	66	.96
Moore-McCormack Lines Inc	3	2	.67
Norton, Lilly & Co	20	23	1.15
Pan-Atlantic Lines	684	1,227	1.79
Total	874	1,459	1.67

Very truly yours,

PARKER MCCOLLESTER.

PMcC/WEL.

c/c Hon. Ulysses Butler, Chief Examiner, Interstate Commerce Commission; Messrs. Toll R. Ware, Missouri Pacific Bldg., St. Louis, Mo.; Robert Thompson, Texas & Pacific Ry. Co., Dallas, Tex.; T. P. Healy, 466 Lexington Ave., New York, N. Y.; W. T. Pierson, Erie Railroad, Midland Bldg., Cleveland, Ohio; F. R. Cross, Baltimore & Ohio R. R. Co., Baltimore, Md.; J. F. Eshelman, 1740 Broad St. Station Bldg., Philadelphia, Pa.; G. H. Muckley, 205 Transportation Bldg., Washington, D. C.; W. N. McGehee, Southern Ry. Bldg., Washington, D. C.; W. C. Burger, 908 West Broadway, Louisville, Ky.; W. C. Kendall, Transportation Bldg., Washington, D. C.

2411

ASSOCIATION OF AMERICAN RAILROADS

TRANSPORTATION BUILDING

WASHINGTON, D. C., *November 29, 1940.*

HOBOKEN MFRS. R. R. CO.

v.

A. & S. R. R. CO. ET AL.

I. C. C. Docket 25878

NEW ORLEANS & LOWER COAST R. R.

v.

A. C. & Y. R. R. ET AL.

I. C. C. Docket 25728

ULYSSES S. BUTLER, Esq.,
Chief Examiner,
Interstate Commerce Commission, Washington, D. C.

DEAR MR. BUTLER: I am enclosing herewith two copies of a Stipulation, dated November 27, 1940, signed by Mr. Parker McCol-

lester, counsel for Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., and myself, as counsel for the Association of American Railroads.

I request that this stipulation be made a part of the record. Copies are being sent to all parties.

Yours very truly,

J. CARTER FORT.

JCF–h.
Enc.

cc. Messrs. Parker McCollester, 25 Broadway, New York, N. Y.; Toll R. Ware, Missouri Pacific Bldg., St. Louis, Mo.; Robert Thompson, Texas & Pacific Ry., Dallas, Texas.; T. P. Healy, 466 Lexington Avenue, New York, N. Y.; W. T. Pierson, Erie RR, Midland Bldg., Cleveland, Ohio; F. R. Cross, Baltimore & Ohio Railroad, Baltimore, Md.; J. F. Eshelman, 1740 Broad Street Sta. Bldg., Philadelphia, Pa.; G. H. Muckley, 205 Transportation Bldg., Washington, D. C.; W. N. McGehee, Southern Railway Bldg., Washington, D. C.; W. C. Burger, 908 West Broadway, Louisville, Ky.; W. C. Kendall, 302 Transportation Bldg., Washington, D. C.; Charles Clark, Southern Railway Bldg., Washington, D. C.; F. W. Gwathmey, Shoreham Building, Washington, D. C.; E. A. Smith, Illinois Central System, Chicago, Ill.

2412

Exhibit 84

Before The Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

STIPULATION

By arrangements made between counsel, the figures included in Exhibit 72, filed by Mr. Macgowan, and referred to in a letter filed with the Commission by Mr. McCollester, dated September 25, 1940, and marked Exhibit 81, were rechecked in offices of Hoboken Manufacturers Railroad Company at Hoboken, N. J., jointly by Mr. Macgowan and Mr. Kendall on November 9, 1940.

Based upon such recheck, it is stipulated between counsel for Hoboken Manufacturers Railroad Company, complainant in Docket No. 25728, and Seatrain Lines, Inc., intervener, and coun-

sel for the Association of American Railroads, intervener, as follows:

1. To the extent that cars unloaded on its line or those received empty in home route do not provide sufficient and proper empties for loading shipments received from break-bulk water carriers and freight originating locally on its line, the Hoboken orders cars from its trunk line connections for return loading. It "pools" all empty cars which it holds for loading, including those released on line and those ordered and received empty for return loading.

2413 2. In compating the figures included in Exhibit 72 and shown in Exhibit 81 of detention of cars handling west or northbound freight from the break-bulk lines, and beginning dates use were:

(a) In the case of cars made empty on Hoboken's line, the dates of release from previous loads; and

(b) In the case of cars received empty by Hoboken from its connections and not used for other loading, the dates of such receipt.

The ending dates used were those of interchange of the cars by Hoboken to its connections.

PARKER, MCCOLLESTER,
Counsel for Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc.

J. CARTER FORT,
Counsel for Association of American Railroads.

Dated November 27, 1940.

Exhibit 85

Consenting and nonconsenting railroads

RAILROADS GIVING CONSENT TO DELIVERY OF THEIR FREIGHT CAR EQUIPMENT TO SEATRAIN LINES, INC., FOR COASTWISE MOVEMENT

	Cars owned			
	Box	Open top	Others	Total
Akron, Canton & Youngstown Ry Co	270	129	39	438
Atchison, Topeka & Santa Fe Ry	31, 419	12, 245	25, 462	69, 126
Bangor & Aroostook R. R. Co	2, 447	140	905	3, 492
Birmingham Southern Ry Co	176	294	10	480
Boston & Albany, R. R	(1)	(1)	(1)	(1)
Burlington, Rock Island R. R. Co	14	8	41	63
Central Railroad of New Jersey	3, 086	7, 145	109	10, 340
Chicago and Eastern Illinois Ry Co	1, 229	3, 297	91	4, 617
Chicago, Burlington & Quincy R. R	21, 483	14, 398	5, 415	41, 296
Chicago Great Western R. R. Co	3, 245	500	342	4, 087
Chicago, Rock Island & Pacific Ry	19, 823	5, 709	3, 098	28, 630
Chicago, River & Indiana R. R	(1)	(1)	(1)	(1)
Cincinnati Northern R. R	(1)	(1)	(1)	(1)
Cleveland, Cincinnati, Chicago & St. Louis R. R	(1)	(1)	(1)	(1)
Colorado & Southern Ry	907	2, 127	319	3, 353
Delaware & Hudson Railroad Corp	2, 641	8, 199	174	11, 014
Delaware Lackawanna & Western R. R	7, 518	8, 783	298	16, 599
Denver & Rio Grande Western R. R. Co	4, 550	5, 567	1, 721	11, 838
Denver & Salt Lake Ry	385	339	55	779
Duluth, South Shore & Atlantic Ry	293	1, 225	264	1, 782
East Jersey R. R. & Term. Co			276	276
Erie Railroad Company	10, 532	12, 743	367	23, 643
Ft. Dodge, Des Moines & Southern R. R. Co	29	27		56
Ft. Worth & Denver City Ry	974	96	94	1, 164
Georgia & Florida R. R	308	30		338
Gulf Coast Lines	1, 936	505	328	2, 769
International-Great Northern R. R. Co	2, 098	100	221	2, 419
Kansas City Southern Ry	1, 678	1, 339	221	3, 238
Lehigh & Hudson River Railway Co	14	98	14	126
Lehigh & New England R. R. Co	941	2, 048		2, 989
Lehigh Valley Railroad Co	4, 358	9, 318	10	13, 686
Live Oak, Perry & Gulf R. R. Co	3		23	26
Louisiana & Arkansas Ry	1, 122	225	361	1, 708
Manufacturers Railway Company	50			50
Michigan Central R R	(1)	(1)	(1)	(1)
Minneapolis & St. Louis R. R. Co	2, 109	708	208	3, 145
Mississippi Central R. R	37	85	102	224
Missouri & Arkansas Ry. Co	24	15		39
Missouri-Kansas-Texas Lines	4, 561	1, 271	999	6, 841
Missouri Pacific Railroad	16, 552	10, 139	2, 164	28, 855
New Iberia & Northern R. R. Co	(2)	(2)	(2)	(2)
New Orleans, Texas & Mexico Ry	(2)	(2)	(2)	(2)
New York Central R. R. (System)	99, 078	58, 522	5, 317	123, 917
New York, New Haven & Hartford R. R. Co	7, 721	3, 309	130	11, 160
New York, Ontario & Western	57	2, 660	128	2, 845
New York, Susquehanna & Western R. R. Co	63	525		588
Northampton & Bath R. R	217			217
Northeast Oklahoma Railroad Co		74	2	76
Peoria & Eastern Ry	(1)	(1)	(1)	(1)
Pittsburg and Shawmut R. R. Co	8	549		557
Pittsburg, Shawmut & Northern R. R. Co	143	122	11	276
Pittsburg & Lake Erie R. R. including P. & Mc K. & Y	4, 023	23, 378	19	27, 420
2415 Reading Company	8, 682	22, 693	4, 677	36, 052
Rutland Railroad	926	308	159	1, 393
St. Louis-San Francisco Ry. Co	14, 293	8, 494	1, 906	24, 693
Tennessee Central Railway	178	618	76	872
Texas & Pacific Ry Co	4, 397	1, 360	843	6, 600
Texas Electric Railway	5		6	11
Toronto, Hamilton & Buffalo Ry. Co	733	342	102	1, 177
Western Maryland	2, 209	7, 423	20	9, 652
Wheeling & Lake Erie Ry. Co	2, 884	9, 227	100	12, 211
Wichita Falls & Southern R. R. Co	98		3	101
Western Pacific	2, 357	1, 396	1, 520	5, 273
	255, 865	249, 941	58, 708	564, 514

[1] Included in N. Y. C.
[2] Included in G. C. L.

2816 RAILROADS NOT GIVING THEIR CONSENT TO DELIVERY OF THEIR FREIGHT CAR EQUIPMENT TO SEATRAIN LINES, INC., FOR COASTWISE MOVEMENT

	Cars owned			
	Box	Open top	Others	Total
Alabama, Tennessee & Northern R. R. Corp	21	248	59	328
Algoma Central & Hudson Bay Ry. Co	132	428	449	1,009
Alton Railroad Co	2,101	433	259	2,793
Ann Arbor R. R. Co	867	245		1,112
Atlantic Coast Line R. R. Co	9,670	5,903	2,520	17,559
Atlanta & West Point R. R. Co	403	474	82	959
Western Railway of Alabama				
Georgia Railroad	636	316	28	980
Atlanta, Birmingham & Coast R. R. Co	201	558	239	998
Baltimore & Ohio R. R. Co	30,219	50,021	2,390	82,630
Barre & Chelsea R. R. Co			194	194
Bay Terminal R. R. Co			280	280
Bessemer & Lake Erie R. R. Co	700	11,078	109	11,887
Boston & Maine Railroad	2,927	2,896	402	6,225
Cambria & Indiana R. R. Co		3,253		3,253
Canadian National Railways	54,209	10,209	10,547	75,073
Canadian Pacific Railway	55,892	6,446	10,835	73,263
Central of Georgia Ry. Co	5,084	1,908	366	7,648
Central Vermont Ry., Inc	1,264	199	157	1,620
Charleston & Western Carolina Ry. Co	634	85	100	819
Chesapeake & Ohio Ry. Co	11,374	30,310	569	62,453
Chicago & Illinois Midland Ry. Co	325	1,626	32	1,983
Chicago, Milwaukee, St. Paul & Pacific R. R. Co	32,463	14,486	8,251	55,200
Chicago & North Western Ry.-C. St. P. M. & O.	24,555	15,324	9,031	48,910
Chicago, Indianapolis & Louisville Ry	814	2,597	145	3,556
Chicago & Western Indiana R. R. Co		100	44	144
Chicago, St. Paul, Minneapolis & Omaha Ry	(1)	(1)	(1)	(1)
Clinchfield Railroad Co	289	2,677	119	3,385
Colorado & Wyoming Ry. Co	6	2,306	101	411
Columbus & Greenville Ry. Co	604	56		360
Copper Range R. R. Co	37	156	59	252
Cumberland & Pennsylvania R. R. Co		99		99
Delray Connecting R. R. Co		244		244
Detroit, Toledo & Ironton R. R. Co	2,228	857	50	3,135
Detroit & Mackinac Railway Co	197	55	47	297
Detroit & Toledo Shore Line R. R. Co		149		149
Duluth, Missabe & Northern Ry. Co	345	12,859	413	13,617
Duluth, Missabe & Iron Range	20		67	87
East St. Louis Junction R. R. Co	770	9,684	749	11,183
Elgin, Joliet & Eastern Ry. Co	194		194	388
Florida East Coast Ry	8,670	2,248	155	10,873
Grand Trunk Western R. R. Co	621	155	2	778
Green Bay & Western R. R. Co				
Kewaunee, Green Bay & Western R. R	(1)	(1)	(1)	(1)
Ahnapee & Western Ry. Co.				
Great Northern Ry. Co	24,634	10,883	4,927	40,444
Gulf, Mobile & Ohio R. R. Co	5,427	1,846	729	6,002
Huntington & Broad Top Mountain R. R		142		142
Illinois Central System	19,461	21,892	4,790	46,543
Illinois Terminal R. R. System	409	709	67	1,185
Interstate Railroad Co	1	2,907	9	2,917
2817 Lake Superior & Ishpeming R. R	99	1,766	429	2,294
Long Island Railroad	18	93		111
Louisville & Nashville R. R. Co	16,162	34,528	1,805	52,395
Litchfield & Madison Ry. Co		542	3	550
Maine Central Railroad Co	3,129	691	673	4,493
Minneapolis, St. Paul & Sault Ste. Marie Ry. Co	9,990	3,730	1,646	15,366
Montour Railroad Co		1,736		1,736
Muncie & Western	100			100
Nashville, Chattanooga & St. Louis Ry	3,565	1,357	314	5,236
New York, Chicago & St. Louis R. R. Co	6,092	4,506	758	11,356
New York, Ontario & Western Ry. Co	8,179	46,853	907	56,029
Norfolk & Western Ry. Co	521	150	82	753
Norfolk Southern Ry. Co	21,378	7,095	9,105	37,578
Northern Pacific Ry. Co	76,793	147,118	6,315	230,226
Pennsylvania Railroad	10,104	3,493	147	13,744
Pere Marquette Ry. Co	1	147	1	149
Pittsburgh, Lisbon & Western R. R. Co		2,897	46	2,943
Pittsburgh & West Virginia Co. (The)	483	4	1	488
Port Huron & Detroit R. R	95		313	408
Quebec Central Ry	499	242	13	754
Richmond, Fredericksburg & Potomac R. R. Co				

RAILROADS NOT GIVING THEIR CONSENT TO DELIVERY OF THEIR FREIGHT CAR EQUIPMENT TO SEATRAIN LINES, INC., FOR COASTWISE MOVEMENT—Continued

	Cars owned			
	Box	Open top	Others	Total
St. Louis & Hannibal R. R. Co.	4	17	9	30
St. Louis, Southwestern Ry. Co.	3,158	211	398	3,767
Salt Lake & Utah R. R. Co.	13	84	33	130
Savannah & Atlanta Ry. Co.	196		68	264
Seaboard Air Line Railway	10,209	3,755	2,697	16,661
Southern Railway System	30,526	16,069	5,206	51,801
Southern Pacific Lines (Pacific)	21,722	3,346	13,473	38,541
Spokane International Railway Co.	22	36	222	280
Spokane, Portland & Seattle Ry. Co.	297		339	636
Temiskaming & Northern Ontario Ry. Co.	226	50	264	540
Texas & New Orleans R. R. Co.	5,186	1,280	4,379	10,825
Toledo, Peoria & Western Railroad	33	60	9	102
Union Railroad Co. (Pitts.)	17	5,704	121	5,842
Union Pacific System	25,354	10,975	10,232	46,561
Utah Idaho Central R. R. Co.	7	98	2	107
Virginian Railway Co.	75	11,269	14	11,358
Wabash Railway Co.	11,432	4,634	600	16,666
Winston-Salem Southbound Ry. Co.	23	49	20	92
Total	562,131	561,438	120,460	1,244,029

[1] Included in C. & N. W.
[2] Included in G. B. & W.

2418

Exhibit 86

ESTIMATED COST OF FREIGHT CAR OWNERSHIP, COVERING THE YEARS 1939 AND 1940, FOR PER DIEM RATE PURPOSES

The attached study shows the results of an "investigation of the per diem rate for freight train cars, Class I railroads of the United States and Canada," covering the calendar year 1939. Since completion of this study, Class I railroads in the United States (with two exceptions) have filed their regular annual reports for the year 1940 with the Interstate Commerce Commission. It is possible, therefore, closely to approximate 1940 freight car ownership costs to compare with those developed in the 1939 study.

The comparison of aggregate costs for the two years is given in the following tables. Basis No. 1 uses the item "interest on depreciated reproduction value of cars," while Basis No. 2 substitutes therefor the item "interest on ledger value."

	Aggregate freight car ownership costs	
	1940	1939
Basis No. 1:		
1. Cost of repairs	$187,350,000	$163,765,280
2. Cost of taxes	40,700,000	35,803,991
3. Interest on depreciated reproduction value	121,540,000	119,977,791
4. Cost of depreciation and retirements	103,160,000	101,377,960
5. Miscellaneous charges	56,000,000	55,804,082
Total	508,750,000	476,729,074
Basis No. 2:		
1. Cost of repairs	187,350,000	163,765,280
2. Cost of taxes	40,700,000	35,803,991
3. Interest on ledger value	187,660,000	185,251,679
4. Cost of depreciation and retirements	103,160,000	101,377,960
5. Miscellaneous charges	56,000,000	55,804,082
Total	574,870,000	542,002,992

2419 On the basis of these figures, the average costs per car per day in 1940 and 1939 were as follows, based on ownership of 1,630,000 freight cars in 1940 and 1,644,113 in 1939:

	1940	1939
	Cents	*Cents*
Basis No. 1 (using interest on dep. rep. value)		
(a) No account taken of bad order and surplus cars	85.278	79.441
(b) Deducting bad order cars from ownership	94.080	87.644
(c) Deducting bad order and surplus cars from ownership	106.761	99.458
Basis No. 2 (using interest on ledger value)		
(a) No account taken of bad order and surplus cars	96.391	90.318
(b) Deducting bad order cars from ownership	106.307	99.644
(c) Deducting bad order and surplus cars from ownership	120.636	113.077

BASIS FOR 1940 ESTIMATES

1. Number of freight cars.—Statistics of freight car ownership regularly compiled by the Car Service Division, A. A. R., show a decline during 1940 of nine-tenths of one per cent. Applying that ratio of decline to the 1,644,113 cars used as the basis of the 1939 study, gives approximately 1,630,000 cars for 1940.

2. Car repair costs.—Excluding from both years the two Class I roads which have not yet filed annual reports for the year 1940, freight-train car repairs (operating expense account 314) increased 14.4 per cent in 1940 over 1939. Applying that ratio of increase to the $163,765,280 used in the 1939 study as representing cost of car repairs, gives a corresponding figure for 1940 of $187,350,000.

3. Taxes.—The cost of taxes in the 1939 study amounted to $35,803,991, which was arrived at by a series of calculations

appearing on page 16 of the study. Using the same method, but substituting 1940 data, a figure of $40,700,000 is de-
2420 veloped for this item in 1940. In this connection it may be noted that payroll taxes of Class I railroads increased 10.2 per cent in 1940 over 1939; other taxes increased 11.9 per cent; railroad property investment, including materials and supplies, increased about $212,000,000; investment in per diem freight-train cars increased about $40,000,000; total payrolls increased approximately $100,000,000. These increases account for the rise in 1940 of the cost of taxes charged to freight car ownership.

4. Interest on ledger value.—Excluding from both years the two Class I railroads which have not yet filed annual reports, the ledger value of freight-train cars increased 1.3 per cent in 1940 over 1939. Applying that ratio of increase to the ledger value of cars used in the 1939 study, and taking 6 percent of the result, gives $187,660,000 as the interest on ledger value of cars in 1940. This compares with $185,251,679 used in the 1939 study.

5. Interest on depreciated reproduction value.—Following the same process as described in paragraph 5 above, interest on depreciated reproduction value of freight cars in 1940 is calculated at $121,540,000 compared with $119,977,761 used in the 1939 study.

6. Depreciation and retirements.—Excluding the two roads not yet having filed their annual reports for 1940, equipment retirements and freight-train car depreciation (operating expense accounts 329 and 331) increased 1.76 per cent in 1940 over 1939. Applying that ratio of increase to the $101,377,960 calculated as the cost of these items in 1939 gives $103,160,000 as the corresponding cost in 1940.

7. Miscellaneous.—Detailed information for 1940 is not yet available. Therefore, it was assumed that the 1940 costs entering into this item were approximately the same as those for 1939. Although the general trend indicates that these costs were somewhat greater in 1940 than they were in 1939.

Summary of cost of freight car ownership covering the year 1939 for per diem rate purposes

PER DIEM RATES FOR FREIGHT CARS OF U. S. CLASS I ROADS

	Repairs	Taxes	Interest on dep. rep. value	Interest on ledger value	Depreciation and retirements	Miscel. charges	Total cols. 1+2+3 +5+6	Total cols. 1+2+4 +5+6
	1	2	3	4	5	6	7	8
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Rate 1 [1]	27.280	5.966	19.993	30.870	16.893	9.259	79.441	90.318
Rate 2	30.107	6.583	22.057	34.057	18.638	10.259	87.644	99.644
Rate 3	34.166	7.470	25.031	38.650	21.149	11.642	99.458	113.077

PER DIEM RATES FOR FREIGHT CARS OF CANADIAN CLASS I ROADS

Rate 1	27.587	5.966	16.102	37.074	20.592	9.259	79.546	100.519
Rate 2	30.435	6.583	17.765	40.902	22.718	10.259	87.760	110.897
Rate 3	34.538	7.470	20.159	46.416	25.780	11.642	99.589	125.846

PER DIEM RATES FOR FREIGHT CARS OF U. S. AND CANADIAN CLASS I ROADS

Rate 1	27.313	5.966	19.083	31.365	17.189	9.259	79.450	91.132
Rate 2	30.133	6.583	21.715	34.604	18.963	10.259	87.653	100.542
Rate 3	34.195	7.470	24.642	39.268	21.520	11.642	99.469	114.095

NOTE.—Rate 1 is calculated without taking into account any bad orders or surplus cars. Rate 2 is calculated by deducting from the per diem car ownership 9.359% bad orders. Rate 3 is calculated by deducting from the per diem car ownership 9.359% bad orders and 10.767% surplus cars, leaving 79.874% of the total ownership as active cars, which forms the base for this rate.

PER DIEM RATE FOR FREIGHT CARS OF U. S. CLASS I ROADS BASED ON 1925 PERFORMANCE (See I. C. C. 1780)

	[1] 42.838	5.991		22.082	16.561	11.361		98.833

[1] Comparable with rate 1 for U. S. class 1 roads, interest calculated on ledger value.

2422 INVESTIGATION OF THE PER DIEM RATE FOR FREIGHT TRAIN CARS CLASS I RAILROADS OF THE UNITED STATES AND CANADA

In order to secure the necessary information to properly progress this subject Mr. Buford addressed questionnaires under date of August 12 and 28, 1940, to all Class I Railroads in the United States and Canada. These questionnaires called for the following information:

Average number of freight cars and cabooses in existence, during 1939, of owned, leased, or controlled lines, including Car Trust cars, by series and by types (box, stock, hopper, etc.) as well as by classes (A, B, C, D, E as per A. A. R. Interchange Rules 112),

Average weight per car in the series.

Reproduction value of the series calculated as per Interchange Rule 112.

Average Age of the series.

Ledger Value (Original Cost plus Additions and Betterments) of the series.

In addition to the above, certain information was obtained from the following sources:

Preliminary Abstract of Railway Statistics.

I. C. C. Bureau of Statistics for 1939.

Statistics of Railways in the United States, I. C. C. for years 1926 to 1938 inclusive.

Statistics of Railways of Class I United States (1926–1939) A. A. R. Bureau of Railway Economics.

I. C. C. Docket 17801 Investigation Concerning Car Hire Settlements, The Per Diem Rate.

With the above information at hand there was developed the ownership cost plus a reasonable return on value of all per diem freight train cars belonging to the Class I Railroads in the United States and the same for the per diem freight train cars belonging to the Class I Railroads in Canada.

These ownership costs consist of the following items:

1. Cost of Repairs.
2. Cost of Taxes.
3. Interest on Value.
4. Cost of Depreciation and Retirements.
5. Miscellaneous Charges.

In accordance with the above outline the following cost of ownership plus a reasonable return was produced for per diem freight cars in the United States for the year 1939:

1. Cost of Repairs	$163,765,280
2. Cost of Taxes	35,803,991
3. Interest on Value	119,977,761
4. Cost of Depreciation and Retirements	101,377,960
5. Miscellaneous Charges	55,804,082
Total	476,729,074

2423 An alternate method of calculating this result is to use as a base for Item 3 the Ledger Value (First Cost plus Additions and Betterments) of the cars instead of the Depreciated Reproduction Value of the cars. This method produces the following for the per diem freight cars in the United States for 1939:

1. Cost of Repairs	$163,765,280
2. Cost of Taxes	35,803,991
3. Interest on Ledger Value	185,251,679
4. Cost of Depreciation and Retirements	101,377,960
5. Miscellaneous Charges	55,804,082
Total	542,002,992

Likewise a similar cost study was made of the per diem freight cars of the Canadian National and the Canadian Pacific Railways. The results of this study for 1939 were as follows:

1. Cost of Repairs	$14,350,343
2. Cost of Taxes	3,103,593
3. Interest on Value	8,376,301
4. Cost of Depreciation	10,711,679
5. Miscellaneous Charges	4,837,312
Total	41,379,028

The alternate method of using as a base for Item 3 the Ledger Value instead of the Depreciated Reproduction Value gives the following results for 1939:

1. Cost of Repairs	$14,350,343
2. Cost of Taxes	3,103,593
3. Interest on Ledger Value	19,285,175
4. Cost of Depreciation	10,711,679
5. Miscellaneous Charges	4,837,312
Total	52,288,102

The details of the method by which each of the above items were produced, both for per diem cars owned by United States lines and Canadian Lines, are attached hereto.

Active Per Diem Freight Cars

In order to determine the average active per diem freight cars a study was made of the years 1925 to 1929 inclusive and 1935 to

1939 incl. These two five-year periods were selected because they represent more normal transportation conditions than other periods in recent years. Exhibits A, B, C, D and E attached show in detail for these two 5-year periods the Average Ownership of per diem freight cars, the average bad orders, the average surplus cars, the average bad orders and surplus cars, and the average active cars. From these exhibits it will be noted that:

	Cars
1. Ave. Ownership for 10 years	1,996,635
2. Ave. Bad Orders for 10 years	186,858
3. Line 2 ÷ Line 1=9.359%.	
4. 100%—9.359%=90.641%.	
5. Ave. Surplus cars for 10 years	214,981
6. Line 5 ÷ Line 1=10.767%.	
7. Ave. Active cars for 10 years	1,594,796
8. Line 7 ÷ Line 1=79.874%.	

Line		U. S. roads	Canadian roads	U. S. roads		Canadian roads		U. S. and Canadian roads	
		1	2*	3	4	5	6	7	8
				Per diem rate	Alternate per diem rate	Per diem rate	Alternate per diem rate	Per diem rate	Alternate per diem rate
A	Cost of ownership	$476,729,074	$41,379,028						
B	Alternate cost of ownership	$542,092,992	$52,288,101						
C	Total number of cars	1,644,113	142,517	79.441 cts.	99.318 cts.	79.546 cts.	$1.00519	79.450 cts.	91.132 cts.
D	Percent bad orders	9.359	9.359	87.644 cts.	99.644 cts.	87.709 cts.	$1.10897	87.653 cts.	$1.00542
E	Percent surplus cars	10.767	10.767						
F	Percent active cars	79.874	79.874	99.458 cts.	$1.13077	99.589 cts.	$1.25846	99.469 t	$1.14095

See next page for explanatory details.

2425 Line A Cost of Ownership is composed of the five items, Cost of Repairs, Cost of Taxes, Interest on Value, (Value being the depreciated reproduction value), Cost of Depreciation and Retirements and Miscellaneous Charges.

Line B Cost of Ownership is composed of the same five items with this difference: Interest on Value is based on the Ledger Value, (first cost plus additions and betterments).

Line C columns 1 and 2 give the total number of per diem freight cars belonging to Class 1 U. S. lines and Canadian lines respectively.

The per diem rates given in Line C, Columns, 3, 4, 5, 6, 7, and 8 are predicated on the theory that there were no bad order cars and no surplus cars at any time during 1939. In other words that all per diem freight cars were in use every day in the year. For the rate in Column 3 the ownership cost of Column 1, Line A was used. For the rate in Column 4 the ownership cost of Column 1, Line B was used. For the rate in Column 5 the ownership cost of Column 2, Line A was used. For the rate in Column 6 the ownership cost of Column 2, Line B was used. For the rate in Column 7 the combined ownership costs of Columns 1 and 2, Line A was used and the combined number of cars of Columns 1 and 2, Line C was used. For the rate in Column 8 the combined ownership costs in Columns 1 and 2, Line B was used and the combined number of cars of Columns 1 and 2, Line C was used.

The rates in Line D were developed as follows:

Recognizing the fact that there are a certain number of bad order cars in existence all the time and that from a ten year study (see Exhibits A and B) 9.359% is an average percentage of bad orders, then a proper per diem rate is obtained by dividing the ownership cost by 100% − 9.359%, or 90.641%, of the number of cars times 365 days in the year. Therefore, the rate in Column 3 is $476,729,074 ÷ 90.641% of (1,644,113 × 365).

The rate in Column 4 is $542,092,992 ÷ 90.641% of (1,644,113 × 365).

The rate in Column 5 is $41,379,028 ÷ 90.641% of (142,517 × 365)

The rate in Column 6 is $52,379,028 ÷ 90.641% of (142,517 × 365)

The rate in Column 7 is ($476,729,074 + 41,379,028) ÷ 90.641% of (1,644,113 + 142,517) × 365.

The rate in Column 8 is ($542,092,992 + $52,288,101) ÷ 90.641% of (1,644,113 + 142,517) × 365.

The per diem rates for the Canadian roads Columns 5 and 6 and the per diem rates for the combination of U. S. and Canadian roads, Columns 7 and 8 were calculated on the assumption that the same percentage of bad orders developed for the U. S. roads was properly applicable to Canadian roads.

Line E records a surplus of cars of 10.874%. This percentage was developed from a ten-year study of U. S. roads (see Exhibits A and C). The assumption is made that this same percentage of surplus cars applies also to the Canadian lines.

The rates in line F were developed as follows: Recognizing the fact that there are a certain number of surplus cars in existence all the time and that the sum of the bad orders and surplus cars, subtracted from the total ownership, produces the active cars, then 79.874%, Column 1, is the proper proportion of active cars (see Exhibits A to E incl.). It is assumed that 79.874% is properly applicable to the Canadian lines. Then a proper per diem
2426 rate based on active cars is obtained by dividing the ownership cost by 79.874% of the number of cars times 365 days in the year. Therefore.

The rate in Column 3 is $476,729,074 ÷ 79.874% of (1,644,113 × 365).

The rate in Column 4 is $42,082,892 ÷ 79.874% of (1,644,113 × 365).

The rate in Column 5 is $41,379,028 ÷ 79.874% of (142,517 × 365).

The rate in Column 6 is $52,379,028 ÷ 79.874% of (142,517 × 365).

The rate in Column 7 is ($476,729,074 + $41,379,028) ÷ 79.874% of (1,644,113 + 142,517) × 365.

The rate in Column 8 is ($542,082,892 + $2,288,101) ÷ 79.874% of (1,644,113 + 142,517) × 365.

2427 EXHIBIT A

Average ownership freight cars class I roads as reported to car service division 10-year period 1925 to 1929 inc., 1935 to 1939 inc.

(a) AVERAGE OWNERSHIP

	All box	Gondola, hopper, coal, coke, and ore	Stock	Flat	Others not including refrigerators	Total not including refrigerators
Year						
1925	1,029,152	760,541	87,230	56,250	46,817	2,304,504
1926	1,074,518	806,114	86,156	60,875	46,115	2,282,230
1927	1,096,324	806,209	83,518	60,025	46,392	2,286,527
1928	1,059,922	853,164	84,911	64,974	45,976	2,256,847
1929	1,047,160	906,720	84,393	64,113	44,787	2,227,028
Average	1,061,415	826,550	85,242	61,247	45,817	2,271,426
1935	845,831	828,072	66,362	77,634	46,501	1,842,403
1936	773,902	765,816	62,866	73,843	46,031	1,750,082
1937	739,291	802,862	63,889	80,311	19,063	1,710,296
1938	758,459	811,677	59,096	87,568	15,177	1,693,250
1939	710,666	761,523	56,852	84,041	17,317	1,682,179
Average	765,630	794,270	62,613	80,679	28,802	1,725,843
10 years	913,523	810,410	73,928	71,463	37,309	1,906,635

2428

EXHIBIT B

(b) AVERAGE BAD ORDER

	All box	Gondola, hopper, coal, coke, and ore	Stock	Flat	Others not including refrigerators	Total not including refrigerators
Year:						
1925	82,218	85,876	5,873	6,347	2,153	182,464
1926	69,605	72,270	4,653	5,339	2,110	153,977
1927	61,541	60,642	4,089	5,260	2,241	133,863
1928	64,014	65,105	4,037	5,820	2,133	141,109
1929	62,634	60,033	3,982	5,513	1,924	134,086
5 years	68,002	68,785	4,527	5,654	2,132	149,100
1935	113,017	135,964	9,292	10,798	3,328	272,399
1936	94,656	120,247	9,621	9,655	2,321	245,500
1937	77,179	98,190	6,421	6,039	1,339	189,148
1938	80,736	122,212	5,965	6,018	1,240	216,161
1939	73,937	115,265	6,066	5,335	1,264	201,867
5 years	87,905	120,776	7,473	7,569	1,892	225,615
10 years	77,454	94,781	6,000	6,612	2,0[illegible]	180,858

2429

EXHIBIT C

(c) AVERAGE SURPLUS

	All box	Gondola, hopper, coal, coke, and ore	Stock	Flat	Others not including refrigerators	Total not including refrigerators
Year						
1925	104,071	98,717	18,678	5,453	1,047	227,966
1926	101,878	65,451	20,545	5,283	1,324	194,481
1927	133,451	80,487	21,458	6,859	1,377	243,632
1928	130,735	109,296	21,949	7,557	1,687	271,194
1929	113,008	75,561	23,969	6,454	1,149	220,851
5 years	116,767	85,896	21,320	6,321	1,318	231,622
1935	172,573	71,279	25,433	10,155	1,121	280,561
1936	93,895	37,642	23,940	5,862	978	162,317
1937	67,689	33,982	22,907	4,426	942	129,946
1938	117,812	102,277	24,141	8,356	1,385	253,971
1939	75,817	61,996	19,106	6,539	1,526	164,984
5 years	105,541	81,435	23,105	7,098	1,190	198,339
10 years	111,154	73,666	22,212	6,695	1,254	214,981

2430

EXHIBIT D

(d) AVERAGE BAD ORDER & SURPLUS

	All box	Gondola, hopper, coal, coke, and ore	Stock	Flat	Others not including refrigerators	Total not including refrigerators
Year						
1925	186,289	184,593	24,551	11,800	3,200	410,430
1926	171,483	137,721	25,198	10,622	3,434	348,458
1927	194,992	141,129	25,547	12,109	3,618	377,495
1928	194,749	174,371	25,986	13,377	3,820	412,303
1929	176,332	135,594	27,951	11,967	3,073	354,917
5 years	184,709	154,681	25,847	11,975	3,449	380,721
1935	285,590	207,243	34,725	20,953	4,449	552,960
1936	188,551	160,889	33,561	15,517	3,299	407,817
1937	144,788	132,172	29,328	10,465	2,281	319,014
1938	198,548	224,489	30,101	14,374	2,615	470,132
1939	149,754	177,261	25,172	11,874	2,790	366,851
5 years	193,446	192,211	30,578	14,637	3,082	423,954
10 years	188,998	163,447	28,212	13,307	3,265	401,839

3431 EXHIBIT E

(e) AVERAGE ACTIVE CARS

	All box	Gondola, hopper, coal, coke, and ore	Stock	Flat	Others not including refrigerators	Total not including refrigerators
Year						
1925	880,896	810,947	62,688	86,956	43,617	1,894,074
1926	903,335	820,393	61,112	86,251	42,681	1,913,772
1927	873,332	849,140	59,971	83,915	42,674	1,909,032
1928	862,173	800,763	57,825	81,597	42,156	1,844,544
1929	870,712	820,929	56,312	82,444	41,714	1,872,111
5 years	879,889	820,441	59,581	84,233	42,568	1,886,706
1935	550,241	612,829	33,640	56,681	36,052	1,289,443
1936	587,451	628,527	32,329	58,326	35,732	1,342,365
1937	611,453	670,729	32,341	59,046	17,722	1,391,282
1938	539,862	587,188	28,980	53,532	14,502	1,224,124
1939	560,912	604,052	31,660	54,167	14,527	1,265,328
5 years	569,964	620,065	31,790	56,350	23,709	1,301,889
10 years	725,423	720,252	45,686	70,291	33,144	1,594,796

2432 UNITED STATES LINES

Item A. Freight Train Car Repairs

The total of the item Freight Train Car Repairs was determined as follows: In answer to Mr. Buford's questionnaire of August 12, 1940, the Class I railroads in the United States reported the amounts they charged to freight train car repairs account 314. These reported amounts included the repairs to cabooses as well as to other freight train cars.

The following Class I Railroads in the United States own refrigerator cars, paid for on a mileage instead of on a per diem basis, while on foreign lines: Atchison, Topeka & Santa Fe; Boston and Maine; Denver and Salt Lake; Illinois Central; Louisiana and Arkansas; Northern Pacific and the Pere Marquette. It was necessary to take these mileage refrigerators out of the picture as this is a study of per diem freight cars. Therefore, from the reported freight car repair charges reported by the above roads, there were substracted amounts consisting of the repair charges of their mileage refrigerators. These latter charges were developed as follows:

A study conducted by the Association of American Railroads of 90,725 privately owned refrigerators on their 1934 performance developed that it cost $161.04 per car per year for repairs to these cars. On account of changes in prices of material and rates of pay for labor, 1939 compared with 1934, a correction factor of 19% must be added to the $161.04 per car per year. (For the development of this correction factor see Exhibit F.) 19% of $164.04 is $30.59. $161.04 + $30.59 = 191.63 repair cost per car per year for refrigerators for the year 1939. $191.63 multiplied

by the number of refrigerators owned by each road mentioned above gives the cost of repairs for the year 1939 for each refrigerator fleet. The amount of repairs for each refrigerator fleet subtracted from the amount reported for repairs to that road's freight cars and cabooses produces the repair cost for all per diem freight cars and cabooses for that line.

The total amount of each railroad's report of the cost of repairs to freight cars and cabooses (less the repair cost of mileage refrigerators for those roads mentioned above) was divided by the number of freight cars and cabooses. This latter amount multiplied by the number of per diem freight cars gives the cost of repairs for per diem cars for 1939. The total amount for this item for the Class I United States Railroads is $163,765,280.

2433

Exhibit F

Association of American Railroads Prices For Labor and Materials, Method of Developing

A permanent committee of the Mechanical Division, the Committee on Prices for Labor and Materials, composed of representatives from railroads and private car lines, procure semi-annually from the Purchasing Agents of eleven representative railroads—(1) AT&SF, (2) CB&Q, (3) CPR, (4) CMStP&P, (5) L&N, (6) NYC, (7) NYNH&H, (8) NYC&StL, (9) PRR, (10) SAL and (11) SP&S—prices for the various items of material used in repairing freight-train cars.

From this information is developed an average price of each of these items of material to which is added an allowance for freight charges, store expense and interest on car repair material store stock inventory balances, resulting in the material prices as contained in the A. A. R. Rules of Interchange. These latter are considered as fair representative average prices due to the geographical location, size, etc. of the eleven railroads and are accepted as such by all railroads and private car lines located in the United States, Canada, Mexico and Cuba subscribing to the A. A. R Rules of Interchange.

In like manner inquiry is directed semi-annually to the chief mechanical officer of the same eleven representative railroads, with the exception of the NYC&StL being eliminated and the Sou. Pac. being added, as to any changes in labor rates or proportion of helpers and apprentices to mechanics that would affect the weighted average.

The A. A. R. labor rate as contained in the Rules of Interchange is based on a weighted average according to the number of men employed at the various rates to which is added 61.92% for items of indirect expense such as wages of foremen, work inspec-

tors, clerks, laborers, proportion of expense of operating power plant, shop switching, proportion of salaries and expenses of chief mechanical officers, their assistants, clerical staffs, etc.

This percentage was originally developed by a Special Committee on Compensation for Car Repairs, consisting of representatives of railroads and private car lines, of the Master Car Builders Association, during 1915 and was subsequently revised by the A. A. R. Committee on Prices for Labor and Materials in 1920 and 1922.

2434 Development of Correction Factors Applicable to Cost of Labor and Materials Used in freight-Train Car Repairs

During 1930 the Mechanical Division Arbitration Committee made a study of the labor and material charges involved in 897 of the largest car repair bills received during the first six months of 1930 by the twenty-five representative railroads following:

(1) ACL.
(2) AT&SF.
(3) B&O.
(4) B&M.
(5) CB&Q.
(6) C&NW.
(7) CMStP&P.
(8) CRI&P.
(9) Can. Naf.
(10) Can. Pac.
(11) IC.
(12) L&N.
(13) Mo. Pac.
(14) NYC.
(15) NYC&StL.
(16) NYNH&H.
(17) No. Pac.
(18) PRR.
(19) SAL.
(20) Sou.
(21) SP PL.
(22) T&NO.
(23) T&P.
(24) UP.
(25) Wabash.

These 897 bills involved charges amounting to $823,071.23 for material and $459,131.26 for labor or a total of $1,282,502.49.

The material involved in the above mentioned bills was segregated into thirty-six principal and one miscellaneous items and priced at the A. A. R. prices in effect January 1 to August 1, 1930.

The value of this same quantity of material at A. A. R. prices in existence in 1934 is $714,272.26 and the labor cost to apply same $413,488.13.

The value of this same quantity of material at A. A. R. prices in existence January 1, 1939 to July 31, 1939 inclusive is $816,534.07 and the labor cost to apply same is $522,080.98.

The value of this same quantity of material at A. A. R. prices in existence August 1, 1939 to December 31, 1939 inclusive is $826,076.58 and the labor to apply same is $522,080.98 (see e5705, pages 14 and 15).

Therefore the correction factor for cost of freight car repairs for the years 1939 as compared with 1934 is developed as follows:

In 1934 the material charge was	$714,272
In 1934 the labor charge was	413,488
In 1934 the total charge was	1,127,760
In 1939 the material charge was	[1] 816,534
In 1939 the material charge was	[2] 826,077
or an average of	[3] 820,510
In 1939 the labor charge was	522,081
In 1939 the total charge was	1,342,591

[1] For 7 months.
[2] For 5 months.
[3] For the year.

$1,342,591 − $1,127,760 = $214,831 increase 1939 over 1934.
$214,831 − $1,127,760 = 19% increase.

2435

	Cost on basis of prices in effect			
	Jan. 1, 1930 to July 31, 1930	1934	Jan. 1, 1939 to July 31, 1939	Aug. 1, 1939 to Dec. 31, 1939
MATERIAL				
1. Air hose	$44,785.93	$41,070.08	$41,461.22	$41,461.22
2. Angle cocks	7,587.50	7,615.19	9,608.99	9,608.99
3. Dirt collectors	437.25	437.25	520.78	520.78
4. Cut-out cocks	343.98	343.98	338.52	338.52
5. Pressure retaining valves	1,230.90	1,303.50	1,537.25	1,537.25
6. Release valves	583.10	593.95	962.12	962.12
7. Cylinders, reservoirs, triple valves and parts	11,144.38	11,144.38	13,196.29	13,196.29
8. Brake beams	28,958.54	27,287.86	36,198.18	35,919.73
9. Brake shoes	63,191.38	53,616.91	68,574.32	70,850.91
10. Castings, cast iron and cast-steel	11,589.85	11,865.80	13,521.49	13,521.49
11. Hand S connectors	454.02	460.60	444.15	444.15
12. Couplers complete	56,279.44	54,199.28	73,613.93	72,573.88
13. Coupler bodies	7,846.83	7,541.04	10,568.22	10,470.84
14. Coupler knuckles	13,931.62	13,458.10	18,068.74	17,944.13
15. Coupler knuckle locks	2,631.42	2,581.37	3,164.36	2,914.55
16. Coupler knuckle pins	5,552.10	5,654.16	6,975.71	6,975.71
17. Coupler lock lifters	305.40	261.77	567.17	567.17
18. Coupler parts, miscellaneous	1,042.57	938.31	695.05	695.05
19. Coupler release clevises	381.93	381.93	520.82	520.82
20. Doors	5,024.91	5,024.91	5,091.97	5,091.97
21. Friction draft gears	17,747.45	17,352.85	19,019.64	19,092.29
22. Journal boxes	5,464.97	3,292.14	4,638.92	4,638.92
23. Journal box lids	8,508.10	6,205.16	6,908.84	6,908.84
24. Journal box dust guards	209.71	211.92	154.12	154.80
25. Journal bearings	110,661.84	60,361.01	65,391.08	65,391.08
26. Pipe and pipe fittings	5,165.47	5,084.76	5,793.39	5,793.39
27. Wrought iron	71,002.77	65,085.87	71,002.77	76,919.67
28. Forgings	11,795.98	10,812.98	11,795.98	12,778.98
29. Malleable iron	6,248.00	6,093.53	5,179.33	4,570.00
30. Lumber	22,971.84	20,775.59	15,981.33	17,579.35
31. Springs	12,340.98	12,340.98	16,454.64	16,454.64
32. Steel, plate and structural	4,851.21	4,959.83	4,851.21	5,068.85
24-26 33. Cast-iron wheels and axles	268,474.58	244,307.43	271,107.07	273,739.18
34. Cast-steel wheels and axles	1,243.76	1,184.44	1,273.56	1,247.25
35. W. S. N-W. wheels and axles	5,553.68	5,632.41	6,040.18	6,075.92
36. W. S. I-W. wheels and axles	168.25	161.99	173.84	184.05
37. Miscellaneous small items	6,359.56	5,518.91	6,508.05	6,382.78
	823,071.23	714,272.26	816,534.07	826,076.58
LABOR				
Labor (including COT&S of air brakes, cleaning dirt collectors, and repairing valves)	450,431.26	413,488.14	522,080.98	522,080.98

2437 Item B. Cost of Taxes

1. Tax accruals $355,677,558 (I. C. C. Preliminary Abstract of Ry. Statistics Steam Rys.—Pages 4 and 16).

2. Pay Roll Taxes $105,551,001 (Statistics of Rys. of Class I United States 1926–1939, A. A. R. Bureau of Ry. Economics, Sheet 10).

3. Line 1 − Line 2 = $250,126,557 Taxes other than pay roll taxes.

4. Investment in railway property used in transportation service $25,274,339,043 (Statistics of Rys. Class I, A. A. R. Bureau of Ry. Economics, Sheet 1).

5. Materials and Supplies $327,578,291 (Statistics of Rys. Class I, A. A. R. Bureau of Ry. Economics, Sheet 1).

6. Line 4 + Line 5 = $25,601,917,334.

7. Line 3 ÷ Line 6 = .977%

8. Line 7 × Investment in per diem Freight Train Cars $3,087,544,565 = $30,165,310 Taxes on per diem Freight Train Cars, other than Pay Roll Taxes.

9. Total compensation to employes $1,863,333,736 (I. C. C. Preliminary Abstract Page 11 and Statistics of A. A. R. Bureau of Ry. Economics, Sheet 3).

10. Line 2 ÷ Line 9 = 5.65% ratio of compensation to pay roll tax.

11. Total repair charge to per diem Freight Train Cars $163,765,280.

12. Ratio Labor Charge to Line 11 50%.

13. Labor included in Line 11 (Line 12 × Line 11), $81,882,640.

14. 5.654% of Line 13 (see Line 10), $1,629,644. Portion of Pay Roll Taxes on Labor in Freight Car Repair Item.

15. Sum of Items E, F, G, & H of Miscellaneous Charges, $35,692,867.

16. Ratio of Labor Charge to Line 15 (see Line 12) 50%.

17. Labor included in Line 15, $17,846,434.

18. 5.654% of Line 17 (see Line 10), $1,009,037. Portion of pay roll taxes on Miscellaneous charges assignable to freight car repairs.

19. Line 8 + Line 14 + Line 18 = $35,803,991. Total Taxes assignable to Freight Cars.

The data for developing the amounts chargeable to Item B Cost of Taxes, was obtained from the following:

Preliminary Abstract of Railway Statistics I. C. C. Bureau of Statistics For 1939.

Statistics of Railways of Class I United States (1926–1939) A. A. R. Bureau of Railway Economics.

I. C. C. Docket 17801 Investigation Concerning Car Hire Settlements. The Per Diem Rate.

Answers to questionnaires sent by Vice President Buford to Class I Railroads in the United States and Canada under date of August 12 and August 28, 1940.

Explanation of the development of the above charge $35,803,991 Item B Cost of Taxes.

Total tax accruals for Class I United States railroads for 1939 is $355,677,558, see Line 1. Of this amount $105,551,001 were pay roll taxes, see Line 2. The difference between these two amounts or $250,126,557 represents the amount of tax charges other than pay roll taxes, see Line 3.

The investment in railway property used in transportation service and materials and supplies in $25,601,917,334, see Lines 4, 5, and 6.

2438 Then the tax rate (other than pay roll taxes) on investment is $250,126,557 see Line 3, divided by $25,601,917,334, see Line 6, or 0.977%.

Then 0.977% of $3,057,344,565 investment in Freight Train cars exclusive of mileage refrigerators and cabooses obtained from the Class I railroads in the United States, in answer to Mr. Buford's questionnaire is $30,165,310 the portion of the $250,126,557 taxes other than pay roll taxes, assignable to per diem freight train cars, see Line 8.

The portion of the $105,551,001 pay roll taxes assignable to per diem freight train cars was developed as follows: To obtain the ratio of compensation to pay roll tax divide the pay roll tax $105,551,001 Line 2 by the total compensation $1,863,333,736, Line 9 which produces 5.654%. Total repair charge to freight train cars exclusive of mileage refrigerators and cabooses is $163,765,280, see Line 11. 50% of this $163,765,280 total repair charge is labor. In I. C. C. 17801 a ratio of 47.89% material was developed. For purposes of this study, 50% is used—50% of Line 11 is $81,882,640, Line 13, the labor charge in Line 11. Then 5.654% of $81,882,640, see Line 14 is $4,629,644 the portion of the pay roll tax on the labor in the per diem freight car repair item.

Under Miscellaneous Charges it has been developed that an amount of $35,692,867, is chargeable to per diem freight train car repairs, in the following detail:

E. Apportionment of M. of E. Misc'l. Accts.	$18,571,887
F. Apportionment of Shop Maint. to Frt. Car Repairs	4,116,954
G. Apportionment of General Expense to Frt. Car Repairs	8,041,938
H. Allocation of Deadhead Haul Cost of Frt. Car Repr. Matl.	4,962,088
Total items E, F, G and H (see Miscellaneous Charges)	35,692,867

The labor ratio in these items is also 50%. 50% of $35,692,867 is $17,846,434 see Line 17. 5.654% of Line 17 (see Line 10) is $1,009,037 the portion of pay roll taxes on Miscellaneous Charges

assignable to freight train car repairs exclusive of mileage refrigerators and cabooses, see Line 18.

Therefore, the total taxes assignable to freight cars exclusive of mileage refrigerators and cabooses is Line 8 + Line 14 + Line 18 or $35,803,991.

2139 Item C. Interest on Value

In response to Mr. Buford's questionnaire of August 12, 1940, the Class I railroads of the United States reported the reproduction values and ages of their freight train cars. This information was given in detail by types of cars (box, stock, hopper, etc.) and by Classes of cars (A, B, C, D, & E as defined by A. A. R. Interchange Rule 112). The reproduction prices per lb. and other allowances used by the railroads in determining the reproduction values of their freight cars are those provided in A. A. R. Interchange Rule 112. These reproduction prices and allowances are developed periodically by the A. A. R. Price Committee. They are predicated upon the actual cost of new freight cars constructed. The prices and allowances used in developing the reproduction values of the freight cars, reported in the above questionnaire, were those developed from the actual cost of new freight cars constructed in the year 1939.

From the reproduction values, described above, was developed the depreciated reproduction values of the cars. The method used in determining the depreciated reproduction values is that provided for this purpose in A. A. R. Interchange Rule 112 and is the one used in determining the values of destroyed freight cars on foreign lines for settlement purposes. The rates of depreciation and limits of depreciation provided in A. A. R. Interchange Rule 112 were developed recently after a very careful study of the history of the majority of freight cars in the United States and Canada. The valuation studies of freight cars in I. C. C. 15100 were the basis of this study in the development of these rates.

Interest at 6 percent per annum on the depreciated reproduction value of the freight train cars exclusive of mileage refrigerators and cabooses produced the Item C Interest on Value in the amount of $119,977,761.

An alternate method of calculating the amount assignable to this item is to use as a base the Ledger Value (Original Cost plus Additions and Betterments). In response to Mr. Buford's questionnaire of August 12, 1940, the Class I Railroads in the United States reported the ledger value of their freight train cars exclusive of cabooses and mileage refrigerators in the amount of $3,087,544,565. 6 percent of this amount is $185,252,674 the alternate amount assignable to this item.

2440 Item B, Depreciation and Retirements

The cost of this item was determined as follows: In answer to Mr. Buford's questionnaire of August 12, 1940, the Class I railroads in the United States reported the amounts they charged to freight car depreciation in 1939 which was included in Account 331-Equipment Depreciation. These reported amounts included the depreciation charged on caboose cars as well as that charged to other freight train cars.

The following Class I railroads in the United States own refrigerator cars, paid for on a mileage instead of on a per diem basis while on foreign lines: Atchison, Topeka & Santa Fe; Boston & Maine; Denver & Salt Lake; Illinois Central; Louisiana & Arkansas; Northern Pacific and the Pere Marquette. It was necessary to take these mileage refrigerators out of the picture as this is a study of per diem freight cars. The amount of the depreciation charge assignable to the mileage refrigerators belonging to the above roads was first determined. This amount was calculated by using the ledger value of these cars as a base (reported by the car owners in response to Mr. Buford's questionnaire of August 12, 1940), and the rates of depreciation used and the limits of depreciation were those specified in A. A. R. Interchange 112. When these amounts of depreciation, assignable to the mileage refrigerators, were determined, they were subtracted from the amounts reported by the railroads as the total depreciation charge to all freight train cars and cabooses. The remainder constitutes the depreciation charge to per diem freight train cars and cabooses.

The depreciation charge for each road for its per diem freight cars and cabooses, was divided by the number of per diem freight cars and cabooses to determine the average depreciation charge per freight car. This average amount multiplied by the number of per diem freight cars owned gives the depreciation charge for the road for per diem freight cars.

According to the I. C. C. Accounting Classification Account 329 Equipment—Retirements is defined as follows: "This account shall include the cost of tearing down retired equipment and recovering the salvage therefrom."

In answer to Mr. Buford's questionnaire of August 12, 1940, the Class I railroads of the United States reported the amounts they charged to Retirements to freight train cars. This amount added to the depreciation on freight train cars, exclusive of cabooses and mileage refrigerators produced Item D. Depreciation and Retirements.

For the Class I railroads of the United States this item is as follows:

Depreciation Charge	$100,041,664
Retirement Charge	1,336,296
Depreciation and Retirements	101,377,960

2441 Miscellaneous Charges

The Miscellaneous Charges are made up of the following elements:

Item E. Apportionment of Maintenance of Equipment Miscellaneous Accounts.

Item F. Apportionment of Shop Maintenance.

Item G. Apportionment of General Expenses.

Item H. Allocation of Deadhead Haul on Freight Car Repair Material.

Item I. Allocation of Interest and Taxes on Freight Car Repair Facilities.

Item J. Allocation of Interest on Working Stock of Freight Car Repair Material.

The data for developing the amounts chargeable to the above items was obtained from the following:

Preliminary Abstract of Railway Statistics I. C. C. Bureau of Statistics For 1939.

Statistics of Railways in the United States, I. C. C. for the years 1926 to 1938 inclusive.

Statistics of Railways of Class I United States (1926–1939) A. A. R. Bureau of Railway Economics.

I. C. C. Docket 17801 Investigation Concerning Car Hire Settlements, The Per Diem Rate.

E.—Detail of Apportionment of M. of E. Miscellaneous Accounts

Data for the development of this charge was obtained from Preliminary Abstract of Railway Statistics I. C. C. Bureau of Statistics For 1939, Page 8.

1.	Superintendence	$28,206,538
2.	Shop Machinery Repairs	14,329,924
3.	Shop Machinery Depreciation	871,880
4.	Power Plant Machinery Repairs	3,476,507
5.	Power Plant Machinery Depreciation	1,491,599
6.	Injuries to Persons	3,068,321
7.	Insurance	3,189,093
8.	Stationery and Printing	800,343
9.	Other Expenses	421,084
10.	Maintenance Joint equipment Debit	5,317,387
11.	Maintenance Joint equipment Credit	2,787,009
12.	Total	58,385,637

13. Steam Locomotive Repairs Yard	36,891,275
14. Steam Locomotive Repairs Other	218,452,241
15. Other Locomotive Repairs Yard	1,467,007
16. Other Locomotive Repairs Other	6,590,409
17. Freight Train Car Repairs	103,424,546
18. Passenger Train Car Repairs	63,526,959
19. Floating Equipment Repairs	7,837,561
20. Work Equipment Repairs	8,264,970
21. Miscellaneous Equipment Repairs	662,639
22. Equipment Retirements	1,748,553
23. Total	514,836,109

24. Ration per diem Freight Car Repairs to Total Equipment Repairs $163,765,280 per diem freight car repairs Line 23 or 31.809%.

25. Portion of Line 12 assigned to per diem Freight Car Repairs (Carried to Line E) (Line 24×Line 12) $18,571,887. Explanation of the development of the above charge, $18,571,887 to E—Apportionment of Maintenance of Equipment Miscellaneous Accounts.

2442 Certain Maintenance of Equipment and Depreciation accounts are common to maintenance of all classes of equipment. These accounts are listed in lines 1 to 11, inclusive, above. The amounts used for these eleven items were taken from the Preliminary Abstract of Railway Statistics I. C. C. Bureau of Statistics For 1939, Page 8.

Line 12 shows the total for these miscellaneous equipment maintenance and depreciation charges. Lines 13 to 22, inclusive, shows all the Maintenance of Equipment repair accounts and Equipment Retirements and the amounts for each item. These amounts were also taken from the Preliminary Abstract of Railway Statistics I. C. C. Bureau of Statistics for 1939, Page 8. Line 23 shows the total of lines 13 to 22, inclusive. $163,765,280 repairs to freight cars exclusive of mileage refrigerators and cabooses divided by line 23—total maintenance of equipment repairs and equipment requirements, produces 31.809%, the ratio that per diem freight train car repairs bears to total equipment repairs and retirements. Then line 12, the total of these miscellaneous equipment maintenance and depreciation accounts, multiplied by 31.809% gives the proportion of these accounts assigned to per diem freight train car repairs. Line 25, amount $18,571,887.

F—Detail of Apportionment of Shop Maintenance to Per Diem Freight Car Repairs

26. Maintenance of Shops & Engine Houses	$12,616,956
27. Shop and Engine House Depreciation	325,777
28. Total	12,942,733
29. Proportion of Line 28 assignable to Maintenance per diem Freight Equipment (Carried to Line F) (Line 24×Line 28)	4,116,954

Explanation of the development of the above charge, $4,116,954 to F—Apportionment of Shop Maintenance to Freight Car Repairs.

The amounts used for lines 26 and 27 were taken from the Preliminary Abstract of Railway Statistics I. C. C. Bureau of Statistics For 1939, Page 8.

The same percentage developed in item E, 31.809% the ratio that freight train car repairs exclusive of mileage refrigerators and cabooses bears to total equipment repairs and retirements, was used to develop the proportion of Maintenance of Shops and Engine Houses and Shop and Engine House Depreciation, assignable to maintenance of per diem freight train cars.

G—Detail of Apportionment of General Expense to Per Diem Freight Car Repairs

30.	Miscellaneous Maintenance of Equipment Accounts (Line 12)	$78,385,637
31.	Maintenance of Equipment Repair Accounts and Retirements (Line 23)	514,836,160
	Total (Sum of Lines 30 and 31)	573,221,797
32.	Total M. W. & S. accounts incl. Joint Facilities	466,830,844
33.	Total Traffic accounts	106,734,544
34.	Total Transportation Accounts, incl. Joint Facilities and Water Lines	1,417,793,917
2443 35.	Total Miscellaneous Operations	37,711,134
	36. Total Transportation for Investment Credit	4,364,692
37.	Total Lines 30 to 36 inclusive	2,597,927,544
38.	General	127,568,820
39.	Percentage of Line 38 assignable to Maintenance Freight Equipment exclusive of mileage refrigerators and cabooses ($163,765,280) Line 37)	6.304%
40.	Proportion of General Accounts assignable to Maintenance of per diem Freight Equipment (Carried to Line G1 (Line 38 x Line 39)	8,041,938

Explanation of the development of the above charge $8,041,938 to G—Apportionment of General Expense to per diem Freight Car Repairs.

The amounts used for lines 30 to 36 inclusive and line 38 were taken from the Preliminary Abstract of Railway Statistics I. C. C. Bureau of Statistics for 1939, Pages 8 and 9.

The salaries and expenses of general officers and their departments, law expenses, relief expenses, valuation expenses, etc. are charged to primary accounts 451 to 460 inclusive. These accounts are common to all the activities of the railroads. Therefore a portion of these expenditures is properly assignable to freight train car repairs.

This apportionment was developed as follows: The total operating expenses, including M. of E., depreciation and retirement accounts and excluding general expense accounts, was developed, line 37. The ratio that maintenance of freight cars exclusive of mileage refrigerators and cabooses amount $163,765,280 bears to line 37 viz: 6.304% was taken of the total General Expense line 38, amount $127,568,820 or $8,041,938. This $8,041,938 is the proper portion of General Expenses assignable to per diem freight train repairs.

H—Detail of Allocation of Deadhead Haul Cost of Per Diem Freight Car Repair Material

41. Freight Train Car Repairs exclusive of mileage refrigerators and cabooses		$163,765,280
42. Ratio Material Charges to total of Line 41		50%
43. Material Included in Line 41 (Line 42×Line 41)		81,882,640
44. Percentage of Cost of Freight Car Material Chargeable as deadhead haul cost (I. C. C. 17801)		6.06%
45. Cost of deadhead haul on material used in per diem Freight Train Car maintenance (Carried to Line H) (Line 44×Line 43)		4,962,088

Explanation of the development of the above charge $4,962,088 to H—Allocation of Deadhead Haul Cost of Freight Car Repair Material.

With reference to the ratio 50% used in line 42: In I. C. C. 17801 a ratio of 47.89% was developed. For purposes of this study 50% was used.

The accounting classification provides that the cost of hauling repair materials over foreign lines shall be added to the cost
2444 of company materials. It also provides that the cost of hauling company materials over company lines shall not be assessed a freight charge but shall be absorbed in operating expenses without allocation to the cost of such materials. The cost of hauling such materials over company lines is an expense incurred, because of owning and maintaining the property. No freight charges are made for hauling company materials over company lines and no data is available as to the cost of same except that developed in I. C. C. 17801. There a ratio of 6.06% was developed as the percentage of cost of freight car repair material chargeable as deadhead haul. 6.06% of $81,882,640 the value of per diem freight car repair material is $4,962,088 the deadhead haul cost of per diem freight car repair material.

I—Detail of Allocation of Interest and Taxes on Freight Car Repair Portion of Shops and Machinery, Land and Track Excluded

46. Value Shops & Engine Houses, Shop Machinery & Power Plant Machinery January 1, 1939 (See Schedule 1)	$850,847,395
47. 6% Interest plus .977% Taxes, see Item B—6.977% on Line 46	59,363,623
48. Percentage of Interest and Taxes on repair facilities assignable to per diem Freight Equipment Repairs (Line 24)	31.809%
49. Proportion of Interest and Taxes on repair facilities assignable to per diem Freight Equipment repairs (Line 48 x Line 47) (Carried to Line 1)	18,882,975

Explanation of the development of the above charge $18,882,975 to I—Interest and Taxes of Freight Repair Portion of Shops and Machinery.

The amount $850,847,395 line 46 representing the value of Shops and Engine Houses, Shop Machinery and Power Plant Machinery was taken from Schedule 1.

Six percent interest was used on the above value and 0.977% taxes developed in Item B cost of Taxes. This produced $59,363,623 total taxes on Shops and Engine Houses, Shop Machinery and Power Plant Machinery.

To obtain the proper portion of this total tax assignable to per diem freight car repairs, this total tax was multiplied by 31.809% the ratio developed for freight car repairs exclusive of mileage refrigerators and cabooses to total equipment repairs.

J—Interest on Investment in Stock of Freight Car Repair Material

50. Material included in Line 41 (See Line 43)	$81,882,640
51. Average annual interest rate assignable to stock of Freight Car Repair Material (I. C. C. 17801)	1.5%
52. Interest on Investment in Stock Freight Car Material (Line 51 x Line 50) (Carried to Line J)	1,228,240

Explanation of the above charge $1,228,240 to J—Interest on Investment in Stock of Freight Car Repair Materials.

On Line 43 was developed the material cost entering into freight car repairs, exclusive of mileage refrigerators and cabooses.

2445 I. C. C. 17801 contains a study showing the average portion of a year that the stock of repair material is carried continually. Ninety days, or one fourth of the year, was found by this study to be the time repair material remained in stock. Therefore ¼ of 6% or 1.5% was applied to the cost of material in freight

car repairs exclusive of mileage refrigerators and cabooses, to develop the proper charge to Interest on Investment in Stock of Freight Car Repair Material.

Total Miscellaneous Charges

E	$18,571,887
F	4,116,954
G	8,041,938
H	1,962,088
I	18,882,975
J	1,228,240
Total miscellaneous charges	55,804,082

2446

SCHEDULE 1

Net changes to investment in, "Shops and engine houses," "Shop machinery," and "Power plant machinery," during years 1926 to 1938 inclusive

Year	Shops and engine houses		Shop machinery		Power plant machinery	
	Increase	Decrease	Increase	Decrease	Increase	Decrease
1926	$26,207,787		$11,303,873		$2,765,050	
1927	17,259,317		8,303,067		4,356,373	
1928	7,949,709		4,033,163		1,666,170	
1929	13,222,324		4,598,011		4,822,789	
1930	10,082,324		5,283,208		598,462	
1931	13,755,922		5,293,081		2,026,416	
1932	6,358,883				256,535	
1933		$3,108,030		$768,088		
1934		3,783,870		1,912,216		870,448
1935	3,343,557		1,293,011	2,917,504		279,600
1936		4,774,448		1,077,561		356,570
1937		691,840	2,514,645			1,382,557
1938		979,025		227,949	2,761,408	
					2,337,018	
Total	98,379,913	13,316,867	42,239,149	6,904,318	20,942,721	2,945,485

Net Increase $134,352,163.

In 17801 I. C. C. the railroads owning 34% of the freight cars had a valuation, in 1925, of the above facilities of $243,608,379. The value of 100% is $716,495,232. Since 1925 up to January 1, 1939 there has been an increase in these facilities of $134,352,163 in value. Therefore the value of these facilities on January 1, 1939, is $716,495,232 + $134,352,163 or $850,847,395.

The data used to develop the increase in value of the above facilities during the years 1926 to 1938, inclusive, was obtained from Statistics of Railways in the United States, I. C. C. for the years 1926 to 1939, inclusive.

2447

CANADIAN LINES

Item A. Freight Train Car Repairs

The determination of the cost of this item was by the same method used in developing repair costs of per diem freight cars

for Class I United States Railroads. Both the Canadian National and Canadian Pacific Railways own mileage refrigerators. These mileage refrigerators were first taken out of the picture in the same manner as was done with the United States Railroads owning mileage refrigerators.

The total amount for the repair item for the two Canadian Lines is $14,350,343.

Item B. Cost of Taxes

The two Canadian Lines could not report the amount of taxes assignable to per diem freight cars. Therefore for purposes of this study it is assumed that the taxes per car per year for these railroads is the same as that of the average per car per year of the United States Railroads. This amount is $21.777 per car per year. As the ownership of per diem cars for the two Canadian lines is 142,517 then 142,517 times 21.777 = $3,103,592 the cost of Item B Taxes.

Item C. Interest on Value

The determination of the cost of this item was by the same method used in that of per diem freight cars for Class I United States Railroads. The total amount for this item for the two Canadian Railroads is $8,376,101.

An alternate method of calculating the amount assignable to this item is to use as a base the Ledger Value (Original Cost plus Additions and Betterments), the same as was done in treating the per diem freight cars of the United States railroads. This method produces for the two Canadian Lines for this item $19,285,175.

Item D. Depreciation

The Canadian lines do not charge depreciation on equipment currently as do United States railroads which keep their accounts in accordance with I. C. C. regulations. Consequently the Canadian roads had no depreciation amount charged during 1939 which they could report. Therefore for item D there was calculated an amount based on the ledger value of the per diem cars reported in response to Mr. Buford's questionnaire of August 12, 1940. The rates of depreciation used were those specified in A. A. R. Interchange Rule 112. This calculation produced a cost of $10,711,679 for this item.

Miscellaneous Charges

It will be noted that the development of the cost of this item for the United States roads, used as a base, information fur-

nished by the I. C. C. and the A. A. R. Bureau of Railway Economics. Information concerning the Canadian lines was not included in these documents. Consequently for purposes of this study it was estimated that the cost of this item for the Canadian roads was the same per car per year as was the average cost per car per year for the per diem freight cars of the United States Class I roads. The average cost of Miscellaneous Charges per car per year for Class I roads per diem freight cars in the United States for 1939 was $33.942. As there were $142.517 per diem freight cars of these two Canadian lines in 1939, the cost of this item is 142.517 times $33.942 or $4,837,312.

2448 In accordance with the above outline the following cost of ownership plus a reasonable return was produced for per diem freight cars for the two Canadian roads:

1. Cost of Repairs	$14,350,343
2. Cost of Taxes	3,103,592
3. Interest of Value	8,376,101
4. Cost of Depreciation	10,711,679
5. Miscellaneous Charges	4,837,312
Total	41,379,028

The alternate method of using as a base for Item 3 the Ledger Value instead of the Depreciated Reproduction Value gives the following results:

1. Cost of Repairs	$14,350,343
2. Cost of Taxes	3,103,592
3. Interest on Ledger Value	19,285,175
4. Cost of Depreciation	10,711,679
5. Miscellaneous Charges	4,837,312
Total	52,288,101

2449

Interstate Commerce Commission

No. 25728[1]

Hoboken Manufacturers Railroad Company

v.

Abilene & Southern Railway Company et al.

Submitted ..... *Decided* .....

Upon further hearing, the terms and conditions (including compensation period of time and manner of payment) upon which defendants participating in through routes with Sea-

[1] This report also embraces No. 25878, New Orleans and Lower Coast Railroad [illegible] v. The Akron, Canton & Youngstown Railway Company et al.

train Lines, Inc., should be required to interchange their cars with Seatrain, determined. Prior reports, 195 I. C. C. 215, 206 I. C. C. 328, and 237 I. C. C. 97.

Graham M. Brush, Frank J. Clark, W. J. Mathey, and Parker McCollester for complainant in No. 25728 and intervener corporation.

H. H. Larimore, J. S. Smith, and Toll R. Ware for complainant in No. 25878.

J. Carter Fort for intervener association.

J. R. Bell, R. D. Brooks, William C. Burger, Charles Clark, Francis R. Cross, Joseph F. Eshelman, F. W. Gwathmey, T. P. Healy, George W. Holmes, H. H. Larimore, Roland J. Lehman, Joseph Marks, G. H. Muckley, W. T. Pierson, E. A. Smith, Robert Thompson and Toll R. Ware for defendants.

Report on further hearing proposed by H. W. Archer and M. J. Walsh, Examiners

Since October 6, 1932, Seatrain Lines, Inc., hereinafter referred to as Seatrain, has been operating vessels between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, on which freight is transported in railroad cars between Hoboken and Belle Chasse, Hoboken and Havana, and Belle Chasse and Havana. Previously, since January 1929, it and its predecessor, Over-Seas Railways, Inc., had been engaged in similar transportation between Belle Chasse and Havana. In the early part of 1940 Seatrain extended its operations to Texas City, Tex. It now handles traffic between that port, on the one hand, and Hoboken and Havana, on the other.

Seatrain's terminal at Hoboken is served by complainant 2450 in the title proceeding, hereinafter called the Hoboken, a terminal switching line approximately 1½ miles in length, extending along the water front at New York Harbor, and directly controlled by Seatrain through stock ownership. Its terminal at Belle Chasse is served by complainant in No. 25878, hereinafter called the Lower Coast, a subsidiary of the Missouri Pacific Railroad Company, extending from Algiers, La., on the west bank of the Mississippi River opposite New Orleans, La., south about 60 miles. Belle Chasse is approximately 10 miles south of Algiers. Seatrain's terminal at Texas City is served by the Texas City Terminal Railway Company.

Shortly after the inauguration of coastwise service by Seatrain, the American Railway Association, predecessor of the Association of American Railroads, hereinafter referred to as the association, promulgated the following car-service rule:

"Rule 4: Cars of railway ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owner filed with the Car Service Division."

As most of the railroads refused to permit delivery of their cars to Seatrain, these complaints were filed assailing the car-service rule referred to and the rules, regulations, and practices of the railroads relating to delivery, or the refusal to permit delivery, of their cars to Seatrain as unlawful under section 1 (4) and (11), section 3 (1) and (3), and section 7 of the Interstate Commerce Act. Seatrain intervened in support of the complaints. Defendants moved to dismiss on the ground that the Commission is without jurisdiction of the matters complained of, but in the report on further hearing in *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, after discussing fully the jurisdictional question, the Commission said, at page 343:

"It is our view that we have jurisdiction to require the establishment of through routes between rail and water car-
2451 riers, and, where such routes are established pursuant to our order or voluntarily, to require the interchange of cars between the rail and water carriers, and to require that equality of treatment provided by section 3 (3) between connecting carriers, whether rail or water, in the facilities for the interchange of traffic including through routes and the interchange of cars. We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist.

"This record shows that Seatrain participates in through routes and joint rates with the Missouri Pacific System lines and the Texas & Pacific and their short-line connections, which carriers permit their cars to be delivered to Seatrain.

"Whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record. Whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided."

No. 25727, refered to in the above quotation, was subsequently decided, and in the report therein, Seatrain Lines, Inc., v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, the Commission found that through routes either existed or should be established and maintained between a certain described portion of official territory and certain described portions of southwestern and southern territories. With respect to the interchange of cars with Seatrain, the Commission said, at page 29:

"We have here found that in certain instances through routes between Seatrain and defendants now exist, and that, in those and

other instances, the establishment and maintenance of through routes and joint rates are necessary in the public interest. The record here shows that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be the loaded cars. If defendants parties to the through routes and joint rates herein prescribed refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention either by a request for reopening Nos. 25728 and 25878, the complaints of the Hoboken Manufacturers' and the Lower Coast referred to above, or by a new complaint."

There is no question raised by the parties that the through routes required in the above decision have not been established and
2452 maintained. Rule 4, however, continues in effect, and certain defendants who, under the rule, filed notice with the association or its predecessor of their refusal to permit delivery of their cars to Seatrain have not withdrawn such refusals. Accordingly, complainants filed motions seeking reopening of these proceedings for the entry of an order requiring defendants to cease and desist from their refusal to permit interchange of their cars with Seatrain for the accomplishment of through transportation over through routes, and upon consideration thereof the proceedings were reopened for further hearing "to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc."

At the further hearing, defendants and the association introduced testimony with respect to the amount of per diem to be paid by Seatrain for railroad cars in its possession and with respect to the responsibility of Seatrain for per diem costs in connection with cars held for, or because of its inability to receive them. Seatrain did not question the fact that the per diem to be paid by it for cars in its possession was in issue but contended that the detention and reclaim features were not properly before the Commission. In the proposed report the examiners recommended, among other things, that the Commission find (a) that the responsibility for per diem reclaims and car detention was properly in issue and (b) that Seatrain should assume the same responsibilities for detention due to its inability to receive cars and switching reclaims as those assumed by line-haul rail carriers. In the exceptions to the proposed report and upon argument, Seatrain requested a reopening of the proceedings in the event the Commission should find that any issue with respect to car detention or per diem reclaims was presented. In the report thereon, 237 I. C. C. 97, the Commission found,
2453 among other things, that the period of time during which,

and the manner in which Seatrain should pay for the use of cars, the amount of compensation it should pay, and any other condition which the evidence adduced showed would be an appropriate condition to attach to an order requiring defendants to interchange their cars with Seatrain were questions there in issue. The Commission refrained, however, from determining the issues with respect to the compensation to be paid by Seatrain for cars in its possession and with respect to responsibility for car detention and per diem reclaims, and reopened the proceedings for further hearing, which has been held. This report is on such further hearing.

The issue here presented is upon what terms and conditions, including compensation, defendants should be required to interchange their cars with Seatrain. This issue is limited to cars containing a portion, but not all, of the traffic transported by Seatrain, and to the interchange of the cars of some, but not all, of the defendants.

Seatrain handles a considerable volume of foreign traffic between Hoboken and Havana, and Belle Chasse and Havana. As to such commerce there are no through routes between defendants and Seatrain, and, as found in Investigation of Seatrain Lines, Inc., supra, the Commission has no jurisdiction over the routes and practices of Seatrain in its strictly foreign commerce. Seatrain also handles considerable port-to-port traffic between Hoboken and New Orleans over routes to which complainants are parties but defendants are not. In this connection the Commission, in the proceeding last referred to, said:

"We find nothing in the act imposing any duty upon or giving us any jurisdiction to require a rail carrier to permit delivery of its car to a water carrier where through routes between such rail and water carriers do not exist.

The territories between which through routes now exist in connection with Seatrain are those between which through 2554 routes were required to be maintained in Seatrain Lines, Inc., v. Akron, C. & Y. Ry Co., supra, namely, southwestern territory and a small portion of southern territory, on the one hand, and that portion of official territory within about 550 miles of the north Atlantic ports, on the other hand. Some of the defendants who refuse to permit delivery of their cars to Seatrain for movement in coastwise service, of which the Great Northern Railway Company and Northern Pacific Railway Company are examples, cannot, because of their location, be parties to these through routes. Defendants here, again contend, as they have throughout the proceedings, that the Commission is without jurisdiction to require defendant railroads to interchange their cars with Seatrain. The question of jurisdiction was fully dis-

cussed in investigation of Seatrain Lines, Inc., supra, where the Commission found that it had jurisdiction where through routes between Seatrain and defendant railroads exist. The basis of the Commission's jurisdiction is there fully set forth, and nothing has been advanced by defendants which would warrant a change in the views there expressed.

The issue presents two questions: (1) The compensation which the defendants who are to be required to interchange their cars with Seatrain should receive for the use of such cars, and (2) upon what other terms and conditions such interchange should be required.

The association publishes rules governing the settlement for the use of railroad-owned freight cars between all common-carrier railroads, known as the code of per diem rules. The first rule provides that the rate for the use of freight cars, to be known as the per diem rate, shall be $1 per car per day. This has been the per diem rate for several years, and in Rules for Car-Hire Settlement, 160 I. C. C. 369, where the reasonableness of this
2455 rate was not questioned, the Commission said at page 378:

"The per diem rate is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 percent interest on investment. From the evidence of record, it is estimated that the cost of car ownership and maintenance averaged 83.812 cents per car-day and $305.91 per car unit in the calendar year 1925, and approximately $1 per car-day in that year for the periods cars were actually in service. Cars were idle a portion of the year, due in part to unserviceable condition and in part to the fact that the supply of cars exceeded the demand."

The reasonableness of the per diem rate is not here questioned insofar as it applies between the railroads. Seatrain is willing to pay that rate, although it contends that the cost of maintenance is less when the cars are in its possession because they are motionless and not subject to the wear and tear incident to through movement over the railroads, and are, to a large extent, protected from the elements. The association and defendants which join it on brief, hereinafter collectively referred to as defendants, contend, however, that the cars are subject to much greater depreciation on Seatrain than in general railroad service and that the per diem to be paid by Seatrain should cover not only the time the cars are actually in its possession but also the time attributable to its use of the cars.

Repairs account for a large proportion of the cost of car ownership. Defendants admit that 61.58 percent of running repair

expenses of 16 cents per car per day, or 9.849 cents, are avoided when cars are not moving. They claim, however, that this saving is more than offset by added cost of repairs due to increased corrosion of the cars while on Seatrain. The evidence submitted to support the latter contention consists of (1) the result of tests conducted on steel of the kind used in freight cars, which tests show that corrosion is considerably more rapid in full salt atmosphere such as Key West, Fla., than in semisalt atmosphere such as Sandy Hook, N. J., or in a sulphurous
2456 atmosphere such as Pittsburgh, Pa., and that corrosion at the latter point is more rapid than in a relatively pure atmosphere such as State College, Pa., and (2) a showing that steel gondola cars used almost exclusively on The Long Island Rail Road Company deteriorated more rapidly than similar cars in general service on The Pennsylvania Railroad Company. Such evidence cannot be accepted to show an excessive amount of corrosion on cars transported by Seatrain, particularly when other evidence of record discloses that Seatrain has transported hundreds of carloads of various iron and steel articles and machinery in box and gondola cars and on flat cars that were not specially packed for protection against corrosion and has had only occasional complaints, and that any particular car is seldom on Seatrain more than one round trip, or 12 days, in a year. It is true a certain amount of rust may accumulate on cars handled by Seatrain during a single trip, but the record establishes that rust also accumulates on cars remaining on railroad sidings during 2 days of rain or heavy dew. The record warrants the conclusion that the costs of repairs are reduced at least 9.849 cents per car per day while the cars are on Seatrain and does not warrant the conclusion that any part of such saving is offset by additional and excessive corrosion.

In contending that the per diem to be paid by Seatrain should cover not only the time a car is actually in its possession but the time attributable to its use of the car, defendants take the position that, incident to the time spent in active and productive service, railroad cars spend much time in idle and unproductive service, such as when held in reserve to meet peaks of traffic, when being repaired and held for repairs when moving empty, when being conditioned and placed for shippers, and when
2457 in the possession of consignors for loading and of consignees for unloading, and that Seatrain, which has no cars[2] of its own, should bear its full share of the cost of car ownership during the idle and unproductive time. They show that, varying with the meaning given the terms "idle and un-

[2] The Hoboken holds approximately 60 cars on its rails to be used by Seatrain as occasion requires, on which the latter bears the cost of car ownership.

productive time" and "active and productive time," a car in general railroad service spends an average of only one day in active and productive service out of each 3.82 to 19 days. When the active and productive time includes only the time the car is rolling under load in line-haul service, not including the time spent in intermediate switching, but one out of every 19 days is so spent. When it includes only the time which elapses between placement of the car for the consignor and release of the car by the consignee, but one out of 3.82 days is so spent. If the time the car is in the possession of the shipper and the consignee is excluded, but one out of every 7 days is so spent, and if the time spent in switching at origin and destination is also excluded, but one out of every 11 days is so spent.

As heretofore stated, the Commission found in Rules for Car-Hire Settlement, supra, that the full cost of ownership and maintenance of cars was approximately $1 each per day, including the time the cars are unserviceable or stored because of lack of demand. While these costs were those of 1925, no attempt has since been made to change the per diem rate, and there is no evidence here indicating increased costs. It must, therefore, be assumed that such costs of ownership reflect present costs.

For every day the average car is in active service either the owner has the use of the car or some other carrier is paying $1 per diem for its use, whether loaded or empty. The owner is fully compensated, therefore, either in use or rent, for the
2458 full cost of ownership and maintenance. This being so, there is no good reason why Seatrain should pay a higher per diem rate than $1, particularly when the record shows that the cost of maintenance would be admittedly decreased approximately 10 cents per day while the cars were in its possession.

That $1 per day would be reasonable compensation for cars while in Seatrain's possession is further established by the fact that it is the uniform per diem rate between all railroads, even when, as in the case of Seatrain, the railroads own no cars, and between the railroads and other water carriers, such as the various ferry companies; that for almost 4 years prior to the inauguration of Seatrain's coastwise service in October 1932, all of the rail carriers freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service at that rate; that other rail carriers that have filed with the association notice of refusal to permit delivery of their cars to Seatrain have accepted, without protest, per diem of $1 on such of their cars as have moved over Seatrain; and that a large number of railroads operating in official and southwestern territories have voluntarily consented to the delivery of their cars to Seatrain subject to a rental of $1 per diem per car.

Whether the order requiring defendants to interchange their cars with Seatrain should be subject to other conditions will now be considered. Defendants, who refuse to permit delivery of their cars to Seatrain, contend that such an order should be conditioned upon terms which will require the latter to assume the same responsibilities with respect to switching reclaims and cars held on connecting roads because of its inability to receive such cars as if it were a road-haul rail carrier. Complainants and Seatrain contend that only the amount of compensation to be received by the owners of the cars is here in issue, and not how the car expense should be divided between Seatrain,
2459 its switching connections, and the road-haul rail carriers who may or may not be the owners of the cars, and, further, that if it were in issue detention of cars cannot be fairly charged to Seatrain unless similar detention is charged to the break-bulk water carriers. It is obvious that the time during which and the manner in which Seatrain should pay for the use of cars, as well as the amount of compensation, would be appropriate conditions to attach to an order requiring defendants to interchange their cars with Seatrain and, accordingly, that such questions are here in issue.

As Seatrain's sailings between Hoboken and Belle Chasse are one a week in each direction, it is necessary to hold at those ports, or adjacent thereto, some cars arriving for delivery to it. At Hoboken these cars are held on the Hoboken, which pays the per diem that accrues during that detention. As the charges received by that carrier for its switching service do not include compensation for car hire, it seeks compensation for such service through per diem reclaims from its connections. Instead, however, of obtaining from Seatrain a reclaim of the per diem for the time the cars are held, because of Seatrain's inability to accept them, the Hoboken is attempting to obtain from its inbound railroad connections reclaims which will reimburse it for the entire amount of per diem accruing on its line. Seatrain refuses to assume any per diem accruing on cars to be delivered to it at Hoboken, except during the time such cars are in its actual possession. As to the traffic to be delivered to Seatrain at Belle Chasse, the Lower Coast publishes a tariff which provides that it will receive cars for movement over Seatrain only upon written delivery orders by the latter and then only subsequent to 12:01 o'clock a. m. of the date prior to the scheduled sailing from that point. This tariff provision has the effect of requiring the connecting line-haul carriers to hold the cars.

A witness for the Hoboken introduced an exhibit show-
2460 ing that from March to July 1940, inclusive, the average

detention on that carrier of cars interchanged with Seatrain was 2.4 days, as compared with 3.71 days on cars interchanged with the break-bulk lines. An analysis of those figures discloses that of 2,579 cars interchanged with Seatrain during that period, 1,394 were delivered to it by the Hoboken upon which the average detention was 3.76 days per car, whereas on 1,185 cars received from Seatrain the dentention per car averaged 0.81 days. The cars instanced included not only coastwise but also Cuban traffic. Detention on the in-bound cars from Cuba, because of customs inspection at Hoboken, was greater than on coastwise cars. Therefore, in computing the detention on in-bound cars, if those from Cuba, which are not involved in these proceedings, were excluded, the detention of the Hoboken in respect of cars received from Seatrain would be less than 0.81 days. The average detention on the line-haul carriers connecting with the Lower Coast on 2,180 cars which moved during the last 6 months of 1938, because of Seatrain's inability to receive them, was 3.3 days.

The cars handled by the Hoboken in connection with the break-bulk lines, were interchanged largely, if not entirely, with the Pan-Atlantic Steamship Corporation. Out of 623 cars so interchanged, the Hoboken shows only 11 cars delivered by it to the break-bulk lines, on which the detention was 2.27 days, and 617 cars received from the latter, on which the detention averaged 3.74 days. In respect of cars containing freight received from the break-bulk lines, the detention was computed beginning (a) as to cars made empty on the Hoboken, from the dates of release from previous loads, and (b) as to cars received empty by the Hoboken, from the dates of such receipt, and ending upon the interchange of those cars by the Hoboken to its trunk-line connections. The detention incident to the delivery of cars to Seatrain, however, includes only the period from the time
2461 the Hoboken receives the car from its trunk-line connections until it is delivered to Seatrain, because there would be no immediate return movement on such a car as there would be on one containing freight for a break-bulk line.

During January, March, and May, 1939, the detention at New Orleans of 1,201 cars containing freight to be delivered to the break-bulk lines average 0.19 days on line-haul carriers, plus 2.39 days on the terminal switching lines. The above figures do not include detention of cars on the Missouri Pacific or on The Texas and Pacific Railway Company. From January to June 1940, inclusive, the detention on the former, on traffic for coastwise break-bulk lines, averaged 1.14 days. In connection with steamship lines, other than Norton, Lilly & Company and the Luckenbach Lines, the detention was 0.6 days. From January to July 1940, inclusive,

the detention on the Texas & Pacific of cars containing freight for coastwise break-bulk lines averaged 1.67 days. Individual averages were 0.23 days for the Clyde-Mallory Lines, 0.96 days for Southern Pacific Steamship Lines, 0.67 days for Moore-McCormack Lines, Inc., and 4.79 days for Pan-Atlantic lines. During June, July, and August, 1939, the detention at New York, on 484 cars loaded with freight for seven coastwise break-bulk lines, averaged 0.76 days.

The detention at New York and New Orleans of cars loaded with freight for coastwise break-bulk lines was not because of the inability of the break-bulk lines to receive the freight. At New York the detention represented the time between the arrival of the car in the terminal yard and the release of the car at the lighterage pier. At New Orleans the detention represented the time between the arrival of a car at the line-haul railroad yard and the delivery of the car to the New Orleans Public Belt Railroad. Detention on the Hoboken and on connections of the Lower
2462 Coast, however, of cars interchanged with Seatrain is caused principally by the latter's inability to accept them.

Per diem rule 15 provides that, in the absence of an embargo, a railroad which fails promptly to receive cars from a connecting railroad shall be responsible to the connecting railroad for the per diem on such cars while held for delivery. In other words, as between connecting railroads the one responsible for the delay must assume the per diem during the delay. The reasonableness of this principle is obvious because, as between connecting carriers interchanging cars the one which causes delay to a car, with a resulting accrual of per diem, should be responsible for such per diem. If Seatrain is to interchange cars with the railroads as freely as the latter interchange with one another and at the same per diem rate, it is but reasonable that Seatrain should likewise assume the per diem during the time the cars are being held because of its inability to receive them.

The Hoboken and Seatrain point out that the interchange of freight with the break-bulk lines at New York involves the use and detention not only of cars, but of lighters, contending that the latter are also railroad equipment. The use and rental of lighters are not, however, in issue in these proceedings.

It was testified on behalf of Seatrain that it competes with the Florida East Coast Car Ferry, hereinafter called the Car Ferry, for the movement of freight in cars between points in the United States and Cuba; and that the railroads which permit the interchange of their cars with the Car Ferry refuse to interchange their cars with Seatrain, thus discriminating against the latter. The Car Ferry operates between Port Everglades, Fla., and Havana. It is owned by the Florida East Coast Railway Company, herein-

after called the East Coast, which provides in its tariffs for 7 days free time at Port Everglades on export shipments in connection with the Car Ferry. As the latter does not assume per diem
2463 for the detention of those cars, Seatrain contends that it (Seatrain) should not be compelled to assume per diem for detention of cars on the Hoboken or on connections of the Lower Coast. The record shows no actual holding of cars by the East Coast for the Car Ferry. Furthermore, the East Coast does not serve the ports from and to which Seatrain operates. Aside from this, the Commission has no jurisdiction over the routes and practices of Seatrain or the Car Ferry in their strictly Cuban operations.

Complainants and Seatrain contend (1) that defendants assume the per diem expense on cars held at the ports or adjacent thereto incident to the interchange of freight with the break-bulk lines, and are compensated therefor by their freight revenues, and (2) that failure of defendants to assume to the same extent the per diem expense accruing on cars to be delivered to Seatrain discriminates against the latter. Free time is allowed to consignees on traffic billed to the ports for coastwise or foreign movement beyond. As coastwise break-bulk traffic ordinarily moves under through bills of lading the free time provision does not apply. Furthermore, the methods of delivering freight to the break-bulk lines and to Seatrain are different. In respect of the former, the freight may be unloaded immediately upon its arrival at the pier and the car released for other purposes, whereas in respect of the latter, the railroads have not the option of unloading the freight upon arrival of the car at the pier, because of the necessity of delivering the car to Seatrain, a non-break-bulk line. The amount of free time granted under the demurrage rules to shippers over the break-bulk lines is of no importance in determining what would be reasonable time and conditions under which Seatrain and defendants, parties to through routes, should interchange cars. The record does not warrant a finding that the failure of defendants to grant at the ports free time on cars to be delivered to Seatrain to the
2464 extent they grant free time on freight to be delivered to the coastwise break-bulk lines unjustly discriminates against Seatrain.

The Hoboken considers the service performed by it, in respect of delivery of cars to Seatrain, as terminal switching, for which it seeks to be reimbursed by its line-haul connections in the amount of $2.54 per car, reflecting the agreed per diem for 2.54 days. The Lower Coast, however, unlike the Hoboken, does not require its line-haul connections to pay terminal switching reclaim of per diem on cars interchanged by it with Seatrain.

For that movement, which it regards as intermediate switching, the Lower Coast receives an intermediate switching reclaim averaging 54 cents per car. The manner, however, in which traffic is interchanged by the Hoboken and Lower Coast with Seatrain is similar. Both instances necessitate the physical interchange of the car. For cars moving in terminal switching the Lower Coast receives per diem reclaim of $2.96 per car. The main distinction between a terminal switching road and an intermediate switching road is that the former is one on which a shipment originates or terminates and the latter is one which handles cars from one railroad, steamship, ferry or barge line to another railroad, steamship, ferry, or barge line.

The per diem rules provide that for terminal switching the switching line may reclaim from the line-haul carrier for the average number of days, not to exceed 5, required in such switching, and that for intermediate switching the switching line may reclaim one day's per diem from the carrier from which it received the car if per diem accrued while the car was on the intermediate switching line. If complainants are to be regarded as terminal switching lines so far as traffic interchanged with Seatrain is concerned, their line-haul connections, and not Seatrain, should bear, in the form of reclaims, the per diem charges accruing on their lines. If, however, Seatrain's service is to be regarded as substantially similar in all essential respects to that of a line-haul carrier, as defendants contend and as the record warrants, it is apparent that complainants' services should be regarded as those of intermediate switching lines, and that Seatrain's responsibilities in connection with switching reclaims should be the same as those of line-haul rail carriers. The Commission should so find.

2465

At the present time Seatrain settles with complainants for per diem and complainants make payment to the owners of the cars. Defendants contend that Seatrain should make payment direct to the owning railroads, to which contention Seatrain has no objection. Apparently, however, some modification of the existing per diem agreement would be necessary before this could be done. It would be preferable for Seatrain to make direct settlement with the owning railroads.

The Commission should find that defendants, insofar as they participate in through routes with Seatrain, should be required to interchange their cars with the latter in performance of through transportation over such through routes at the compensation provided in the code of per diem rules of the association, provided that Seatrain subjects itself to all the terms and conditions of the codes of car service and per diem rules of the association and assumes responsibilities the same as those assumed under such rules by

line-haul carriers, including any per diem for detention due to its inability to receive cars, and subject also to appropriate switching reclaims.

At the further hearing, an attempt was made by counsel for certain defendants to introduce evidence relating to compensation alleged to have accrued since 1932 from the Hoboken or Seatrain for the use, or detention, of cars owned by these defendants. These defendants have, in fact, sued the Hoboken and Seatrain in
2466 the Federal Court for the Southern District of New York for the amount alleged to be due them. The evidence relating to these claims, sought to be introduced at the further hearing, was excluded by the examiners. The only issues before this Commission are those raised by the complaints herein, and it is to be observed that the prayer for reparation contained in such complaints was withdrawn at the original hearing, and only a finding of general damages was sought as to the past, it being admitted that the amount of such general damages could not be definitely ascertained. An award of general damages is not within the province of this Commission. And any claim which defendant rail carriers may have against the Hoboken or Seatrain cannot now be injected into these proceedings.

2468 **Before the Interstate Commerce Commission**

Docket No. 25728

Hoboken Manufacturers Railroad Company

v.

Abilene & Southern Railway Company, et al.

Docket No. 25878

New Orleans and Lower Coast Railroad Company

v.

The Akron, Canton & Youngstown Railway Company, et al.

Exceptions of complainant Hoboken Manufacturers Railroad Company and Intervener Seatrain Lines, Inc., to report proposed by H. W. Archer and M. J. Walsh, Examiners

Filed May 6, 1941

2482 **III. Exceptions**

1. We except to the Examiners' statements on sheets 5 and 6 of the proposed report as to the limitations of the Commission's

jurisdiction. The Examiners have followed previous expressions of the Commission which we believe reflected a too narrow view of its authority here. Therefore these criticisms are rather of the Commission's prior rulings than of any original conclusions of the Examiners. In particular we submit that the Examiners and the Commission erred in not concluding:

"(a) That the Commission does have jurisdiction to require the non-consenting railroads to permit the delivery of their cars to Seatrain for the purpose of handling freight to Cuba, this jurisdiction resting on two grounds: first, the jurisdiction to prevent discrimination against Seatrain and in favor of the
2483 Florida East Coast Car Ferry, to which the delivery of the cars of all railroads is permitted without restriction or condition; and, second, the Commission's jurisdiction to prescribe just and reasonable rules as to car service to be observed within the United States, the delivery of cars to Seatrain taking place within the United States.

"(b) That the Commission's jurisdiction to require a railroad to permit the use of its cars by another carrier is not limited to instances where the owning railroad is a party to through routes with the other carrier, but exists wherever the interchange of railroad equipment is reasonable and necessary for the efficient handling of the freight of the country, subject to reasonable compensation to car owners. Thus we submit that if the Northern Pacific should attempt to say that the Boston & Maine could not deliver one of the Northern Pacific's cars to the Boston & Albany in the handling of a through shipment moving westbound, the Commission would be empowered to find that this was an unreasonable car service rule or practice on the part of the Northern Pacific and to order the Northern Pacific to give its consent to the use of its car under the circumstances. In other words, we believe that the power of the Commission with respect to cars is derived from two sources: its authority with respect to the establishment and operation of through routes and to require carriers to provide reasonable facilities therefor; and its specific authority with respect to car service rules, regulations and
2484 practices; and that it has authority where Seatrain is concerned under all of these provisions."

2. We except to the following finding of the Examiners on sheet 11, this again being in accordance with a prior ruling of the Commission herein which we believe was an error.

"It is obvious that the time during which and the manner in which Seatrain should pay for the use of cars, as well as the amount of compensation, would be appropriate conditions to attach to an order requiring defendants to interchange their

cars with Seatrain, and accordingly that such questions are here in issue."

Both on the facts previously of record, and in the light of the additional facts stated in our motions in Part I hereof, and for the reasons urged in support of our further motion, Part II hereof, we submit that the foregoing finding or ruling is erroneous.

3. If, however, "the time during which and the manner in which Seatrain should pay for the use of cars" (meaning thereby whether Seatrain should pay any portion of the per diem or re-claim on cars held at the ports), should be held to be a proper condition to be attached to the order herein, then we take exception to the findings and conclusions of the Examiners as to what this condition should be and to their failure to find, that Seatrain should not be responsible for the per diem expense accruing on cars when held by the railroads at the ports as a part of their railroad service and undertaking, for which they are compensated by their rates or divisions.

2485 The entire discussion of this subject in the proposed report proceeds, as we believe, from a wholly erroneous point of view and it is difficult to pick out individual findings or conclusions to which exception should be taken.

(a) Exception is accordingly taken to all of that portion of the proposed report beginning with the first complete paragraph on sheet 11 to and including the paragraph ending at the top of sheet 17.

(b) Exception is also taken to so much of the second complete paragraph on sheet 17 as embodies the Examiners' recommendations with respect to responsibility for per diem on cars held at the ports.

(c) Exception is taken to the failure of the Examiners to find that for Seatrain to assume by reclaim or otherwise the per diem expense on cars held at the ports prior to the delivery to and receipt by Seatrain of the freight would mean the performance by Seatrain of a portion of the railroads' service within the railroads' undertaking under their rates and tariffs for which the railroads must be deemed to be fully compensated by their rates and divisions and demurrage and storage charges.

The apparent attempts on sheet 15 to distinguish the situation involving Seatrain freight from that involving freight interchanged with the break-bulk lines rests on invalid grounds. It is stated that coastwise traffic ordinarily moves under through bills of lading and that the free time provision of the

2486 tariff does not apply. Seatrain traffic likewise moves under through bills of lading. The effect of this fact on the non-

applicability of the free time provision, however, is not what the Examiners assume it to be. Free time provisions are limitations upon the length of time during which freight will be held without charge either for storage or car demurrage. Where the free time provisions do not apply, as in the case of freight on through bills of lading, there is no limitation of the time during which the railroads are obligated to hold the freight.

Again it is stated that the methods of delivering freight to the break-bulk lines and to Seatrain are different in that the former may be unloaded immediately upon arrival at the pier and the car released for other purposes; whereas in the case of Seatrain freight the railroads do not have this option. Both of these assumptions are erroneous. While freight may be unloaded to a pier or warehouse in the case of break-bulk freight, the steamship line cannot be required to accept it on its pier unless and until it is ready to do so. Therefore the railroad must provide facilities for holding the freight. It can hold the freight in a car, on a lighter, or on a lighterage pier, or it can put it in a warehouse. In either event it is put to expense, and this is the expense of a service which is part of its undertaking and for which it receives compensation in its freight revenues and for which it is not entitled to double compensation from another source. Moreover, in the case of freight moving via Seatrain, theoretically, at least, the railroads have an option to unload the freight from a car if it is going to be held for a
2487 long time, releasing that car and storing freight, and then reloading the freight in another car.

We submit there is no more reason for imposing as a condition to a non-consenting railroad's permission to have one of its cars delivered to Seatrain that Seatrain shall assume the per diem expense for the few days the car waits at that port because it has arrived in advance of the sailing date than there is for attaching a condition that Seatrain shall assume the per diem expense while the car is en route to the port. In both instances while the freight is in the railroad's possession and before interchange with Seatrain is made it is the railroad which is using the car for the purpose of performing its carrier undertaking and of earning the freight revenues which it is paid by the shipper thereon.

4. By way of illustrating some of the particular features of the Examiners' discussion to which the foregoing general exceptions are addressed, but not attempting to dissect out from the balance of the report each and every specific statement which we believe to be in error, the following are some of the details of this phase of the proposed report which we believe to be erroneous and to which we take exception:

(a) Exception is taken to the failure of the Examiners to find, as required by the uncontradicted testimony which they have apparently completely disregarded, that the railroads are already compensated by their freight rates for the expenses involved in holding at the ports freight for interchange with water carriers including Seatrain.

2488 See, for example, testimony of Witnesses Smith, R. 1251, 1253, 1259; Mathey, R. 1229, 1236; Randall, R. 1343–46.

(b) Exception is taken to the reference on sheets 11 and 12 and elsewhere to cars being held "because of Seatrain's inability to accept them" as being an unfair and erroneous representation of the true situation.

The railroads' rates on waterborne traffic are necessarily made in the light of the characteristics of that traffic and the undertakings of the railroads with reference thereto. The record shews that the railroads' tariff provisions for greater free time on coastwise and import traffic than on freight for local delivery were made in the light of the fact that steamships do not have sailings every day and that it is in the interest of shippers as well as the railroads themselves that the shippers may be permitted to ship from time to time in advance rather than accumulating their shipments to arrive at the port in a bunch just at sailing time. The record shows that these considerations exist in the case of Seatrain as well as in the case of any other water carrier. To say, therefore, that the cars are held because of Seatrain's inability to accept them and thereby imply that the holding is similar to that which may occur when a railroad, which has daily service, for some reason or other refuses to accept cars from a connection is to create an erroneous impression and confuse the issue. It is the shipper's shipment in advance or the railroad's movement of the car quite as much as the fact that Seatrain's ship does not

2489 sail on the day the shipment arrives at Hoboken or New Orleans which is the reason for the holding, and this is a consideration reckoned with in the rates and covered by their tariff provisions as a part of the railroads' duty and obligation.

(c) For the same reasons exception is taken to the finding on sheet 14:

"If Seatrain is to interchange cars with the railroads as freely as the latter interchange with one another and at the same per diem rate, it is but reasonable that Seatrain should likewise assume the per diem during the time the cars are being held because of its inability to receive them."

This and similar reasoning all result from the failure of the Examiners to pay any attention to the undertakings of the railroads under their tariffs in connection with water borne freight

and to the compensation which they receive in their rates or divisions for the performance of the duties devolving upon them thereunder.

(d) Exception is taken to the statement on sheet 11:

"Seatrain refuses to assume any per diem accruing on cars to be delivered to it at Hoboken, except during the time such cars are in its actual possession."

This is an inaccurate statement. When cars are held not under the railroads' undertaking under their tariffs and rates but for Seatrain's account at its direction, Seatrain does assume the per diem and recognizes its obligation to do so.

2490 (e) Exception is taken to the following findings on sheet 13:

"The detention at New York and New Orleans of cars loaded with freight for coastwise break-bulk lines was not because of the inability of the break-bulk lines to receive the freight.

* * * * *

"Detention on the Hoboken and on connections of the Lower Coast, however, of cars interchanged with Seatrain is caused principally by the latter's inability to accept them."

Taken together, these are most extraordinary statements, for which, we submit, there is no support in the record. For example, the record shows not the slightest distinction between the holding of cars containing freight for delivery to the Pan-Atlantic, on which the average detention on the Hoboken was 2.27 days, and the holding of cars containing freight for delivery to Seatrain. In both instances the cars were held because the freight had to be held and the freight had to be held because the railroads undertook to do so as a part of their service where the freight was shipped early and the ship did not have a sailing immediately on the arrival of the freight or otherwise was not ready to receive it.

It is apparent that this finding is predicated entirely upon a statement contained in Mr. Kendall's letter dated October 22, 1940, filed herein as revised Exhibit 75. At the hearing Mr. Kendall was requested to furnish breakdowns of certain figures and certain additional information and this was supplied by the letter

2491 in question. However, in addition to the data requested, the letter contained various comments volunteered by Mr. Kendall which we believed to be in error and as to which we had opportunity for neither cross-examination nor rebuttal and which, therefore, were stricken from the record upon our objection (Letter of Chief Examiner Butler, dated November 16, 1940). The statements on which we believe the foregoing findings must have been predicated (the similarity of the language to that of the Examiners' findings makes this inference almost conclusive) are

found in the last two paragraphs on page 31551-7 of the letter, revised Exhibit 75. These paragraphs are among those stricken on order of the Chief Examiner.

The Examiners' findings are in conflict with the direct testimony of witnesses for some of the railroads concerned to the effect that they do have to hold cars containing freight for the break-bulk lines because the vessels of these lines do not sail every day in the week. Moreover, the Examiners have plainly overlooked the extremely interesting and informative testimony of Witness Randall in regard to the operation of the permit system in the handling by the railroads of water-borne freight. This testimony is abstracted in our original brief. Mr. Randall made it clear that it is part of the railroads' undertaking to hold freight until the day it is permitted by a steamship company and that when the permit day is some time off they even reserve the right to hold freight at interior yards in order not to congest their tracks at the port.

Moreover, the Examiners have completely disregarded
2492 the testimony as to the per diem expense which the railroads assume in accumulating cars at the ports in order to handle freight arriving by break-bulk water carriers. If it is proper to talk in terms of disabilities of water carriers, it is certainly as much of a disability of break-bulk water transportation that the freight arrives in a shipload lot at one time without the cars required for its transportation to the interior and that in order to handle the freight the railroads must accumulate the cars at the port in advance of the ship's arrival and assume the per diem expense thereon, as is the fact that outbound freight must be accumulated at the port awaiting sailing date.

The point, which the Examiners ignore, is that the railroad rates, which are applicable to Seatrain freight as well as to freight moving by the break-bulk lines, do include compensation to the railroads for and recognize the obligation of the railroads at their expense to hold freight at the ports because of the characteristics of rail and water transportation.

Perhaps the whole difficulty of the Examiners in this proceeding is their failure to realize that we are dealing with waterborne traffic, that Seatrain is a water carrier, that its duties and obligations are only those of a water carrier, and that the railroads' undertakings and obligations under their rates, divisions and tariff provisions are those which they have assumed or which devolve upon them because they are appropriate to the handling by a railroad of freight in connection with a water carrier.

2493 (f) On sheet 14 the Examiners state:

"The Hoboken and Seatrain point out that the interchange of freight with the break-bulk lines at New York involves the use and detention not only of cars, but of lighters, contending

that the latter are also railroad equipment. The use and rental of lighters are not, however, in issue in these proceedings."

Exception is taken to the last sentence of this finding. This again results from the failure of the Examiners to recognize that the real question on which the determination of this issue turns is as to the extent to which the expenses incident to the detention of equipment at the ports in holding waterborne freight are expenses for which the railroads are compensated by their freight rates and which come within the railroads' undertaking. The lighters are as much railroad equipment as are railroad cars, and the fact that cars containing freight for a break-bulk water carrier may be unloaded, does not prove that the railroads assume no expense of equipment detention if the freight is held on lighters instead of cars. This is plain from the testimony of Witness Randall in this proceeding and from the activities of the railroads in connection with port freight which have been so prominent in the papers in recent months.

The Examiners have plainly overlooked the fact shown by the evidence here that in their divisions case with the break-bulk lines, Docket No. 27969, the railroads are urging as one of the facts justifying the divisions which they seek the expense which they incur in holding freight, both in cars and on lighters, awaiting its delivery to and acceptance by the break-bulk water lines.

2494 (g) Exception is taken to the Examiners' rejection on sheets 14 and 15 of the evidence that the Florida East Coast Railway Company provides seven days free time at Port Everglades on export shipments and that the Florida East Coast Car Ferry does not assume the per diem expense for the detention of the cars.

This evidence was offered to show that there is no ground for any contention that the fact that freight is delivered to a water carrier in cars changes the nature of the railroad's undertaking with respect to assuming the expense of holding the freight awaiting such delivery. The Association of American Railroads should be as much concerned with the interchange of cars with the Florida East Coast Car Ferry as it is with the interchange of cars with Seatrain, and so long as the Florida East Coast Railway is permitted to provide for holding cars for a period of free time and not collect reimbursement for car hire from the Car Ferry Company, certainly the Association has no basis for arguing that its sacred reclaim principles are violated if railroads assume the expense of car detention in the case of cars containing freight for interchange with Seatrain.

(h) Exception is taken to the finding on sheet 15:

"The amount of free time granted under the demurrage rules to shippers over break-bulk lines is of no importance in de-

termining what would be reasonable time and conditions under which Seatrain and defendants, parties to through routes, should interchange cars."

2495 This again illustrates how the Examiners have missed the point. The whole question is as to the extent of the railroads' undertaking, which is covered by their rates and tariffs, and since the same rates and tariffs are applicable to freight handled via Seatrain as to freight moving via the break-bulk lines it is obvious that the extent of the railroads' undertaking and duty must be the same.

Moreover, the fact that the detention of cars incident to the handling of freight is a railroad undertaking and service and not one to be passed on to a water carrier, is plainly indicated by the demurrage and free time tariff provisions which the Examiners thrust aside. For if the railroads hold the cars beyond the periods of free time for which they agree to hold them under their transportation rates, these tariffs provide for the collection of demurrage by the railroads. If a car containing freight for movement via Seatrain should perchance be held beyond the limits of the free time permitted under the railroads' rates and demurrage should accrue, we would have the strange phenomena of the railroads collecting demurrage to compensate them for the use of their cars and all of this demurrage going into the railroads' pockets, while, under the Examiners' theory, it would be Seatrain which would be incurring the expense of the detention by paying the per diem on the cars.

Of course, this would apparently occur only in the case of freight which does not move under through bills of lading. But it would be the situation as to all Cuban freight, where the

2496 bill of lading, although called a through export bill of lading, is in fact two separate contracts. But in the case of freight moving in interstate commerce under a through domestic bill of lading, the record shows that the railroads have not provided any limit to the time that they will hold the freight and provide cars, storage facilities, or lighters necessary for such holding awaiting its delivery to and acceptance by the on-carrying steamship line.

(i) Exception is taken to the entire paragraph beginning at the bottom of sheet 16 and ending at the top of sheet 17.

This paragraph contains so many erroneous assumptions that it is difficult to deal with it. It assumes, first, that merely because the intermediate reclaim provision of the reclaim rules exists, it is a just, reasonable and lawful provision in each and every instance to which it may be applicable.

We submit that the rule can be reasonably only when a carrier is an intermediate carrier between railroads having constant

and daily service. We can imagine the case of a railroad operating only every three days or once a week. In fact we know of several. Certainly in such an instance if there were a switching line connecting that railroad with another having a daily service, the intermediate reclaim rule would be an unreasonable rule to apply, especially if the railroads entered into arrangements for through routes and based their rates, divisions and tariff provisions upon the circumstances under which the freight would have to be handled.

2497 Again the Examiners err in assuming that the Hoboken comes within the definition of an intermediate switching line. By the definition in the Code of Switching Reclaim Rules a switching carrier is not to be considered an intermediate switching road if it participates in the freight rates. To come within the definition, its charges must be switching charges published independently by it, to be absorbed or not by its connections. The Hoboken, however, participates in all of the rates under which the traffic involved moves and receives its compensation in the form of divisions of such joint rates. The difference is an important one because it means, first, that the measure of the Hoboken's compensation is the result of agreement with its connections (unless fixed by the Commission) on the basis of certain undertakings, services and costs, and, second, that the Hoboken shares the responsibilities and undertakings of the other carriers, parties to the joint rates. Under these circumstances, the mere fact that the Association may have fixed one day as the proper reclaim for an intermediate switching line within its definition certainly does not afford any indication of the amount or extent of the reclaim to be paid to the Hoboken by its rail connections, parties with it to the joint rates.

An even more serious fault, however, of this feature of the proposed report is the Examiner's assumption that there is any analogy between the transportation here involved and that via connecting rail carriers. Again we reiterate that the Commission must realize that it is dealing with transportation via rail-

2498 roads and a water carrier, that the railroads' rates, divisions and undertakings are made in the light of this fact and that the issue here to be determined is the extent of the railroads' undertaking under their tariffs, rates, and divisions, which cannot be tossed off lightly by an unsound analogy to a switching carrier connecting two railroads.

Conclusion

In the light of the foregoing, we submit that the Commission should attach no condition to its order with respect to the assumption of per diem or reclaim expense on cars used by the railroads for holding freight at the ports in connection with through movement via Seatrain; that the Commission's decision herein should be confined to a determination of the rate of compensation or per diem to be paid to nonconsenting car owners while their cars are in Seatrain's possession as a condition of their consent to the delivery of their cars to Seatrain; that the Examiners' recommended findings with respect to the measure of this compensation should be adopted and made the findings of the Commission, and that the Commission should enter an order requiring the still nonconsenting railroads on and subject to this one condition to consent to the delivery of their cars to Seatrain.

If contrary to our contention, the Commission should conclude that it should attach to its order directed to the few nonconsenting railroads reaching New Orleans, a condition as to detention or reclaim, we submit that it should be a condition that they assume the same undertaking with respect to bearing any expense, including per diem incident to holding for the same length
2499 of time at the port freight to be interchanged with Seatrain which they assume in connection with freight moving under the same rates to be interchanged with break-bulk water carriers.

Respectfully submitted.

PARKER MCCOLLESTER,
LORD, DAY & LORD,

25 Broadway, New York, N. Y., Attorneys for Complainant Hoboken Manufacturers Railroad Company and Intervener Seatrain Lines, Inc.

Dated: May 5, 1941.

2500 Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each party.

Dated at New York, N. Y., this 5th day of May 1941.

PARKER MCCOLLESTER,
Of Counsel for Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc.

2506 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY, COMPLAINANT

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL., DEFENDANTS

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY, COMPLAINANT

v.

AKRON, CANTON & YOUNGSTOWN RY. CO., ET AL., DEFENDANTS

Exceptions of certain defendants and intervener, association of American Railroads, to the report on further hearing proposed by examiners Archer and Walsh.

Filed May 6, 1941

Come now certain defendants* and the Association of American Railroads, an intervener, hereinafter called defendants, and respectfully file the following exceptions to the report of the Examiners.

2507 I

Defendants except to the failure of the Examiners to find that railroads are under no legal obligation to furnish cars for the use of Seatrain and that the Commission is without authority to require them to turn their cars over to Seatrain.

II

Defendants except to the finding by the Examiners that railroads, insofar as they participate in through routes with Seatrain, should be required to interchange their cars with Seatrain in the performance of through transportation over such through routes at the compensation provided in the Code of Per Diem Rules of the Association, which is now, and has been for sometime, $1.00 per day.

*Defendants for whom these exceptions are filed are those which joined in the "Brief on Rehearing for certain defendants and intervener, Association of American Railroads," dated December 2, 1940.

III

Defendants except to the failure of the Examiners to find that the payment of $1.00 per diem by Seatrain for each day a railroad car is in its possession would fail justly to compensate defendants and would fail to reimburse them for their car ownership costs for the time during which their cars are in Seatrain's possession and for the idle or nonproductive time of such cars attributable to their use by Seatrain.

IV

Defendants except to the failure of the Examiners to set forth in their report the facts of record with respect to the nature
2508 of the use and possession by Seatrain of railroad cars and with respect to the resulting idle or unproductive time of such cars.

V

Defendants except to the finding of the Examiners that railroad cars are not subject to corrosion at an excessive rate while in the possession of Seatrain, due to the exposure of the cars to full salt atmosphere; and to the failure of the Examiners to find that such excessive corrosion results in additional damage to each car of from 30 to 70 cents per day.

VI

Defendants except to the failure of the Examiners to find that Seatrain should pay, as compensation for the use of their cars, $10 for each day a car is in its possession.

ARGUMENT IN SUPPORT OF EXCEPTIONS

The Commission Is Without Authority To Require Defendants To Permit Seatrain To Use Their Cars

What is said under this heading relates to Exception I.

It has been our position from the first that the Commission has no authority to require defendants to turn over their cars to Seatrain. In our brief on further hearing, dated December 2, 1940, this point was discussed at some length. We there called attention to the amendments to the statute, accomplished by the
2509 Transportation Act of 1940, and pointed out that as a re-

sult of those amendments the Commission's lack of statutory authority had become even clearer than it was theretofore. In the proposed report, however, our argument was dismissed with the statement (sheet 6) that, "nothing has been advanced by defendants which would warrant a change in the views," expressed by the Commission in Investigation of Seatrain Lines, Inc., 206 I. C. C. 328. We have no purpose to reargue the question at this time, but we respectfully request that reconsideration be given to the arguments we have already advanced. (See our Brief on rehearing, dated December 2, 1940, pages 9 to 13; our Exceptions to the Proposed Report of Examiners Hoy and Walsh, dated September 19, 1939, pages 4 to 7; and our original Brief, dated May 25, 1939, pages 15 to 21.)

If Seatrain Is Required To Pay a Per Diem of Only $1.00 While Railroad Cars Are in Its Possession, It Will Reimburse Defendants for Only a Fraction of the Cost of Car Ownership Directly Attributable to the Use of Their Cars by Seatrain.

What is said under this heading relates to Exceptions II to VI, inclusive.

At the further hearing in Brooklyn on September 16 and 17, 1940, new evidence was offered on the question of the amount of per diem which Seatrain should pay for railroad cars while in its possession. The treatment of this feature in the Proposed Report of Examiners Archer and Walsh is identical with the treat-
2510 ment in the Proposed Report of Examiners Hoy and Walsh.

In our Exceptions to the last mentioned Proposed Report, dated September 19, 1939, we discussed in detail the errors and shortcomings of that report. Much of the same ground was also covered in our previous and subsequent briefs. (Exceptions to the Proposed Report of Examiners Hoy and Walsh, dated September 19, 1939, pages 8 to 27; Brief dated May 25, 1939, pages 36 to 60, and Brief dated December 2, 1940, pages 14 to 20.) We refer the Commission to the arguments already advanced with the thought that there is no occasion or justification for repeating them here.

If the view of the Examiners should prevail Seatrain would pay for each day that a railroad car is in its possession approximately 1/365th of the annual car ownership cost, or approximately the car ownership cost for one calendar day. But Seatrain is in actual possession of a railroad car (with negligible exceptions) only while it is moving under load, that is, only a fraction of the time directly attributable to Seatrain's use of the car. For every day a car is in the possession of Seatrain, there are several days when the car is idle or unproductive, while in the possession of the railroads, as a direct result of its use by Seatrain. Therefore, the

per diem to be paid by Seatrain for each day a railroad car is in its possession, must be sufficient to include car ownership costs, not only for the day the car was in Seatrain's possession, but also for all idle and unproductive time of the car attributable to Seatrain's use of the car on that day. This has been fully developed
2511 in our Briefs and Exceptions cited above.* However, we shall offer a homely example which, although it reflects some degree of over-simplification, may serve the purpose of bringing our position into sharper focus.

Suppose that each Commissioner, except the Chairman, owns an automobile. The cost of each car, for depreciation, interest, insurance, repairs, and garage is $1.00 per calendar day or $365 per year. Some of the time the cars are in the garage because not needed; a part of the time they, or some of them, are in the repair shop. The cost of depreciation, interest, insurance, and garage continues each day. Although the Chairman owns no car, occasionally he has use for one. The ten Commissioners may think that the Chairman should provide a car of his own, but they are willing, or are by some omnipotent power required, to let the Chairman use their cars. The ten cars are pooled and each of the ten owners, and the Chairman, agrees to contribute his proportionate share of the $3,650 necessary to cover the annual expense of maintenance and ownership. The cars are actually in use on the average only 50 days per car per year, but the expenses described above go on each day. The cost per use day, as distinguished from calendar day, is, therefore, about $7.00. Would the Chairman be paying his share of the cost if he paid into the pool only $1.00 per day for each day he actually used one of the cars? If he used one of the cars 30 days, or 3/5ths of the time the average car is in actual use during the year, would he be contributing his share if he paid $30? Or should he pay $210 and thus bear 3/5ths of the annual expense? If he pays only $1.00 per use day,
2512 or $30 per year, the other Commissioners who actually own the 10 cars and have assumed the burden of investment and ownership, must pay $335 toward the annual ownership cost of the car used by the Chairman, although the Chairman has actually used the car 3/5ths of its use time during the year. We trust we have not abused an advocate's license in placing the Chairman in a role corresponding to that of Seatrain.

The example which we have given demonstrates the fallacy in the reasoning of the Examiners when they say: (sheets 9 and 10)

"For every day the average car is in active service either the owner has the use of the car or some other carrier is paying $1 per diem for its use, whether loaded or empty. The owner is

fully compensated, therefore, either in use or rent, for the full cost of ownership and maintenance. This being so, there is no good reason why Seatrain should pay a higher per diem rate than $1.00 * * *."

If the Chairman pays only $1.00 for every day he uses an automobile, under the circumstances above recited, obviously he is paying $6.00 less than the ownership cost per use day. That deficit must be made up by the owners. This is true in spite of the fact that it might be said, following the reasoning which the Examiners employed, that the owners would receive $1.00 for each calendar day the Chairman used an automobile and that the car would be available for the use of the owners on calendar days when not used by the Chairman. (For a discussion of the above quoted language, see our Exceptions to the proposed report
2513 of Examiners Hoy and Walsh, dated September 19, 1939, pages 19 to 21.)

The situation involved in this proceeding presents underlying circumstances, unique in character, which should lead the Commission, in fixing the per diem to be paid by Seatrain, to resolve all doubts in favor of the car owners. If these defendants should be required to hire out their cars to Seatrain, regardless of their wishes, the result would be to force them to make a substantial investment for the benefit of Seatrain. In providing themselves with an adequate car supply, these defendants must take into account the fact that many of their cars will not be available for railroad service but will be diverted to the service of Seatrain. Therefore, they will find it necessary to buy and maintain more cars than would be necessary otherwise. It is common knowledge that the railroads have been and are taking every precaution to insure a proper car supply to meet the requirements of national defense. In recent months, their purchases of new cars and their expenditures in car repairs have both been abnormally high. Defendants do not own more cars than are needed in the light of present and anticipated railroad traffic. Every car used by Seatrain means an additional car which the railroads must provide.

What we have said would seem to lead inevitably to the conclusion that the railroads should not be required to permit their cars to be diverted to Seatrain. This is a point which has been argued elsewhere. The point we mean to make now is that, if the railroads are required to divert their cars under conditions
2514 to which we have called attention, certainly the Commission should fix a per diem to be paid by Seatrain which will clearly and beyond all reasonable doubt fully reimburse defendants for their car ownership cost.

There is another point, and a relatively minor one, which should be mentioned. We have said that the treatment of the per diem feature in the new Proposed Report is identical with the treatment in the former Proposed Report by Examiners Hoy and Walsh, and that is true, with one exception. On Sheet 9 of the new Proposed Report there is a footnote, numbered "2" which did not appear in the former Proposed Report, and which reads as follows:

"The Hoboken holds approximately 60 cars on its rails, to be used by Seatrain as occasion requires on which the latter bears the cost of car ownership."

The record clearly shows that the statement in the footnote is erroneous. While witness A. R. MacGowan testified on page 976 that there were, at the time of the hearing, "approximately sixty box cars at Hoboken empty," he made it plain on cross-examination that sixty was an abnormal number and that the normal number of cars so held was twenty (Tr. 1014–1015).

CONCLUSION

For reasons stated herein, and in Briefs and Exceptions which we have heretofore filed: (1) The Commission should refuse to accept the Examiners' recommendation that defendants be
2515 required to interchange their cars with Seatrain, and should find that it is without statutory authority to make such a requirement; and (2) If the Commission should enter an order requiring such interchange of cars, it should refuse to accept the Examiners' recommendation that the per diem, to be paid by Seatrain for railroad cars while in its possession, should be fixed at $1.00 and the Commission should find that such per diem should be fixed at not less than $10.

The parties for which these Exceptions are filed request that this proceeding be set for oral argument.

Respectfully submitted.

G. H. Muckley,
J. F. Eshelman,
F. R. Cross,
F. W. Gwathmey,
Charles Clark,
Wm. Burger,
E. A. Smith,
Y. D. Lott, Jr.,
J. Carter Fort,

Attorneys for certain defendants and Intervener, Association of American Railroads.

2516 CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Exceptions upon all parties of record in this proceeding by mailing a copy thereof properly addressed to each party.

Dated at Washington, D. C., this 6th day of May 1941.

J. CARTER FORT.

2519 Before the Interstate Commerce Commission

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

Supplemental exception of certain New York harbor lines to proposed report on further hearing

Filed May 6, 1941

Come now certain New York Harbor lines* defendant
2520 herein, and by way of supplement to the exceptions being concurrently filed by intervener the Association of American Railroads, in which these defendants also join, file this their exception to the report on further hearing proposed by H. W. Archer, Esq. and M. J. Walsh, Esq., Examiners.

EXCEPTION

For errors of fact and of law as more particularly specified in the following Brief in Support of Exception these defendants except to the concluding paragraph of the proposed report which reads as follows:

"At the further hearing, an attempt was made by counsel for certain defendants to introduce evidence relating to compensa-

*This exception is taken on behalf of The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, Lehigh Valley Railroad Company, and The Central Railroad Company of New Jersey (Shelton Pitney and Walter P. Gardner, Trustees).

tion alleged to have accrued since 1932 from the Hoboken or Seatrain for the use, or detention, of cars owned by these defendants. These defendants have, in fact, sued the Hoboken and Seatrain in the Federal Court for the Southern District of New York for the amount alleged to be due them. The evidence relating to these claims, sought to be introduced at the further hearing, was excluded by the examiners. The only issues before this Commission are those raised by the complaints herein,
2521 and it is to be observed that the prayer for reparation contained in such complaints was withdrawn at the original hearing, and only a finding of general damages was sought as to the past, it being admitted that the amount of such general damages could not be definitely ascertained. An award of general damages is not within the province of this Commission. And any claim which defendant rail carriers may have against the Hoboken or Seatrain cannot now be injected into these proceedings."

BRIEF IN SUPPORT OF EXCEPTION

I. The Proposed Report, In Dealing With The Retrospective Features Of The Case, Is Inadequate And Inaccurate At To Matters Of Fact, And In Error As To Matters of Law

The above-quoted statement from the proposed report which is all that it contains as to the retrospective features of the case, does not sufficiently or accurately state the facts, or adequately describe the evidence introduced and sought to be introduced, or set forth the grounds on which it was presented. It is further in error in several respects as to matters of law. While the subject matter of this exception is more fully set forth in the Supplemental Brief of New York Harbor Lines on Further Hearing, dated November 30, 1940, a general outline of the situation is here desirable.

2522 1. Summary of the Facts Leading to the Presentation of the Excluded Evidence

From the inception of Seatrain's operation into New York Harbor there has been dispute between the Hoboken Manufacturers Railroad Company (herein termed the Hoboken) and its rail connections over the former's claims for its terminal switching reclaim of 2.54 days per loaded car on cars which as an intermediate switching carrier it interchanged between them and Seatrain. The trunk lines contended that, at the most, Hoboken was not entitled to more than the intermediate switching reclaim which does not exceed $1.00 per car and is payable only by the line which delivers the car to the switching road. The trunk

lines, therefore, refused to allow Hoboken reclaims on the basis claimed by it. The proposed report of the Examiners herein upholds for future application the principle so contended for in the past by Hoboken's trunk-line connections.

From the outset of the establishment of Seatrain's New York service, the Hoboken has made no settlements with its connections for per diem. As of December 31, 1938, Hoboken was indebted to its trunk line connections for per diem accruing on cars while in possession of itself or Seatrain for 277,810
2523 car days. The division of this detention as between Hoboken and Seatrain was not disclosed by its per diem reports to the owning lines. As of the same date, Hoboken's claims for reclaims against these trunk lines, on the basis of its terminal reclaim of 2.54 days per loaded car, amounted to $141,127. Since Hoboken was not entitled to the terminal switching reclaim of 2.54 days on cars which it had handled in intermediate switching service between its trunk line connections and Seatrain, the latter figure is obviously excessive.

Prior to the Commission's decision of January 8, 1940, on further hearing herein, The New York Central Railroad Company and The Pennsylvania Railroad Company had each filed an action against Hoboken and Seatrain in the United States District Court for the Southern District of New York to recover for the use of their cars. In their answers in said actions—which answers were filed subsequent to the issuance of the Commission's report herein of January 8, 1940—Hoboken and Seatrain alleged that the question of the right of such railroads to refuse permission for the delivery of their cars to Seatrain and the question of the amount of compensation which they were entitled to demand and receive on their cars so delivered are questions which under the Act are to be determined by the Interstate Commerce Commission and not within the primary
2524 jurisdiction of the Court; and that these questions are now awaiting determination in this Docket, No. 25728, and that therefore the Court is without jurisdiction. The precise language of the allegations is shown in Exhibits 77 and 78 (Appendix A hereto) respectively taken from the amended answers of Hoboken and Seatrain in the Pennsylvania's suit.*

The significance in the instant case of the allegations made by the Hoboken and Seatrain in the Court cases must be judged in the light of the fact that they were made subsequent to the issuance of the Commission's report herein of January 8, 1940 (Hoboken Mfrs. R. Co. v. Abilene & S. R. Co., 237 I. C. C. 97), which at page 102, defined the scope of the issues on the further hearing then ordered in the following language:

"It is our view that the *period of time* during which, and the manner in which, Seatrain should pay for the use of cars, the *amount of compensation* it should pay, and *any other conditions which the evidence adduced shows would be an appropriate condition* to attache to an order requiring defendants to interchange their cars with Seatrain are questions herein in issue. The proceedings will be reopened for further hearing." [Italics inserted.]

2525 Since the causes of action in the suit cover definite periods in the past, the allegations of Hoboken and Seatrain represent to the Court that the Commission, in this very proceeding, has before it for determination the question of the amount of compensation to which the trunk line plaintiffs are entitled for the use of their cars in Seatrain service during the period of time covered by their causes of action.

It is notable that the allegations made by the Hoboken and Seatrain in the Court cases use the identical expression—"amount of compensation"—which the Commission employed in its report of January 8, 1940, in defining the scope of the reopened hearings. Since if the Commission's only function here with respect to the past is to determine a reasonable rate of compensation for Seatrain's use of cars, the Court would not be "without jurisdiction" as they allege, but would merely require the Commission's preliminary determination of the administrative question before proceeding with the suit, it must be concluded that Hoboken and Seatrain have taken the position before the Court that the Commission in the instant proceeding has now before it the question not only of a reasonable rate of compensation for the past, but also the determination of the sums or total amounts of compen-

2526 sation due the several connecting trunk lines for Seatrain's use of their cars.

In this connection it is worthy of note that even if the Commission would not otherwise have jurisdiction to require Hoboken and Seatrain to make settlement of per diem and reclaim accounts for the past in accordance with its conclusions as to reasonable rates of per diem and reclaim, the representation of Hoboken and Seatrain to the Court might still be sound if the Commission, under the scope of the issues on further hearing as last defined by it, is nevertheless in a position to require such settlement as a condition of its order.

From the inception of its New York service Seatrain, through control of its subsidiary the Hoboken, withheld from its trunk-line connections compensation for the use of their cars received by it through the Hoboken. What therefore could be more appropriate as a condition to any order the Commission might here enter

than a requirement that Seatrain and Hoboken should make settlement, on such basis as is found to be reasonable or applicable in the past, of all presently unsettled and outstanding per diem and reclaim accounts with its trunk-line connections, and to pay them the balances so determined?

2527 2. Description of the Evidence Adduced Through Witnesses Eyre and Lipscomb and of the Examiner's Rulings With Respect Thereto

In view of the allegations made by the Hoboken and Seatrain in the Court cases two witnesses were called at the last hearing by The Pennsylvania Railroad Company. Through the first of these, Witness Eyre,* were introduced Exhibits 79 and 80, which are reproduced herewith as Appendix B. Exhibit 79 is a summary of per diem reports submitted by the Hoboken to the Pennsylvania covering the period from September 1932, to July 1940, inclusive, and showed a detention of Pennsylvania Railroad freight cars to the extent of 167,058 car days. The detention so reported covered the use of cars by Hoboken and Seatrain, but the reports made no separation as between Hoboken and Seatrain in this respect. Exhibit 80 is a summary of per diem reclaim reports submitted by the Hoboken to the Pennsylania showing the amounts claimed by the Hoboken as due from the Pennsylvania covering the period from August 1932, to December 1936, inclusive.† The

2528 reclaims so claimed by Hoboken were computed on the basis of its terminal switching reclaim of 2.54 days per loaded car, and were not limited, in the case of such cars as it interchanged with Seatrain, to the intermediate switching reclaim which does not exceed $1.00. Even so, the reclaim so claimed by the Hoboken against the Pennsylvania amounted to only $20,600.90. If, for example, the 167,058 car days of detention were evaluated at only $1.00 per day, there would be outstanding as of the end of July, 1940, in favor of the Pennsylvania, according to Hoboken's own reports, a net amount of $146,457.10 ($167,058.22 minus $20,600.90), but this is an understatement because it improperly assumes that Hoboken was entitled to its terminal switching reclaims on cars which it interchanged with Seatrain lines. The Examiner—upon objection by counsel for Hoboken and Seatrain on the ground of irrelevancy, and despite a showing that they bore on several issues before the Commission—received Exhibits

*Mr. L. G. Eyre is Assistant Chief Clerk in the office of the Superintendent of Car Service of The Pennsylvania Railroad Company.

† The period covered by Exhibit 80 does not extend subsequent to the month of December, 1936, for the reason that up to and until January 1937, the Pennsylvania assumed the responsibility of a road haul carrier to the Hoboken in respect of payments of reclaim, but beginning January 1937, the New York Central, which is intermediate between the Pennsylvania and the Hoboken, assumed the responsibility for reclaims on cars to or from the Pennsylvania (1388).

79 and 80 for the sole purpose of showing that the Hoboken in making its report of per diem and per diem reclaims makes no segregation in respect of the detention occurring on Hoboken and on Seatrain or with respect to cars interchanged with Seatrain. To this restriction on the admission of Exhibits 79 and 80 exception was taken (1387).

2529 Witness Lipscomb* thereupon testified that the Pennsylvania has not paid to Hoboken the per diem reclaims as claimed by the latter and summarized in Exhibit 80; and that the Pennsylvania has not received payment for the per diem reported to it by Hoboken as summarized in Exhibit 79. In view of this testimony, and in the absence of some direct proof of tender of payment of such outstanding per diem by Hoboken or Seatrain for their use of cars of the Pennsylvania, no burden rested upon the latter to prove that it has not refused to accept payment for the per diem reported to it by the Hoboken. Nevertheless, because of an unsupported and nonevidentiary statement of counsel for the Hoboken at the 1939 hearings,† Witness Lipscomb was asked on direct if the statement of counsel for complainant was correct so far as the Pennsylvania Railroad Company was concerned. Upon voir dire he testified that the Treasury De-
2530 partment of the Pennsylvania has charge of collections of per diem accounts; that correspondence relating to settlement of such accounts comes under his jurisdiction; and that he has had charge of the files containing such correspondence for a number of years, and longer than the present controversy with Hoboken in respect of per diem. Upon direct examination he then testified that the Treasury Department's records of the Pennsylvania do not show, nor does he himself know of, any refusal by the Pennsylvania to accept payment for the per diem reported to it by the Hoboken as summarized in Exhibit 79. This last testimony was the subject of a motion to strike by counsel for Hoboken and Seatrain on the ground of irrelevancy. In granting it the Examiner included the entire testimony of the witness. Exception was duly taken.

In accordance with the Examiner's ruling, his restriction on the reception of Exhibits 79 and 80 and his action in striking the

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*Mr. C. E. Lipscomb is Assistant Chief Clerk in the Treasury Department of The Pennsylvania Railroad Company.

†Page 787 of the record shows the following statement by counsel for the Hoboken and Seatrain:

"MR. MCCOLLESTER: —What is correct is that the Hoboken has regularly tendered all the per diem earned by the Hoboken and received from Seatrain to the various railroads, and it has been refused by those railroads because of the dispute as to the amount of the reclaim."

Counsel for defendants then asked that this be not considered as a statement of fact until shown to be so, and the Examiner stated that it would not be considered as evidence.

testimony of Witness Lipscomb was argued on brief * but the proposed report does not contain any such statement of the matter as would enable the Commission to pass upon the question of admissibility.

2531 3. The Proposed Report Is in Error as to the Scope of the Issues

It is evident from the language of the concluding paragraph of the proposed report that the failure to set forth therein a summarization of the foregoing facts and of the basis for their presentation is the result of the Examiners' conclusions as to the scope of the issues herein. Thus, at sheet 18 of the proposed report beginning at line 3, there is the following statement:

"The only issues before this Commission are those raised by the complaints herein. * * *"

This is an erroneous concept. The Commission's order of November 21, 1938, reopening the case for "further hearing to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener, Seatrain Lines, Inc.," in reality constituted an investigation by the Commission. It specifically defined the issues to be tried. Subsequently, by its decision of January 8, 1940, in which the case was again opened for further hearing, the Commission further outlined the scope of the issues to be tried as follows:

"It is our view that the period of time during which, and the manner in which, Seatrain should pay for the use of cars,
2532 the amount of compensation it should pay, and any other condition which the evidence adduced shows would be an appropriate condition to attach to an order requiring defendants to interchange their cars with Seatrain are questions here in issue."

If the Examiners are correct in stating that "The only issues before this Commission are those raised by the complaints herein," then it must follow either that the complaints raised all the questions specified by the Commission to be in issue, or that the Commission was powerless to define the issues more broadly than did the complaints and that therefore the Examiners considered themselves free to disregard the issues as so defined to the extent that they might be broader than those raised by the complaint. But neither of these conclusions is permissible. The Hoboken and Seatrain, by their exceptions of September 18, 1939, to the proposed report of Examiners Hoy and Walsh, specifically argued that questions relating to the amounts of

* See Supplemental Brief of New York Harbor Lines on Further Hearing, dated November 30, 1940.

switching reclaim to which complainant Hoboken is entitled and to whether this reclaim should be paid by Hoboken's rail connections or by Seatrain were not in issue (Id. p. 8). They argued that these questions have not been raised by the complaints and answers and are in no way essential to a determination of
2533 the issues so raised. But the Commission's report on further hearing (237 I. C. C. 97) specifically defined the issues as including these questions and the Examiners' own recommendations on this subject indicate their recognition of the broader scope of the investigation as based on the Commission's orders and findings than the issues as attempted to be tendered by complainants.

Certainly the Examiners would not challenge the Commission's power by its order of November 21, 1938, and its decision of January 8, 1940, to conduct an investigation of the subject under specified issues broader in scope than tendered by the original complaints. Section 13 (1) of the Act enumerates those who may complain to the Commission and provides that the Commission shall transmit such complaints to the carrier or carriers concerned and if such complaint is not satisfied, within the time specified,

"or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Every complaint case is therefore an investigation by the Commission. This is particularly illustrated in the fact that
2534 when the Commission undertakes to investigate a complaint, the complainant no longer has any right to terminate the proceeding at will.* A consideration of the specific definition of issues upon further hearing as set forth in the Commission's order of November 21, 1938, and its decision of January 8, 1940, furnish ample evidence that this proceeding in its present stage, in an especial and peculiar sense, is an investigation by the Commission which is not limited as to its issues by the complaints herein.

4. The Proposed Report Errs in Its Treatment of Jurisdictional Questions

The proposed report is also in error in containing the statement that "An award of general damages is not within the province of this Commission." Thus, in a proper case, the Com-

*Royster Guano Co. v. A. C. L. R. R. Co., 50 I. C. C. 34, 40; Advance in Rates Western Case, 20 I. C. C. 207; Furniture to Birmingham, 132 I. C. C. 263; Federated Metals Corp. v. P. R. R., 144 I. C. C. 243; King Stone Co. v. Chicago, I. & L. Ry. Co., 171 I. C. C. 47, 56; West v. Atchison, T. & S. F. Ry. Co., 190 I. C. C. 401, 403.

mission has power to award general damages consequent upon a violation of the Act. Louisville & N. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288. But in any event, the statement is without point since none of the New York Harbor lines was in this proceeding seeking from the Commission an award of damages against the Hoboken or Seatrain in respect of their
2535 use in the past of the cars of such defendants. On the contrary, predicated upon the interpretation of the scope of the issues in this case as expressed to the United States District Court by the Hoboken and Seatrain as aforesaid, the New York Harbor lines simply sought the imposition by the Commission of a condition to any order it might enter that the Hoboken and Seatrain should make payment of any outstanding and unsettled claims for per diem and reclaim in accordance with the rates thereof found reasonable or applicable by the Commission.

Also objectionable is the closing sentence of the proposed report at sheet 18, which reads:

"And any claim which defendant rail carriers may have against the Hoboken or Seatrain cannot *now* be injected in these proceedings." [Italics inserted.]

If the express purpose of this statement were to leave in the greatest obscurity the question of the respective jurisdictions of Court and Commission in this matter, it could scarcely be better phrased to promote that end. Thus, the language is patently ambiguous. It could be construed as meaning that the defendant rail carriers were formerly in a position to have these quesions adjudicated in this proceeding, but that they can not now do
2536 so. Or it might be interpreted as meaning that such claims may still be adjudicated in this very proceeding, but that their presentation and consideration is at the moment premature. Or, while not well expressed for the purpose, it could be construed to mean that never at any time—past, present, or future—could the Commission in this proceeding give consideration to the fact that Seatrain, having for years taken cars without the consent of their owners, now seeks a Commission order in its favor to perpetuate the arrangement, but without at all offering to do equity by making payment for the large per diem balances due various of the New York Harbor lines.

If Hoboken and Seatrain are sound in their allegations in the Court cases concerning the lack of jurisdiction of the District Court, and concerning the jurisdiction of the Commission and the scope of the issues before it in this proceeding, it would appear to follow that if the Commission were here to fail to require Hoboken and Seatrain to compensate the trunk lines whose per diem accounts with them are in an unsettled state, such defendant trunk

lines might entirely lose their right to secure compensation for the past use of their cars. Surely the Commission will not lend its powers to assist Hoboken and Seatrain to accomplish such an inequitable result.

2537 II. Summary Statement of the Action the Commission is Requested to Take

In order, therefore, that such requirements as the Commission may make herein shall not afford immunity to the Hoboken and Seatrain from liability for their past use of defendants' cars, the Commission

(1) Should overrule the Examiners' restriction and exclusion of the evidence above described;

(2) Should determine a reasonable rate of per diem for Seatrain's past use of cars;

(3) Should determine what reclaims were applicable or reasonable for Hoboken for its intermediate switching service in interchanging cars from its trunk-line connections to Seatrain, and

(4) As an appropriate condition of such order as it may enter herein, should require Hoboken and Seatrain to make settlement of all outstanding unsettled per diem accounts with the New York Harbor lines on the basis of the per diem and reclaim rates found reasonable or applicable for the past.

For a fuller statement of the facts and reasons justifying this action the attention of the Commission is respectfully in-
2538 vited to pages 35–50 of the Supplemental Brief of the New York Harbor Lines, dated November 30, 1940.

Oral argument is requested.

Respectfully submitted.

FRANCIS R. CROSS,
JOSEPH F. ESHELMAN,
Counsel.

MAY 6, 1941.

1740 Broad Street Station Building, Philadelphia, Pa.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each other party.

Dated at Philadelphia, Pa., this 5th day of May 1941.

JOSEPH F. ESHELMAN,
Of Counsel.

Appendix A

Sheet 1—Exhibit No. 77

Excerpts from Amended Answer of Hoboken Manufacturers Railroad Company in Civil Action 6–414 in the United States District Court, Southern District of New York, entitled The Pennsylvania Railroad Company, Plaintiff, against Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Company, Defendants.

* * * * *

"Defendant Hoboken Manufacturers Railroad Company, by its attorneys, Lord, Day & Lord, as to its amended answer to the complaint herein, upon information and belief:"

* * * * *

"For an Eleventh Separate and Complete Defense to the First Cause of Action:

"SEVENTEENTH. Alleges that the question of the right of plaintiff by agreement or otherwise to refuse permission for the delivery of its cars by this defendant to defendant Seatrain in the performance of through transportation and the question of the amount of compensation which plaintiff is entitled to demand and receive on its cars, if any, so delivered are questions which, under the provisions of the Interstate Commerce Act, are 2540 , to be determined by the Interstate Commerce Commission and are not within the primary jurisdiction of this Court.

"EIGHTEENTH. Alleges that the aforesaid questions are now awaiting determination in a proceeding pending before the Interstate Commerce Commission, to which plaintiff and both defendants are parties, to wit: Hoboken Manufacturers Railroad Company v. Abilene & Southern Railroad Company et al, Docket No. 25728 on the docket of the Commission, and therefore this Court is without jurisdiction of this suit.

* * * * *

"LORD, DAY & LORD,
Attorneys for defendant Hoboken Manufacturers Railroad Company.

Office and Post Office Address, 25 Broadway, Borough of Manhattan, City of New York.

PARKER MCCOLLESTER.
Of Counsel."

2541 Sheet 2—Exhibit No. 78

Excerpts from Amended Answer of Seatrain Lines, Inc., in Civil Action 6-414 in the United States District Court, Southern District of New York, entitled The Pennsylvania Railroad Company, Plaintiff, against Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Company, Defendants.

* * * * *

"Defendant Seatrain Lines, Inc., by its attorneys, Lord, Day & Lord, as its amended answer to the complaint herein upon information and belief:

* * * * *

"For a Tenth Separate and Complete Defense to the First Cause of Action:

"TWENTY-NINTH.—Alleges that the question of the right of plaintiff by agreement with defendant Hoboken or otherwise to refuse permission for the delivery of its cars to this defendant in the performance of through transportation and the question of the amount of compensation which plaintiff is entitled to demand and receive on its cars, if any, so delivered are questions which, under the provisions of the Interstate Commerce Act, are to be determined by the Interstate Commerce Commission and
2542 are not within the primary jurisdiction of this Court; and further alleges

"THIRTIETH. That the aforesaid questions are now awaiting determination in a proceeding pending before the Interstate Commerce Commission, to which plaintiff and both defendants are parties, to wit: Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company et al., Docket No. 25728 on the docket of the Commission, and therefore this Court is without jurisdiction of this suit.

* * * * *

"LORD, DAY & LORD.

Attorneys for Defendant Seatrain Lines, Inc.

Office and Post Office Address, 25 Broadway, Borough of Manhattan, City of New York.

PARKER MCCOLLESTER.

Of Counsel."

2543

APPENDIX B

Sheet 1—Exhibit 79—*Witness Eyre*

Summary of per diem reports submitted by Hoboken Manufacturers Railroad Company to the Pennsylvania Railroad Company showing the number of car days detention to Pennsylvania Railroad freight cars

	Month	Number of car days
Year 1932	September	144
	October	173
	November	274
	December	327
Year 1933	January	383
	February	444
	March	500
	April	421
	May	600
	June	831
	July	728
	August	857
	September	827
	October	838
	November	796
	December	905
Year 1934	January	971
	February	703
	March	802
	April	1,056
	May	1,386
	June	1,248
	July	1,374
	August	1,107
	September	1,399
	October	1,660
	November	1,446
	December	1,065
Year 1935	January	2,012
	February	1,883
	March	2,030
	April	1,340
	May	1,451
	June	1,935
	July	1,882
	August	1,892
	September	1,026
	October	1,007
	November	1,174
	December	1,041
Year 1936	January	1,574
	February	1,804
	March	1,610
	April	1,604
	May	2,032
	June	1,622
	July	1,587
	August	1,962
Year 1936 Con.	September	1,762
	October	1,902
	November	1,503
	December	1,491
Year 1937	January	1,978
	February	2,259
	March	2,170
	April	2,623
	May	2,330
	June	2,649
	July	2,124
	August	2,560
	September	1,984
	October	1,868
	November	2,331
	December	2,546
Year 1938	January	2,495
	February	2,152
	March	2,850
	April	3,368
	May	3,120
	June	2,548
	July	2,319
	August	2,395
	September	2,051
	October	1,814
	November	1,884
	December	2,513
Year 1939	January	2,724
	February	2,770
	March	2,892
	April	2,360
	May	2,517
	June	2,598
	July	2,409
	August	2,152
	September	2,365
	October	3,687
	November	3,175
	December	2,548
Year 1940	January	2,791
	February	3,148
	March	2,663
	April	1,735
	May	1,506
	June	1,650
	July	2,046

Total car days detention from September 1932 to July 1940, both inclusive 167,058

2544 Sheet 2—Exhibit 80—*Witness Eyre*

Summary of per diem reclaim reports submitted by Hoboken Manufacturers Railroad Company to the Pennsylvania Railroad Company showing the amounts claimed therein by Hoboken Manufacturers Railroad Company as due from the Pennsylvania Railroad Company

Month	Amount of reclaim
Year 1932—August	$27.00
September	284.22
October	286.92
November	267.58
December	343.78
Year 1933—January	$271.52
February	355.32
March	379.10
April	359.94
May	422.52
June	448.76
July	316.16
August	399.20
September	363.22
October	342.90
November	299.72
December	261.62
Year 1934—January	$383.54
February	271.78
March	363.22
April	403.86
May	434.34
June	406.40
July	477.52
August	396.24
September	406.40
October	474.98
November	363.22
December	368.30
Year 1935—January	$424.18
February	391.16
March	487.68
April	439.42
May	342.90
June	391.16
July	457.20
August	439.42
September	401.32
October	429.26
November	401.32
December	350.52
Year 1936—January	$474.98
February	546.10
March	474.98
April	518.16
May	482.60
June	416.56
July	408.94
August	429.26
September	462.28
October	408.94
November	396.24
December	447.04

Summary

1932 (August to December 1932 inclusive)	$1,209.50
1933	4,219.98
1934	4,749.80
1935	4,955.54
1936	5,466.08
Total	20,600.90

2545–2580 Before Interstate Commerce Commission

PROCEEDINGS

Commr. EASTMAN. The Commission will hear arguments in Dockets 25728 and 25878.

The copies of letters, memoranda, and so forth, which were forwarded with Mr. McCollester's letter of June 6, and which I believe the parties have all received, will be received in evidence as a single exhibit, No. 87, consisting of 11 pages.

(Exhibit No. 87 received in evidence.)

Commr. EASTMAN. I also am in receipt of a letter from Thomas P. Healy, General Solicitor of the New York Central System, reading as follows:

"My attention has been directed to certain correspondence between you, Mr. McCollester, and others concerning the above-entitled proceedings.

"Through an unfortunate misunderstanding, the New York Central, Pittsburgh & Lake Erie and other system lines are shown as being parties to the exceptions filed by Mr. Fort and others on behalf of the Association of American Railroads. The same is true with respect to the reply filed by the Association to exceptions submitted by the Hoboken and Seatrain.

"The New York Central and its system lines have consented to the use by Seatrain of its cars at the current per diem rate, and the New York Central has entered into an agreement
2581 covering the detention by Hoboken of cars interchanged with Seatrain. There is, therefore, no controversy between the New York Central and its system lines, on the one hand, and Hoboken and Seatrain, on the other, with respect to any car service feature, and the complaints should be dismissed as to the New York Central and its system lines.

"I respectfully request that this letter be made a part of the record. Because of conflicting engagements, I will be unable to appear at the oral argument now assigned for June 12th.

"Yours very truly,

"THOMAS P. HEALY."

Mr. McCOLLESTER.

Argument of Mr. Parker McCollester

Mr. McCOLLESTER. May it please the Commission, the proceeding which is again before you for argument, I think for the third time, involves at this stage the question of the entry of an order by the Commission requiring those railroads which have still persisted in their refusals to permit their cars to be delivered to Sea-

train, to cease such refusals. The Commission has heretofore decided—just to refresh your memories on the points—that it has jurisdiction to require railroads to permit the delivery of their cars to Seatrain in the performance of through transportation over through routes.

2582 *Exhibit 87*

LORD, DAY & LORD

Cunard Building, 25 Broadway

NEW YORK, *June 6, 1941.*

INTERSTATE COMMERCE COMMISSION,
Washington, D. C.

Docket No. 25728, Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Co. et al.; Docket No. 25878, New Orleans & Lower Coast Railroad Co. v. The Akron, Canton & Youngstown Ry. Co. et al.

GENTLEMEN: This has reference to Chairman Eastman's letter of June 3rd to me, in which it was stated that my Motion No. 2 for the inclusion in the record of the agreement with the New York Central, Erie, and Lackawanna regarding settlement of reclaim should be granted, provided copies were furnished to the Commission and to opposing counsel.

Chairman Eastman's letter refers to the agreement as between Seatrain Lines and the New York Central, Erie, and Lackawanna. It might more properly be said that there was a separate agreement with each railroad made between Seatrain, Hoboken Manufacturers Railroad, and the several trunk lines. In addition to the three trunk lines named, agreement has now been reached also with the General Railroad of New Jersey and the Lehigh Valley Railroad on the same terms.

None of the agreements has been reduced to a single
2583 formal document, but a form of contract relating to the future has been drafted and is now in negotiation with the New York Central. It is contemplated that similar contracts will probably be made with the other trunk line railroads. However, there are ample written memoranda confirming the agreements, and for the record I therefore enclose the following, identified by the numbers in the upper right-hand corners:

1. Copy of memorandum, dated January 29, 1941, of agreement between New York Central Railroad, Seatrain Lines, Inc., and Hoboken Manufacturers Railroad with respect to settlement of switching reclaim on Seatrain traffic. This memorandum was

dictated at the conference at which the agreement was arrived at and copies retained by all parties.

2. Letter, dated February 2, 1941, from E. D. Moffat, of the Delaware, Lackawanna & Western, addressed to Mr. G. M. Brush, President of Hoboken Manufacturers Railroad Co.

3. Copy of telegram, dated February 4, 1941, from Mr. W. T. Pierson to Mr. Graham M. Brush, advising that the Erie Trustees will settle reclaim.

4. Copy of letter, dated May 13, 1941, from R. W. Brown, Vice President of Central Railroad Company of New Jersey, to Mr. Graham M. Brush, confirming agreement of Central Railroad Company of New Jersey.

5. Memorandum of meeting held at Hoboken on February 23, 1941, between representatives of Hoboken Manufacturers Railroad, Delaware, Lackawanna & Western, Erie, Lehigh Valley and New York Central, at which the basis of arriving at the reclaim settlement should be determined.

6. Copy of letter, dated April 1, 1941, signed by representatives of various trunk line railroads and Hoboken Manufacturers Railroad, agreeing to the check of records to determine the basis of settlement of past accounts, which appear as 6a.

7 and 7-a. A break-down of the foregoing as between Seatrain and non-Seatrain traffic.

2584 For the future the per diem reclaim figures agreed upon are contained in a statement circulated by the Association of American Railroads. This is not reproduced because the figures are thus shown in No. 4 above.

As to the past, the agreements have all been consummated by passing of the necessary checks for reclaim and per diem, respectively, except in the case of the Lehigh Valley, where the settlement is in process, and current accounts have been settled up to date on the basis agreed to for the future.

The Lehigh Valley's agreement is so far oral, but it is expected that there will be a letter of confirmation.

Referring to my Motion No. 3, I beg to advise that the understanding as to divisions there referred to has not gone into effect because the Southwestern railroads have been unwilling to agree thereto.

Very truly yours,

PARKER MCCOLLESTER.

PmcC/WZL.

c/c—Honorable Joseph B. Eastman, Chairman, Interstate Commerce, Washington, D. C.; J. Carter Fort, Association of American Railroads, Washington, D. C.; Joseph F. Esbelman, The Pennsylvania Railroad Co., Philadelphia; Charles Clark, Southern Railway Company, Washington, D. C.; G. H. Muckley,

Transportation Bldg., Washington, D. C.; Toll R. Ware, Missouri Pacific Railroad Co., St. Louis, Mo.; W. T. Pierson, Erie Railroad Co., Midland Bldg., Cleveland, Ohio; Thomas P. Healy, New York Central Railroad Co., 466 Lexington Ave., New York, N. Y.; William C. Burger, Louisville & Nashville Railroad Co., Louisville, Kentucky.

2585 Copy of Memorandum, dated January 29, 1941, of Agreement between New York Central Railroad, Seatrain Lines, Inc., and Hoboken Manufacturers Railroad with respect to settlement of switching reclaim on Seatrain traffic

In figuring reclaim on coastwise traffic moving east-bound on joint rates, the maximum free time to be considered shall be the free time allowed by the Central on coastwise traffic moving on combination rates (at present 5 days); on west-bound coastwise traffic moving under joint rates reclaim shall be 1 day, if earned. On other traffic free time to be used in figuring reclaim shall be the free time allowed in Central's tariffs (at present east-bound coastwise not moving under joint rates 5 days; west-bound coastwise not moving on joint rates 2 days; export 10 days; import 2 days).

[Copy]

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

OFFICE OF GENERAL SUPERINTENDENT

SCRANTON, PA., *February 2, 1941.*

E. B. Moffatt, General Superintendent.

Mr. G. M. BRUSH,

President, Hoboken Manufacturers R. R. Co.,

Foot Fifth Street, Hoboken, N. J.

DEAR MR. BRUSH: I have been advised by Vice President Ray of the agreement which has been reached in reference to the settlement of reclaim and per diem matters with the Hoboken Manufacturers Railroad.

He has requested me to make arrangements for checking up the situation as promptly as possible.

No doubt your people have immediately available the data to work up the revised figures, and we are prepared to assign a representative to work with them if you desire. In that event, will you kindly advise when you will be ready to make the check and to whom our representative should report.

Yours very truly,

(Signed) E. B. MOFFATT.

ebm k

2586 [Copy]

WESTERN UNION TELEGRAM

CLEVELAND, OHIO, 4 44 3P 1941 Feb. 4, P. M. 4:59

GRAHAM M. BRUSH,
Pres., Seatrain Lines, Inc.,
39 Broadway, NY.

Confirming telephone conversation this afternoon, Erie trustees will settle Seatrain Hoboken per diem and reclaim matters for period subsequent January 18, 1938, on same basis as New York Central and Lackawanna settlement.

W. T. PIERSON.

18 1938.

2587 [COPY]

CENTRAL RAILROAD COMPANY OF NEW JERSEY

OFFICE OF VICE PRESIDENT—OPERATION AND MAINTENANCE

R. W. BROWN, Vice President.

READING TERMINAL,
Philadelphia, Pa., May 13, 1941.

MR. GRAHAM M. BRUSH,
President, Hoboken Manufacturers Railroad Company,
1419 Bloomfield Street, Hoboken, New Jersey.

DEAR MR. BRUSH: Further referring to the matter of reclaim settlement by the Hoboken Manufacturers Railroad Company and its connections and with particular reference to your letter February 4, 1941:

As per verbal understanding reached by Mr. Tosh on his visit to your office yesterday, for the years 1933 to 1940, inclusive, we will arrange to settle for car detention on all cars handled by the Hoboken Mfrs. R. R., including Seatrain business, on the averages for each year determined by joint check of representatives of Hoboken Manufacturers R. R. and its connections, as noted in their joint report dated April 1, 1941, as follows:

Year 1933, average days	2.45
Year 1934, average days	2.28
Year 1935, average days	2.21
Year 1936, average days	2.41
Year 1937, average days	2.67
Year 1938, average days	2.69
Year 1939, average days	2.69
Year 1940, average days	2.43

and for the months January to April, inclusive, 1941, on the average of 2.43 determined for the year 1940. It was this check which

determined the average of 2.49 days for the entire eight-year period.

From and after May 1, 1941, and until new arbitraries are established, it is understood we will allow Hoboken Manufacturers R. R. reclaims on the basis as set forth in your letter February 4th, page 2, and the average detention on such basis as determined by check of the entire year 1940 by the above-mentioned representatives under the supervision of the Association of American Railroads, as follows:

	Average days
All local business, excluding Seatrain	2.84
Cars handled East-bound between railroad connection and Seatrain (with maximum detention of five days allowed on any one car for coastwise movement, and ten days for export movement)	3.39
2588 Cars handled West-bound between Seatrain and railroad connection under combination rates (with a maximum detention of two days allowed on any one car)	.48
Cars handled West-bound between Seatrain and railroad connection under joint rates (with a maximum detention of one day allowed on any one car)	.30

Mr. Tosh will have his representative check the detail with your Mr. Macgowan, and settlement will be made upon the completion of this check.

Will appreciate your acknowledgment in confirmation of this understanding.

Yours very truly,

(Signed) R. W. Brown,
Vice President.

2589 [Copy] 5.

Memorandum of Meeting Held at Hoboken on February 25th, 1941, in Regard to Per Diem Reclaim Check

Present: D. L. & W. R. R., L. A. Jenkins, S. C. S., W. J. Crossin, Clerk; Erie R. R., E. J. Stubbs, S. T., E. J. Colter, Supt. Car Hire; Lehigh Valley R. R., A. S. Wright, Chief Clerk, J. P. Gavin, Reclaim Clerk; N. Y. C. R. R., M. R. Clinton, A. S. C. S., H. P. Hannan, Supt. Car Serv. & Demr.; H. M. R. R., A. R. Macgowan, Superintendent, J. B. Cossolini, Auditor.

It was agreed that the agreement reached between the New York Central R. R., the Erie R. R. and the D. L. & W. R. R., and the Hoboken Manufacturers R. R. in regard to eastbound to Seatrain was in accordance with the Tariffs, allowing on coastwise five days free time, exclusive of Sundays and holidays, and on export ten days free time, exclusive of Sundays and holidays.

It was agreed for the purpose of past reclaim that a check would be made for four months each year—January, April,

July, and October of each year as representative, and these four months taken to obtain the average for that year's reclaim settlement, this check to commence with January 1933 and continue to and include the year 1940, it being considered that Seatrain ships only started to run in October 1932 and the established per diem reclaim rate of $2.54 would apply for the year 1932.

An examination was made of a few of the per diem records and for the purpose of this check it was agreed that a maximum of eight days on eastbound cars to Seatrain would be taken instead of the five days for coastwise and ten days for export cars. It appeared that eight days would be fair and equitable, and to adhere strictly to the agreement would involve considerable extra detailed work with little or no change in the final results from the method proposed.

On the westbound from the Seatrain ships, the maximum of two days to be figured in accordance with the agreement, and the local to be figured in accordance with Rule 5 of the reclaim rules, the check for the past reclaim to be made by the interested railroads. The Lehigh Valley R. R. and the Central R. R. of New Jersey upon agreement to a settlement the same as now in effect with the New York Central R. R., the D. L. & W. R. R. and the Erie R. R., would be included in this check.

For the establishment of a per diem reclaim for the future, it is recommended that the year 1940 be checked under the supervision of the Association of American Railroads as provided for in the per diem reclaim rules the principle as to the days to be figured on cars to and from Seatrain to be in accordance with the agreement with the trunk line railroads, the eastbound cars to Seatrain to be on the basis of the demurrage tariffs of five days free time, exclusive of Sundays and holidays, for coastwise business, and ten days, exclusive of Sundays and holidays, on export business. On westbound cars, a maximum of two days on traffic moving on joint and proportional rates, and when through rates are established, a maximum of one day, at which time it will then be necessary to re-establish the arbitrary reclaim allowances. On HMRR local traffic, Rule 5 of per diem reclaim rules to apply.

It is recommend for the present at least, that three separate arbitraries be established.

1. East-bound car to Seatrain.
2. West-bound cars from Seatrain.
3. Local cars to and from the HMRR.

It is recommended that this check be deferred until the Lehigh Valley R. R. and the Central R. R. of New Jersey have advised as-

to their agreement or disagreement with the settlement now proposed, at which time these two railroads, as well as the New York, Susquehanna & Western R. R., should have representatives in connection with the making of this reclaim check for the future.

2591 [Copy]

HOBOKEN MANUFACTURERS RAILROAD COMPANY

HOBOKEN, N. J.

APRIL 1-st, 1941.

Mr. A. C. Tosh, *S. T. C. N. J. RR., Philadelphia, Pa.*
Mr. L. A. Jenkins, *S. C. S. D. L. & W. RR., Scranton, Pa.*
Mr. E. J. Stubbs, *S. T. Erie RR., Cleveland, Ohio.*
Mr. C. L. Grim, *S. C. S. L. V. RR., Bethlehem, Pa.*
Mr. E. S. Jackson, *S. C. S. N. Y. C. RR., Buffalo, N. Y.*
Mr. T. B. Gerard, *S. C. S. N. Y. S. & W. RR., Middletown, N. Y.*

GENTLEMEN: Our check of the records of the Hoboken Manufacturers Railroad to determine the average car detention from 1933 to 1940, inclusive, for the purpose of settlement of past reclaim accounts, has been completed.

For this check four months of each year were taken: January, April, July, and October, except in 1937 the month of June was used instead of July due to a strike on Seatrain vessels in July 1937 which resulted in more than average detention on cars delivered to Seatrain Lines.

A statement showing details of these figures is attached.

(Sgd.) G. M. HARRIMAN,
Central R. R. of N. J.
(Sgd.) W. J. CROSSIN,
D. L. & W. R. R. Company.
(Sgd.) E. J. COTTER,
Erie R. R. Company, Lehigh Valley R. R. Co.
(Sgd.) J. A. MEADE,
New York Central R. R.
(Sgd.) L. S. CARPENTER,
N. Y. S. & W. R. R. Company.

Accepted:

(Sgd.) A. R. MACGOWAN,
Hoboken Manufacturers R. R. Co.

2592 *Check of Hoboken manufacturers railroad records for 4 months of the years 1933 to 1940, inclusive, to determine the arbitrary number of days on Hoboken manufacturers railroad for each year*

Year	January		April		July		October		Total		Average days
	Cars	Days	Cars	Days	Cars	Days	Cars	Days	Cars	Days	
1933	342	913	420	782	512	1,234	476	1,352	1,750	4,281	2.45
1934	506	1,324	661	1,544	610	1,528	649	1,336	2,516	5,732	2.28
1935	641	1,350	720	1,555	670	1,638	790	1,705	2,821	6,248	2.21
1936	790	2,054	767	1,726	707	1,766	682	1,555	2,946	7,095	2.41
1937 [1]	705	1,808	807	1,982	[1] 1,103	[1] 2,641	763	2,588	[1] 3,539	[1] 8,969	2.67
1938	625	1,585	798	1,892	690	1,840	801	2,060	2,854	7,677	2.69
1939	763	1,810	544	1,690	801	1,957	1,070	3,179	3,178	8,546	2.69
1940	1,121	3,059	870	2,101	1,168	2,870	1,456	3,216	4,614	11,246	2.43
Total	5,644	14,263	5,566	13,182	[1] 6,131	[1] 15,468	6,687	16,791	[1] 24,025	[1] 59,734	2.49

[1] June substituted for July account strike conditions on Seatrain Lines.

2593 HOBOKEN, N. J., *April 7, 1941.*

Mr. GRAHAM M. BRUSH,
President Seatrain Lines, Inc.,
New York Office.

Our telephone conversation, in connection with the per diem reclaim check made by the connecting railroads covering the period 1933 to 1940 inclusive, copy of which was sent to you; we have broken down the time on this reclaim check between HMRR local cars and cars between the trunk line railroads and Seatrain Lines. The attached statement shows this breakdown.

A. R. MACGOWAN.

ARM/rs
Enc.

P. S.—The division for 1940 will be given when the recheck claim for that year is completed.

2594 *Division of reclaim check between H. M. R. R. local cars and trunk line cars to and from Seatrain*

Year	Total all cars			Divided					
				Local cars			Seatrain and railroads		
	Cars	Days	Average (days)	Cars	Days	Average (days)	Cars	Days	Average (days)
1933	1,750	4,281	2.45	1,042	3,044	2.92	708	1,238	1.75
1934	2,516	5,732	2.28	1,149	3,088	2.70	1,367	2,634	1.93
1935	2,821	6,248	2.21	1,102	2,945	2.68	1,719	3,303	1.92
1936	2,946	7,095	2.41	1,330	4,044	2.91	1,556	3,051	1.96
1937	3,339	8,909	2.67	1,532	4,762	3.10	1,807	4,147	2.30
1938	2,854	7,677	2.69	1,253	4,088	3.26	1,601	3,579	2.23
1939	3,178	8,540	2.69	1,585	5,943	3.12	1,593	3,603	2.26
Total	19,404	48,488	2.50	9,053	26,933	2.98	10,351	21,555	2.08

2595 [Second report of the commission on further hearing omitted. Printed side page. 82 ante.]

2607 [Order of October 13, 1941 omitted. Printed side page. 95 ante.]

2610 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL.

Petition for Reconsideration and Modification of Order

Filed Dec. 10, 1941

Come now Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway System, and Texas and New Orleans Railroad Company, defendants in docket 25878, and respectfully petition the Commission to reopen the above proceedings for reconsideration and upon such reconsideration to modify the order dated October 13, 1941, insofar as it requires petitioners to hold cars containing coastwise commerce for Seatrain Lines, Inc. (hereinafter called "Seatrain"), at New Orleans, La., pending receipt of an O. K. from Seatrain that it is ready and willing to accept them; and to enter an order requiring Seatrain to accept the cars on tender or pay per diem thereon while they are being held. In any event, a maximum limit for holding should be fixed.

-2641

For grounds of this petition it is respectfully stated:

I

Petitioners are line haul carriers serving New Orleans, La., and at that point, either directly or through intermediate switching lines, connect with the New Orleans & Lower Coast Railroad Company, which in turn connects with Seatrain at Belle Chasse, La., about 10 miles below New Orleans. Petitioners are defendants in docket 25878, N. O. & L. C. R. R. Co. v. The A. C. & Y. Ry. Co., et al.

II

The order entered herein on October 13, 1941, requires petitioners to interchange their cars with Seatrain, and on and after February 2, 1942:

"* * * to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car

per day; *provided, however, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.*" [Italics ours.]

The proviso in the above quoted portion of said order, 2612 which states that Seatrain shall be required to pay the $1 per diem "only for such period as the cars are in its actual possession" is designed to require petitioners to hold cars at New Orleans for Seatrain until it is ready to accept them. Thus, it is relieved of per diem payments on cars which Seatrain requires petitioners to hold for it at New Orleans by means of the tariff of its affiliate, the N. O. & L. C., described in the report (Sheets 6; 8). Conversely, the burden of holding these cars for Seatrain and of being responsible for the cars and contents, as well as per diem payments, is put upon petitioners.

III

Petitioners contend that the order is unlawful and is unfair and inequitable for the following reasons:

Seatrain, while partaking of the character of a water carrier, differs from the ordinary water carrier because it transports freight in railroad cars on its vessels and not in bulk, as do other water carriers. It uses the cars as containers of the freight it transports. The railroad car is a necessary part of Seatrain's operation, yet it owns no cars, and under the order of October 13, 1941, the railroads of the country are required to supply it with cars at a per diem rate of $1; a figure much below the cost to them, as shown in this record. Seatrain, which necessarily uses railroad cars in its method of transportation, refuses, and under the order herein, is not required, to abide by the universally recognized interchange rules and regulations as to holding cars and paying per diem, although the usual $1 per diem rate is all that it is required to pay while it has the cars in its actual possession. The $1 rate was apparently fixed as reasonable for Seatrain because it was the 2613 rate generally applicable between railroads, although the conditions pertaining to Seatrain transportation and use of cars differ materially from those generally applicable among railroads. But the interchange rules covering the holding of cars for connections, universally applicable among railroads, were modified to suit Seatrain and relieve it of per diem payments on cars being held during the period it refuses to accept them prior to the date they can be loaded on its vessels. The Commission thus treats Seatrain as a rail line in fixing the per diem rate and then, reversing itself, treats Seatrain as a water line in fixing the interchange rules.

The apparent basis for the order of the majority, which results in petitioners being required to hold cars for Seatrain, is the finding on Sheets 8–9 that:

"On the other hand, it is clear that on traffic interchanged with the break-bulk lines defendants bear a burden through car detention which is analogous to the burden which they would bear on traffic interchanged with Seatrain, if the latter should pay per diem only when the cars are in its actual possession. It is also clear that this car detention in the case of traffic interchanged with water lines, caused by their infrequent service as compared with rail service, is a disability which has always been recognized and which is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic. From this point of view, such detention is a matter for consideration in connection with these rates and divisions, rather than in determining the per diem rates which Seatrain should pay."

The first sentence in this quotation is erroneous and not supported by this record. The second sentence is also erroneous. The order in this case applies only to cars moving over through routes (Sheet 10). Demurrage rules do not apply where ship-
2614 ments move on through billing, which is true of shipments via Seatrain as well as those via break-bulk lines with which it competes. Nor can the burden of per diem payments be properly taken care of in the divisions because considerable traffic moves on combination rates where no divisions apply (R. 1268–9).

Comparison of Holding on Break-Bulk Traffic and for Seatrain Is Erroneous

On Sheet 7 the majority compare an average holding by inbound trunk lines at New Orleans on traffic for break-bulk lines of 2.58 days with an average holding of 3.3 days for Seatrain. The comparison is entirely unsupported by the record and is erroneous. The 2.58 day figure used as the average per diem incurred by road haul carriers on break-bulk traffic is computed as follows from Revised Exhibit 75 and the explanatory statement received in the record with that exhibit:

0.19[1] on road haul carriers prior to delivery to switching lines.
0.89[2] days on intermediate switching line to the dock until release by break-bulk lines.
1.50[2] days on switching line after release by break-bulk line and until returned to road haul carrier.

Total 2.58 days.

[1] Does not include Mo. Pac. and T. & P.
[2] Includes Mo. Pac. and T. & P.

The 3.3 days for Seatrain is only the time the cars are held on inbound road haul carriers and includes no time on switching lines.

2615 The Comparable Figures, Therefore, Are 0.19 Days for Break-Bulk Holding and 3.3 Days for Seatrain Holding

The record shows that the 150 days included in the 2.58 figure applies entirely to cars after their release by the water lines upon being unloaded at the docks. The record also shows that many of these cars were reloaded for another and wholly independent movement. Such cars were therefore returned loaded to the road haul carriers so that no part of the time after release of these cars from the inbound trip to the dock could possibly be charged to the inbound loaded movement or included in any figure purporting to show the time cars containing break-bulk traffic are held on inbound road haul carriers.

Nor can the 0.89 days be included in the comparison because no comparable figure is included in the 3.3 days for Seatrain holding. The record shows that the Southern Railway, Louisiana & Arkansas, and Illinois Central deliver to the N. O. & L. C. through the Public Belt [1] (R. 1301-2; 1331). On cars held by them it would be necessary to add to the 3.3 days the time on the switching line or lines intermediate to the N. O. & L. C., as well as the time on the N. O. & L. C. On deliveries from the T. & P. and Mo. Pac., and other carriers delivering through the M. P.-T. & P. Terminal, the time on the M. P.-T. & P. Terminal, as well as time on the N. O. & L. C., and in some cases on other switching lines should be added to the 3.3 days. Where cars are delivered directly to the N. O. & L. C. the time on that line would have to be added to the 3.3 days holding on inbound road haul carriers for Seatrain.

2616 Enough has been said to show that the figures of 2.58 and 3.3 are in no way comparable. Those figures were apparently the basis for the finding on Sheet 8 "that on traffic interchanged with the break-bulk lines defendants bear a burden through car detention which is analogous to the burden which they would bear on traffic interchanged with Seatrain, if the latter should pay per diem only when the cars are in its actual possession." Since the factual basis of the above statement is erroneous, the conclusion based thereon must necessarily fall.

There Is No Holding on Break-Bulk Traffic Attributable to Break-Bulk Carriers

The record clearly shows that none of the infinitesimal holding by the inbound road haul carriers on break-bulk traffic is due to

[1] G. M. & O. also delivers through the Public Belt.

the refusal of the break-bulk lines to take the traffic when tendered. Witness Kendall testified (R. 876–7):

"Q. How is that business handled, which keeps the detention down to such a very small figure?

"A. It is delivered by the trunk line carriers at New Orleans, to the coastwise lines immediately upon arrival at New Orleans.

"Q. Carried to a dock and unloaded on a dock?

"A. That is my understanding; yes, sir.

"Q. Well, the general conclusion which this exhibit justifies would seem to be that on that coastwise break-bulk movement to New Orleans, the railroad cars are not detained in awaiting the sailing of the ship, or for any other reason; is that true?

"A. There is practically no detention of cars at New Orleans, break-bulk service."

Furthermore, Witness McDermott, Assistant General
2617 Superintendent of Transportation of the Missouri Pacific, including N. O. & L. C., testified (R. 1296) that he did not know of a single instance where the Public Belt could not take the cars and unload them immediately on the break-bulk lines' docks without any holding on the Public Belt at all.

On the other hand, the holding of cars by trunk lines for Seatrain is compelled by Seatrain and is due to its refusal to receive the cars as tendered, which is directly contrary to the practice which all rail lines universally recognize as their duty. It is plain that except for Seatrain's refusal to take the cars as tendered, and if cars for Seatrain were handled the same as cars for break-bulk lines, there would be no holding of cars for Seatrain.

On Sheet 7 of the majority report, it is said concerning the comparison of 2.58 days per diem on break-bulk cars and 3.3 for Seatrain—which has been shown to be entirely erroneous and in conflict with the record—in an apparent effort to explain the lower time shown, even by those figures, for break-bulk lines, that the periods used to determine the figures were not the same and

"* * * the lower average for traffic interchanged with the break-bulk lines may have been caused by the fact that the freight was to some extent unloaded and held in storage, thus releasing the cars. As Seatrain points out, the facilities for and the expense of such storage constitute a burden upon the railroads analogous to the expense incident to detention of the cars."

The periods were not the same but that does not make them any less representative. The record, however, does contain a comparison of the holding on the inbound trunk lines for the
2618 same period, namely, the last six months of 1938, for both

break-bulk traffic and for Seatrain. These figures are contained in Exhibit 62 for break-bulk traffic and in Exhibit 59 for Seatrain. These exhibits show:

	Total cars	Days held	Average per car
Break-bulk traffic	1,050	25	0.02
Seatrain	2,120	6,896	3.30

The issue here concerns the time the cars are required to be held by the inbound road haul carriers because of the refusal of the connecting carrier to take them as tendered, and the figures above set out are the only exactly comparable figures of record on this issue. The following figures, covering later periods, are also of record:

Holding on break-bulk line traffic

	Total cars	Days held	Average per car
Ex. 75 (1st 6 mos. 1939)	2,815	618	0.22
Rev. Ex. 75 (Jan., Mar., May, 1939)	8,201	229	[1] 19
Ex. 82 (1st 7 mos. of 1940 for Mo. Pac.)	675	407	[2] 60
Ex. 83 (1st 7 mos of 1940 for T. & P.)	813	1,398	[2] 1.60

[1] Does not include time on M. P. or T. & P. (See explanatory statement attached to Revised Ex. 75.)

[2] Includes only Pan-Atlantic, Morgan Line, Clyde-Mallory Line, and Moore-McCormack because they are coastwise lines which operated from New Orleans to North Atlantic coast, as does Seatrain. The record shows, however, that this time was computed from the time the car arrived in the yards of the M. P. and T. & P. until it was delivered by the switching line; in other words, the time shown is not really time due to holding the car at all but covers the time consumed in breaking up the train and other yard operations of the in bound carriers (R. 1293-5; 1303).

The cars covered by Exhibit 62 include all cars delivered to break-bulk lines by the I. C., L. & N., G. M. & N. and T. & N. O.

The Southern Railway cars could not be obtained in the 2619 time available. The figures for the T. & P., M. P. and also the L. & A., could not be secured because those carriers would not make their records available (R. 877).

The cars covered by Exhibit 75 include all cars delivered to break-bulk lines by all carriers serving New Orleans, namely, G. M. & N.; I. C.; L. & A.; L. & N.; M. P.; Sou.; T. & N. O., and T. & P. The record, therefore, covers a year's period showing the time cars containing traffic for break-bulk lines were held; namely, the last six months of 1938 and the first six months of 1939. The 1938 period includes four rail carriers and 1939 period covers all, or eight rail carriers. A consolidation of these figures shows:

Total cars 3,865; days held 643; average days per car 0.166.

The Seatrain figure of 3.3 days covers the last six months of 1938 but there are later figures of record, given by the T. & P. and M. P., which confirm this figure. A Missouri Pacific witness testified that in the first seven months of 1940 it delivered 354 cars to Seatrain which it held 1,224 days, or an average of 3.46 days per car (R. 1290). Witness for T. & P. testified that in the first seven months of 1940 it delivered 489 cars to Seatrain which it held an average of 2.89 days (R. 1299).

Seatrain Should Abide by Same Interchange Rules as Rail Lines

The most favorable and comprehensive legitimate comparison which is afforded by this record to Seatrain's situation, therefore, is 0.166 days holding on break-bulk traffic and 3.3 days on Seatrain traffic. It must again be recalled that no holding on
2620 break-bulk traffic is due to refusal, or even the inability, of those carriers to take the traffic and that, on the other hand, the holding for Seatrain is due entirely to its refusal to take the cars as tendered. This refusal is not due to any inability to take the cars but to Seatrain's desire to relieve itself of per diem payments. If a connecting railroad should refuse to accept cars from its line haul connection, it would have to pay per diem to the carrier holding the cars. This is eminently fair and is provided in Rule 15 of the Car Service Rules. Why Seatrain, which transports freight in cars, as do the connecting rail lines, should be exempt from the fair and universal rule in this respect is not apparent. It contends it should be relieved of this operating expense, which should be considered, and is, a legitimate expense resulting from its method of operation, because it is a water carrier and competes with break-bulk water carriers for which it claims the railroads hold cars. This record shows that the New Orleans lines do not hold cars for Seatrain's break-bulk competitors due to their inability or refusal to take the traffic as tendered, as is the case with Seatrain. The basis for Seatrain's contention that it should be relieved of per diem payments is therefore destroyed because there is no similar holding for its competitors. Seatrain also competes with the all-rail routes which move freight in cars, and therefore Seatrain, as to car service matters, is comparable to all-rail routes and not break-bulk water routes. It should assume the same car service burdens. If Seatrain is to be relieved of per diem payments on cars being held for it, why should not the rail lines with which it competes be also similarly relieved of such payments?

2621 Seatrain, by Referring to Demurrage and Free Time Rules on Break-Bulk Water Traffic, Beclouds th Issues

Seatrain, of course, being faced with a showing of record that the holding by the road haul carriers on break-bulk traffic was 0.02 days and on Seatrain traffic 3.3 days, sought to becloud the facts and issues by attempting to bring in the picture demurrage free time rules, and certain per diem reclaims paid by the road haul carriers to the switching lines such as the Public Belt. For example, in the case of the Public Belt it was shown that it received a per diem reclaim of 2.46 days per car, and that this was accorded on traffic going to break-bulk lines. It is also accorded to the Public Belt on traffic going to Seatrain and the record shows that several New Orleans carriers deliver to Seatrain through the Public Belt and also the N. O. & L. C. However, the record clearly shows that this 2.46 days reclaim to the Public Belt is computed for that carrier from the figures covering all traffic and includes all classes of business (R. 1297). It would therefore include traffic originating or delivered at industries on the Public Belt, as well as domestic and export or import traffic, etc. The 2.46 days per diem reclaim accorded the Public Belt is not at all representative of the time of cars on that carrier which are delivered to break-bulk lines. Such time is not over .89 days, as shown by Revised Exhibit 75 (See also R. 1296). While the inbound road haul carrier allows that reclaim on cars going to break-bulk lines, that and similar reclaims are allowed on traffic to Seatrain—sometimes a double reclaim to the Public Belt and to N. O. & L. C. Further, as the reclaim is based on the average detention for a certain period, the inclusion in the average
2622 of traffic to break-bulk lines where the per diem is much less than on local traffic, for example, reduces the average and thereby the road haul carriers' payments on other traffic are reduced. The fact is, and this record shows, that the time cars for break-bulk lines are on switching lines is much less than the average per diem reclaim allowed on that traffic. As similar reclaims are allowed to switching lines on Seatrain traffic, there is no point in beclouding the issues by consideration of any time beyond the holding on the inbound road haul carrier. In fact, no other time should be included or considered because the issue here is whether Seatrain or the road haul carriers should pay for the holding on the latter carriers, and involves no question of who should pay per diem reclaims to switching lines. The demurrage and free time situation was lugged in the case by Seatrain to becloud the facts and issues and apparently it has so far been successful.

Record Does Not Support Statement That Rail Lines Store Freight for Break-Bulk Carriers at New Orleans

Moreover, there is no support in this record for the statement of the majority (Sheet 7) that at New Orleans "the lower average for traffic interchanged with the break-bulk lines may have been caused by the fact that the freight was to some extent unloaded and held in storage, thus releasing the cars." There is no evidence that any freight moving to break-bulk lines is unloaded and stored at New Orleans, as here surmised. Further, there is no showing here that even if there was such unloading and storage of freight, it would be at the expense of, or on the property of, the rail line at New Orleans, as also assumed
2623 by the majority Sheet 7). As is well known, the water lines usually furnish the docks at the ports and if freight is unloaded on those docks it is the water lines' freight and responsibility. Therefore, what Seatrain points out in this connection is irrelevant. In its brief, dated November 30, 1940, on further hearing, Seatrain dealt with the detention at New Orleans at pages 50-55, but it said nothing about unloading and storing of freight for break-bulk carriers. Nowhere in the record is there any evidence that rail lines unload and store freight going to break-bulk lines at New Orleans, and, in fact, the testimony of Witness Kendall (R. 876), that there is no detention at New Orleans that can be attributed to the refusal or inability of break-bulk lines to take the traffic, negatives this assumption of the majority.

Majority Prejudges Division Case Now Pending and Confuses Issue of Reasonable Interchange Rules with Question of Divisions

At page 9 of the majority report it is said that:

"As we see it, the net result will or should be much the same in either event. If defendants are relieved by per diem payments of Seatrain from a burden of car detention which they bear on traffic interchanged with the break-bulk lines, they will, theoretically, entitled to relatively lower divisions of through rail water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination. Considerable difficulty, however, would be encountered in making any such adjustment."

Petitioners urge that this view is erroneous—this case
2624 does not involve divisions. It does involve car service interchange rules and regulations. Our position is based on principle. Seatrain's proper and legitimate obligation to bear

the expenses of this per diem should not be shunted off with a suggestion respecting theoretical compensation elsewhere. The Commission should fix reasonable interchange rules without regard to their effect upon some other feature of the transportation, or the relations of the carriers engaged therein. It should not, as does the majority report, prejudge any division controversy or attempt to eliminate from a divisional controversy, by a decision herein, any question, no matter how difficult, which rightly belongs in a division case. It is not a foregone conclusion, or even a probable one, that if Seatrain paid per diem while cars were being held on its connections because of Seatrain's refusal to accept them on arrival, Seatrain should be compensated for this expense in its share of a joint rate. It holds itself out to transport freight in cars; it should receive the cars which are shipped via its route on its solicitation when they are tendered to it, not when it elects to receive them to avoid per diem expense. The burden of car detention falls on the rail lines reaching New Orleans; the division question involves all lines participating in the traffic.

The majority report says (Sheet 9):

"If defendants are relieved by per diem payments of Seatrain from a burden of car detention which they bear on traffic interchanged with the break-bulk lines, they will, theoretically, be entitled to relatively lower divisions of through rail-water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination."

2625 This presupposes that rail lines' per diem burden is the same on break-bulk traffic as on Seatrain traffic, which is not the fact.

The principle here involved concerns reasonable rules for the interchange of cars; it does not concern divisions. The statement of the majority that if Seatrain paid per diem it would be entitled to credit for such payments in its operating expenses and therefore to increased divisions, not only prejudges the divisions case (docket 28668) now pending, but does not squarely decide the issue here concerning reasonable interchange rules. The Commission might just as logically have decided that the rail lines should be required to pay the per diem while the cars are actually in Seatrain's possession because if Seatrain pays it, it would be entitled to greater divisions. Under the reasoning of the majority, the rail lines might just as logically be required to load and unload Seatrain vessels or supply the fuel needed to operate them, because of Seatrain paid these expenses it would be entitled to have them considered in fixing divisions. It is

plain that the majority erred in confusing reasonable interchange rules with divisions.

The majority may have been right in saying that "considerable difficulty, however, would be encountered in making any such adjustment" by way of divisions, but such difficulty does not warrant the majority in prescribing regulations governing the interchange of cars which are unfair and result in requiring certain carriers to hold cars for a connection which refuses to take them as tendered.

Moreover, putting the burden of car detention on the rail lines serving New Orleans on the theory that this burden can be
2626 compensated by divisions is erroneous because the majority admits that this would entail considerable difficulty and also because it is impossible in some cases. It is no more difficult to compensate Seatrain, if this is a legitimate expense that should be compensated for in divisions, than it is to compensate the rail lines for such expense. Why put the burden on the rail lines when the expense accrues entirely by reason of Seatrain's action?

The record shows that some of the traffic moving in the cars which petitioners are required to hold for Seatrain moves over through routes on combination rates (R. 1268–9). Such rates are not divided and hence the rail lines could not be compensated for the car holding on this traffic by adjusting divisions. Nor do the rail rates to the ports compensate for such detention.

The rates to Belle Chasse are generally the same as to New Orleans, and Belle Chasse is in the New Orleans switching limits. Moreover, in Seatrain Lines, Inc. v. A. C. & Y., 243 I. C. C. 192; 222–3, the southern carriers were required to make the same absorptions for Seatrain as they make on traffic to break-bulk lines, because the Commission found it discriminatory against Seatrain to do otherwise. It is likewise unduly preferential of Seatrain for the New Orleans rail lines to be required to pay for holding the cars for Seatrain because of its refusal to take them while not doing the same thing for connecting rail lines.

Majority Report Puts Unwarranted Added Risk on Petitioners

The order of the majority requires the rail lines, in addition to bearing the per diem expense, to assume the respon-
2627 sibility for the cars and their contents during the time Seatrain requires the rail lines to hold the cars awaiting its pleasure in receiving them. Not only do the rail lines receive no compensation for the assumption of this added risk, but they are actually required by this order to pay per diem while so doing.

Majority Orders Places No Maximum Limit on Period Cars Are Required to be Held

The order places absolutely no limit on the time Seatrain can compel the rail carriers to hold the cars. All depends upon the caprice of Seatrain. It could promptly take cars from some of its connections and make others hold the cars indefinitely. Such an order is unfair and unreasonable. Seatrain is now operating only bi-weekly service, so that the possibilities of the periods cars may be required to be held are increased. Apparently in its agreement with its connections at Hoboken, a limit of five days was fixed for the holding of any one car (see letter dated June 6, 1941, from Mr. McCollester to I. C. C., together with attachments. See particularly memo dated January 29, 1941, of agreement between Hoboken and New York Central; also letter dated May 13, 1941, Brown to Brush, confirming agreement of C. R. R. of N. J.).

Majority Report Opens the Door to Prejudice

While Seatrain should not be unduly preferred by being relieved of its proper obligation to pay per diem on cars during the period that it refuses to accept them it is an aggravation of such situation to afford Seatrain the opportunity and unwarranted privilege of unduly preferring its favored and affiliated rail connections to the detriment of those not so favored and affiliated.

This can be done by Seatrain under the order in this case
2628 by the acceptance of delivery of cars tendered by its favored and affiliated rail connections and refusal to accept such cars from those not so favored and affiliated during an unlimited period. Certainly, in any view of the primary question here under consideration, this order affording Seatrain an unlimited time of refusal, in all probability, cannot result otherwise than in undue prejudice against such unfavored and unaffiliated rail connections. It is not believed that the Commission could have had this aspect of the situation in mind when rendering such an order.

In the consideration of this matter, it is submitted that the fundamental distinction between the operations of Seatrain and the operations of the break-bulk lines should not be lost sight of. Seatrain makes use of railroad cars as containers. The car, while on board its ferry, is used as a container or a storage place for freight, and for no other purpose. It is this character of Seatrain operation which produces the holding of railroad cars until Seatrain is willing or ready to load same on its ferry. Irrespective of this, it has been erroneously found and ordered that the rail lines

should bear the expense of holding these freight car containers for Seatrain pending its willingness to accept delivery of same.

There is another very pertinent consideration in this connection which should be called to the attention of the Commission. Under this order affording Seatrain an unlimited time during which it may refuse to accept delivery of cars, Seatrain's favoring one rail connection as against another in the more expeditious acceptance of delivery of cars, would inevitably result in unduly preferring the traffic of one connection to the improper prejudice of the traffic orginating on the other, to the undue preference of
2629 some shippers and the undue prejudice of others. The shipping public, therefore, may well be concerned with this improper practice so authorized by the order.

"Practical and Simple Way" Is Not Lawful and Reasonable Way to Handle Matter

The majority say (Sheet 9) that the practical and simple way to handle the matter "is to leave the burden of car detention with defendants when traffic is interchanged with Seatrain just as when it is interchanged with the break-bulk lines." This, we submit, disregards at least three important differences between the situation of petitioners in interchanging freight with Seatrain and the break-bulk lines, namely:

(1) Seatrain takes the cars and the break-bulk lines do not.

(2) There is no car detention burden at New Orleans on the rail lines when traffic moves to break-bulk lines that is due to the disability or refusal of the break-bulk lines to take the traffic, whereas in the case of Seatrain the rail lines are required to hold the cars because Seatrain refuses to take them.

(3) The so-called burden of car detention on road haul carriers from any cause is much less on traffic going to break-bulk lines at New Orleans than on traffic going to Seatrain—the comparison not being 2.58 days on break-bulk traffic to 3.3 days for Seatrain, as stated by the majority (Sheet 7), but ranging from .02 days to .22 days on break-bulk traffic and being 3.3 days for Seatrain traffic. The "burden" borne by petitioners on traffic to break-bulk lines is not "analogous" to that borne by them on Seatrain traffic, as stated on Sheet 7, for two reasons: first, Seatrain compels the burden, break-bulk lines do not; and second, the "burden" or
2630 holding for Seatrain is much greater than on break-bulk traffic.

It is unfair and inequitable to compel petitioners to assume the substantial burden of holding cars for Seatrain, even if they did perform a similar service, but to a much smaller degree on break-bulk traffic. A burden is a burden, but burdens may be,

and in this case are unequal. It is a case of the famous rabbit stew—one rabbit and one horse, the horse being the Seatrain detention. There is, of course, some time required in ordinary and normal railroad operation, after cars arrive at New Orleans, to break up the train, classify the cars, and switch them to the switching line interchange tracks. This operation is included in the time shown for detention of cars containing traffic going to break-bulk lines. The time cars are held for Seatrain which is here involved, however, is of an entirely different character. That time is incurred because Seatrain itself requires it, not by the normal operations of the line haul carrier.

New Orleans Lines Should Not Be Penalized Because of Voluntary Action of Certain Eastern Lines at Hoboken

Nor does the fact that Seatrain's line haul connections at Hoboken have agreed to hold cars for it and assume the per diem expense reinforce the view of the majority, as stated by it (Sheet 9). What carriers choose to do voluntarily is far different from what the Commission may or should compel them to do. Further, what certain rail carriers at New York may do, for reasons of their own, is not proof of what is lawful and reasonable for rail carriers at New Orleans. If the carriers at Hoboken had not agreed to so hold the cars, would the majority have
2631 arrived at a different conclusion as to what was reasonable at New Orleans? The record shows that the eastern lines, including Seatrain's Hoboken connections which have now capitulated, strenuously tried to persuade the Commission that Seatrain should be required to pay per diem on cars being held by them for Seatrain. It was only toward the last of the prolonged litigation that Seatrain was able to force its Hoboken connections to agree to so hold the cars.[1] The record does not show what pressure was brought to bear on these carriers to persuade them to this agreement. Nor does it show what competitive conditions caused one or more of the carriers at Hoboken to accede to Seatrain's demands. There must have been some such conditions, as they did not all agree at the same time, as shown by

[1] The New York Central and P. & L. E. informed the Commission on June 10, 1941, that they had agreed with Seatrain as to detention at New York (Letter dated June 10, 1941 from T. P. Healy to Chairman Eastman). Mr. McCollester's letter to the Commission dated June 6, 1941, shows the following dates of agreements with Seatrain's connections at Hoboken:

New York Central	Jan. 29, 1941
D. L. & W.	Feb. 2, 1941
Erie	Feb. 4, 1941
C. R. R. Co. of N. J.	May 13, 1941

Lehigh Valley apparently did not definitely come into the fold until after Mr. McCollester's letter was written, although in Mr. McCollester's letter of June 6, 1941, it is stated an oral agreement had been reached, but no date was specified.

this record (See letter of Mr. McCollester to I. C. C., dated June 6, 1941, and attachments). The record also shows that prior to the agreement at Hoboken there was a very large amount of per diem outstanding to Seatrain's connections,[2] not only for holding the cars but also for time the cars were in actual possession of Seatrain. Up to December 31, 1938, settlement had not been made by the Hoboken Manufacturers Railroad Com-
2632 pany for 277,810 car days (R. 825). This was a powerful leverage for Seatrain, which owns the Hoboken, to use to obtain the agreement as to holding the cars.

Certainly the defendants serving New Orleans should not be compelled to hold cars for Seatrain simply because certain lines serving Hoboken decided to do so, some of them in order to settle and collect large back per diem accruals and others probably because of competitive conditions.

IV

CONCLUSION

It is respectfully submitted, that for the reasons stated the Commission should reopen this proceeding for reconsideration, and upon such reconsideration should:

(1) Cancel from its order of October 13, 1941, that portion which requires Seatrain to pay per diem only when cars are in its actual position and thereby requires petitioners to hold cars at New Orleans until Seatrain is ready and willing to take them.

(2) Enter an order requiring Seatrain and N. O. & L.-C. to take cars from petitioners as tendered or to pay per diem to carriers holding such cars in accordance with Car Service Rule 15.

(3) If the Commission, on reconsideration, refuses to modify the order as requested above, the order should at least be
2633 modified so as to place a reasonable limit on the time cars are required to be held by petitioners free of per diem payments by Seatrain.

Respectfully submitted.

J. R. BELL,
W. C. BURGER,
CHARLES CLARK,
Y. D. LOTT, JR.,
E. A. SMITH,
G. H. MUCKLEY,
Attorneys for Petitioners.

Dated Washington, D. C., December 10, 1941.

[2] Suits had been filed by the New York Central and Pennsylvania R. R. to collect this per diem (R. 1350).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each such party.

Dated at Washington, D. C., this 10th day of December 1941.

(Sgd.) G. H. MUCKLEY,
Of Counsel.

2635 Before the Interstate Commerce Commission

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

Petition of certain defendants for modification of findings and order of the Commission's decision of October 13, 1941

Filed Dec. 15, 1941

Come now the defendants herein whose names are set forth in Appendix A hereto, and, reserving jurisdictional and any other objections which they may have thereto, respectfully petition the Commission to modify in the respects and for
2636 the reasons hereinafter indicated the findings and order embraced in its decision herein of October 13, 1941.

I. THE PETITIONERS

The petitioners are the railroads defendant in these proceedings named in Appendix A to this petition, and which are among the railroads defendant named in the Appendix to the Second Report of the Commission on Further Hearing herein, decided October 13, 1941. The several railroads of petitioners serve one or more ports for ocean-borne traffic in continental United States.

II. THE RELIEF SOUGHT

Petitioners ask that the Commission modify its report and order of October 13, 1941, herein in the following respects.

(1) So as to provide that Seatrain in its use of railroad-owned cars shall be subject to the Car Service and Per Diem Rules of the Association of American Railroads to the same extent as are railroad subscribers to the Car Service and Per Diem Agreement; and

(2) So as to make the order run against Seatrain Lines, Inc., as well as against railroads.

2637 III. GROUNDS IN SUPPORT OF THE PETITION

1. THE COMMISSION SHOULD NOT COMPEL THE RAILROADS TO FURNISH CARS FOR SEATRAIN'S USE ON A MORE FAVORABLE BASIS THAN OBTAINS AS AMONG RAILROADS THEMSELVES, BUT SEATRAIN, IN SUCH USE OF CARS, SHOULD BE SUBJECT TO THE SAME RULES AS APPLY TO THE RAILROADS

(a) In view of the importance of this case as a precedent the Commission should not require cars to be furnished to Seatrain on a preferential basis

The question presented by these proceedings is a novel one, and, in view of the possible expansion of the Seatrain type of service and the inauguration of similar operations at ports served by your petitioners, the significance of its determination as a precedent is at once apparent. It is, therefore, of importance that the Commission's decision should not be predicated upon principles which are essentially unsound and unfair. The Commission's decision herein of October 13, 1941, gives Seatrain Lines access to the car supply of the country upon more favorable terms and conditions than railroads observe among themselves, and, is, therefore, both unsound and unfair. Thus, for example, the Commission's order compels railroads de-
2638 livering cars to Seatrain to hold such cars at their own expense for per diem until Seatrain elects to take them, although as among railroads themselves a delivering line may make reclaim against a road refusing to permit acceptance of a car tendered to it. Regardless of whether petitioners are presently concerned as direct connections of Seatrain at ports which it now serves, they have such an interest for the future, and in the instant case as a precedent, in respect of the terms and conditions of use of their cars by vessels of the Seatrain type, as prompts them to urge the Commission to make such modification of its findings and order herein as shall insure that operators of such vessels shall not become entitled to access to the car supply of the country upon conditions more favorable than apply as among the railroads themselves.

(*b*) The Commission's failure to fix the same terms and conditions for Seatrain's use of cars as apply among railroads appears to be based on the mistaken assumption that to do so would necessarily upset the agreed arrangements at Hoboken

In failing to provide that Seatrain's use of cars should be upon the same terms and conditions as apply among the railroads under the Car Service and Per Diem Agreement, the Commission evidently acted upon a misapprehension. Thus, it seems
2639 apparent from the Commission's decision that its omission to fix the same terms and conditions for Seatrain's use as for railroad use was because of its mistaken assumption that to do so would necessarily require an abandonment of the arrangement which obtains at Hoboken by the voluntary agreement of the road-haul connections of the Hoboken Manufacturers Railroad. The record indicates that the arrangement at Hoboken was arrived at by an agreement the making of which was permissible under the codes of car service and per diem rules. If, therefore, the Commission were to require that Seatrain's use of cars should be in full accordance with the rules which govern railroads in the interchange of cars as among themselves, the agreed arrangement at Hoboken could continue, and it would still remain possible for railroads by voluntary action to provide for relaxations from the application or effectiveness of such rules in the same cases as are permissible thereunder with respect to railroads.

(*c*) The Commission should not permit the voluntary concessions by some railroads to govern its determination of reasonable rules for general application

The Commission's determination herein will necessarily have implications beyond the precise scope indicated by the bare terms of the order. Unless modified, the instant decision
2640 will doubtless be seized upon in respect of other or additional operations as a precedent to the effect that such car carriers by water are entitled to avail themselves of the railroad car supply of the country without any capital outlay therefor and upon more favorable terms than apply as among the railroads themselves. For this very reason the Commission, in determining upon a permanent and general policy in respect of the rules and principles which should govern the use of cars in Seatrain service, ought not give material weight to voluntary concessions made by a few railroads at a particular port. It would be contrary to sound principles, as well as prejudicial to the rights of other carriers concerned at other ports in

other operations, to deny them the benefit of the customary rules observed as among railroads simply because of an exception thereto granted such an operation by certain railroads, particularly where such exception was voluntarily accorded within the framework of the general rules.

(*d*) The Commission's lack of emergency powers over Seatrain's car service makes it particularly appropriate that it be required fully to observe the same rules as govern railroads subscribers to the car service and per diem agreement

The Commission has not asserted in respect of Seatrain's
2641 car service any jurisdiction comparable to that which it has in respect of railroads' car service under paragraphs (10) to (17) of Section 1 of the Act. It admits that these provisions are not of themselves applicable.

Subscribers to the Car Service and Per Diem Agreement designate the Car Service Division as their agent upon which service of all orders and directions with respect to car service may be made by the Interstate Commerce Commission. If Seatrain is to obtain railroad cars, it would seem appropriate that Commission directions affecting them should reach it through the same agency.

The present emergency makes imperative the most effective use of present equipment. Yet Seatrain's operation requires two means of transportation—cars and boats—for the accomplishment of a single transportation service, and entails a much greater length of time in the accomplishment of that service as compared with all-rail movement. This is equivalent to a diminution of the cars supply pro tanto. In view of these facts it would seem that the least obligation which the Commission should lay upon Seatrain would be to require it fully to observe the same rules and regulations as apply to railroads subscribers to the Car Service and Per Diem Agreement.

2642 2. THE COMMISSION SHOULD MODIFY ITS ORDER SO AS TO RUN AGAINST SEATRAIN AS WELL AS AGAINST THE RAILROADS.

The Commission's findings and order are deficient in that while they bind the railroads to whom the order applies, they do not appear to attempt to bind Seatrain to observe the obligations which it should bear.

Apparently the Commission omitted to make the order run against Seatrain because of its expressed willingness to report detention of cars and to pay per diem charges directly to car owners. But even if such asserted willingness were deemed to be a sufficient guarantee of Seatrain's performance of such stipulations, the obligations so assumed might not be equal to those laid on the railroads by the order to observe, in the interchange

of cars with Seatrain, rules, regulations, and practices "corresponding with the current code of per diem rules."

But the Commission's reliance on Seatrain's expression of willingness, to insure observance of such obligations as it should bear, is not warranted by the attitude Seatrain has heretofore taken on various occasions. Thus, following the decision in No. 25727, Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, prescribing through routes and joint rates, Seatrain took the position that the order ran only against the railroads and not against itself. The Commission thereupon entered its order of
2643 July 28, 1938, amending its order of January 28, 1938, so as also to require Seatrain to join with defendants in the establishment and maintenance of such through routes and joint rates.

In the instant case also Seatrain took the position, in its exceptions to the last proposed report, that if it did not like the terms and conditions imposed by the Commission it would undertake to circumvent them.*

When the Commission by its order of November 1, 1938, reopened these cases for further hearing to determine upon what terms and conditions defendants should be required to interchange their cars with Seatrain, it specifically included the question of compensation to be paid to defendants. Unless a requirement that the railroads give their cars into Seatrain service is balanced by an equally binding requirement for the making of compensation, the order might well be confiscatory. Compensation for the use of cars is not by prepayment, and under the Commission's order the cars must be allowed to go into Seatrain service prior to the making of compensation therefor. If the making of the compensation rests only upon the willingness of Seatrain, and not upon any express provisions of the Commission's order, then that order is deficient.

That the foregoing argument is no mere tilting at wind mills is borne out by the fact that for a long period of years there
2644 was withheld from a number of New York Harbor lines all compensation whatsoever for the use of their cars delivered into Seatrain service by its subsidiary the Hoboken Manufacturers Railroad Company, complainant herein.

IV. Conclusion

For the reasons hereinabove indicated petitioners ask that the Commission modify the findings and order in its decision herein of October 13, 1941, so as to provide that Seatrain in its use of

* Exceptions and Motions of Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc. dated May 5, 1941, pages 2, 11-12

railroad-owned cars shall be subject to the same Car Service and Per Diem Rules of the Association of American Railroads to the same extent as are railroads subscribers to the Car Service and Per Diem Agreement, and so as to make the order run against Seatrain Lines, Inc., as well as against railroads.

Respectfully submitted.

J. R. BELL,
CHARLES CLARK,
W. A. COLE,
JOSEPH F. ESHELMAN,
FRANK W. GWATHMEY,
G. H. MUCKLEY,
CONRAD OLSON,
J. P. PLUNKETT,
EDWARD W. WHEELER,
Counsel for Petitioners.

DECEMBER 13, 1941.

1740 Broad Street Station Building, Philadelphia, Pa.

2645 Certificate of Service

I hereby certify that I have this day served the foregoing document on all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each other party.

Dated at Philadelphia, Pa., this 13 day of December, 1941.

JOSEPH F. ESHELMAN,
Of Counsel.

2646 APPENDIX A

NAMES OF PETITIONERS

Atlantic Coast Line Railroad Company.
Boston and Maine Railroad.
Central of Georgia Railway Company.
Florida East Coast Railway Company (W. R. Kenan, Jr., and S. M. Loftin, Receivers).
Great Northern Railway Company.
The Long Island Rail Road Company.
Maine Central Railroad Company.
The Pennsylvania Railroad Company.
Seaboard Air Line Railway Company (L. R. Powell, Jr., E. W. Smith, and Henry W. Anderson, Trustees).
Southern Railway Company.
Southern Pacific Company.
Texas and New Orleans Railroad Company.
Northern Pacific Railway Company.
Union Pacific Railroad Company.
Norfolk and Western Railway Company.

2647 THE PENNSYLVANIA RAILROAD COMPANY

LEGAL DEPARTMENT

PHILADELPHIA, *15 December, 1941.*

Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company et al., I. C. C. No. 25728. New Orleans & Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railway Company et al., I. C. C. No. 25878.

The Honorable W. D. BARTEL,
Secretary, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR: Supplementing my letter to you of December 13, 1941 transmitting for filing copies of Petition of Certain Defendants for Modification of Findings and Order of the Commission's Decision of October 13, 1941, this will advise that there should have been shown as included in the list of names of petitioners in Appendix A at page 13 of the petition, the name of—

Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

A copy of this letter is being sent you for each of the copies of the petition previously sent you.

Very truly yours,

jfe–eb–. JOSEPH F ESHELMAN,
Copies to all parties of record. *Assistant General Counsel.*

2648 THE PENNSYLVANIA RAILROAL COMPANY

LEGAL DEPARTMENT

PHILADELPHIA, *26 December, 1941.*

Hoboken Manufacturers Railroad Company v. Abilene & Southern Railway Company et al., I. C. C. No. 25728. New Orleans & Lower Coast Railroad Company v. The Akron, Canton & Youngstown Railway Company et al. I. C. C. No. 25878.

The Honorable W. P. BARTEL.
Secretary, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR: Further supplementing my letter to you of 13 December 1941, transmitting for filing copies of Petition of Certain Defendants for Modification of Findings and Order of the Commission's Decision of October 13, 1941, I am now advised that the following railroads should also have been shown as included

in the list of names of petitioners in Appendix A at page 13 of the petition:

Louisville & Nashville Railroad Company.
Illinois Central Railroad Company.

A copy of this letter is being sent you for each of the copies of the petition previously sent you.

Very truly yours,

JOSEPH F. ESHELMAN,
Assistant General Counsel.

jfe–eb–
Copies to all parties of record.

2650 Before the Interstate Commerce Commission

No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 25878

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY

v

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

Petition of the Pennsylvania Railroad Company for clarification of finding 1 of its report of October 13, 1941.

Filed Dec. 15, 1941

Comes now defendant The Pennsylvania Railroad Company and, reserving jurisdictional and other objections which it may have thereto, respectively petitioned the Commission to
2651 clarify Finding 1 of its Second Report on Further Hearing herein, decided October 13, 1941, in the respects and for the reasons hereinafter stated.

I. STATEMENT OF THE RELIEF SOUGHT

Petitioner respectfully asks that the Commission clarify Finding 1 at sheet 10 of its mimeographed report herein of October 13, 1941, by such modification in the language thereof as it may deem appropriate to make more clear its evident intention that the finding shall operate only prospectively from the effective date of the Commission's order and not retroactively during any periods of

time in the past. If however, the Commission really intended such finding to apply to the past, then petitioner, in the alternative, but without conceding the Commission's jurisdiction in the premises, asks that the Commission determine specifically the periods of time, the through routes, and the traffic to which such finding is intended to relate, and what was the reasonable rate of per diem for Seatrain's use of the petitioner's cars and what were the applicable or reasonable rates of reclaim to be received by complainant Hoboken from said petitioner during such past periods as are intended to be covered by Finding 1, and further that the
2652 Commission require the Hoboken and Seatrain to make settlement with and payment to said petitioner in respect of unpaid per diem on the basis of the rates of per diem and reclaim so found reasonable or applicable for the past.[1]

II. GROUNDS OF THE RELIEF SOUGHT

1. Unless Finding 1 Is Clarified It May Be Misconstrued as Relating to the Past, With Resulting Detriment to This Petitioner's Right In Its Pending Suit to Recover For Use Of Its Cars By Seatrain and the Hoboken

Although the report and order considered together indicate that the Commission intended to deal with the case in prospective fashion only, and did not undertake to deal with questions of the rights and duties of the parties during the past, it is entirely possible, by reason of the use of the past tense therein, that Finding 1 might be misconstrued as applicable to some period of time in the past. If so construed the right of your petitioner in its pending suit to recover for use of its cars by Seatrain and the Hoboken might be seriously prejudiced.
2653 Finding 1 of the Commission's report of October 13, 1941, as set forth at sheet 10 of the mimeographed copy, reads as follows:

"1. We find that the defendants in these proceedings listed in the appendix, according as they participate in through routes with complainants and Seatrain, *have failed* to provide reasonable facilities for operating such routes and to make reasonable rules and regulation with respect to their operations *in violation of section 1 (4)* of the Interstate Commerce Act *by refusing to agree* to the interchange of freight cars owned by them with complainants for delivery to Seatrain for use in interstate commerce between points in the United States." [Italics inserted.]

[1] For convenience intervener Seatrain Lines, Inc., and complainant Hoboken Manufacturers Railroad Company are herein respectively termed Seatrain and the Hoboken.

From the inauguration of its New York service the Seatrain has never paid the Pennsylvania anything for the use of the cars of the latter delivered to it by the Hoboken, nor has the Hoboken paid the Pennsylvania therefor or for its own detention of Pennsylvania equipment. Because of this situation this petitioner brought a suit, now awaiting trial, in the United States District Court for the Southern District of New York against Seatrain and the Hoboken to recover for such uncompensated use of its equipment. As a protection against the possible financial irresponsibility of one or the other, one of the counts of the
2654 complaint therein seeks to establish joint liability on the part of Seatrain and its subsidiary the Hoboken as for a wrongful taking. One of the defenses of Seatrain and Hoboken therein is to the effect that if there was no consent by the Pennsylvania to such delivery and use of its cars such consent was unlawfully withheld. At no time did the Pennsylvania consent to delivery of its cars to Seatrain or to the use of such cars in Seatrain service.

If by reason of the use of the past tense in above-quoted finding, it were construed as a holding that petitioner's refusal to consent to Seatrain's use of its cars was unlawful in violation of Section 1 (4) of the Interstate Commerce Act, the rights of petitioner, in seeking to obtain compensation for past use of its cars by Seatrain and the Hoboken, might be prejudicially affected.

2. The Decision Indicates That the Commission Was Dealing Only With the Future Use of Cars by Seatrain, and That It Intended to Disclaim Jurisdiction Over Any Questions Involved in Petitioner's Pending Suit

A consideration of the decision as a whole furnishes convincing evidence that the Commission intended to deal therein only with the terms and conditions (including compensation) which should attend a requirement covering Seatrain's future use
2655 of railroad owned cars, and that Finding 1 is to be construed as if it read "will for the future fail" instead of "have failed."

The order which accompanies the report undertakes to operate only prospectively and to fix terms and conditions only for the future. A finding of unlawful withholding of consent in the past would have no necessary relation to such an order for the future.

Additional evidence that the decision was not intended to have any retroactive effect is to be found in the Commission's disposition of the contingent arguments made by petitioner with respect to such claims as are involved in the suit mentioned.

Thus, as a result of representations to the Court made by Seatrain and the Hoboken in their answers in the said pending suit—to the effect that the question of the amount of compensation which petitioner is entitled to receive for the past use of its cars is before the Commission in No. 25728—this petitioner presented evidence and argument herein designed to secure the Commission's determination of such question, if it agreed with Seatrain and the Hoboken that such question was before it. In the light of the fact and arguments on this point stated on brief and exceptions,[2] it is evident from the following
2656 paragraph, which appears at sheet 8 of its mimeographed report, that the Commission did not so agree with the said representations of Seatrain and the Hoboken and did not intend to deal in any way with such claims for the past or in any way to affect them. Thus it stated:

"Prior to January 1, 1937, the Pennsylvania Railroad Company connected directly with the Hoboken, but it has not been a direct connection since that date. Consequently the Pennsylvania is not interested in the questions of the Hoboken's reclaims for the future. It has, however, had a controversy of long standing with the Hoboken involving the payment of per diem and reclaims on Seatrain traffic prior to January 1, 1937.[3] *That controversy is the subject of a suit* which the Pennsylvania has brought against Seatrain and the Hoboken in the United States District Court for the Southern District of New York." [Italics inserted.]

Since the formal findings in the report necessarily take color from the discussion therein dealing with the same subject matter, it would seem that the above-quoted language from the Commission's report would require the conclusion that Finding 1 was not intended to deal with or in any way to affect the claims in suit.

2657 3. Finding 1, If Construed As Applicable to the Past, Would Be Contrary to Law

As between two constructions of a finding of the Commission, one of which would be in accordance with law and the other in contravention of law, the former is, of course, to be preferred. This principle, as applied in connection with the interpretation of Finding 1, would require the conclusion that the finding does not relate to the past. If otherwise construed the finding would be contrary to law.

From the inception of Seatrain's New York service the Pennsylvania has never been compensated for the use of its cars which the Hoboken delivered to Seatrain in contravention of the specific

[2] See Supplemental Brief of Nov. 30, 1940, and Supplemental Exception of May 6, 1941, filed by certain New York Harbor lines.

[3] While the Pennsylvania was not responsible to the Hoboken for reclaims after December 31, 1936, its claims against the Hoboken and Seatrain for detention of its cars come down to date.

instructions given it by the Pennsylvania or of the nonconsent under Car Service Rule 4 registered by the Pennsylvania with the Car Service Division. This was the situation long before the establishment of any through routes. The through routes prescribed by the Commission in Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co., 226 I. C. C. 7, did not become effective prior to 1938. In any event it clearly appears that whenever the through routes may have been established there was already owing to the
2658 Pennsylvania for the unauthorized use of its cars in Seatrain service substantial amounts of money.

In view of this situation it would be unsound in law to conclude that petitioner's withholding of consent to use of its cars in Seatrain service was in violation of the Act. The law does not require a person to give over the use of his property to another without compensation. On the contrary a requirement that the petitioner furnish cars for such service would, under such circumstances, amount to a taking of petitioner's property without compensation and without due process of law.

4. In Order To Obviate a Misconstruction of Finding 1 Which Might Injuriously Affect Petitioner's Claims in Suit, the Commission Should Make the Clarification Here Prayed

It is to be borne in mind that regardless of the withholding by the Pennsylvania of consent for the delivery of its cars to Seatrain, the Hoboken nevertheless so delivered them, and both it and Seatrain have had the use of those cars. Since petitioner's ability to enforce actual collection of compensation for the use of its cars by Seatrain and the Hoboken may as a practical matter depend on establishing their joint and several liability as
2659 joint tort feasors, and since a misconstruction of Finding 1 as applicable to the past might hinder the establishing of such joint liability, the Commission should clarify Finding 1 to eliminate the possibility of such misconstruction and of injury to petitioner's rights.

5. If the Commission Really Intended That Finding 1 Should Apply to the Past Then It Should Fully Declare the Rights and Duties of All the Parties With Respect to the Past Use of Petitioner's Cars in Seatrain Service and Should Require Settlement in Accordance Therewith

Because petitioner is convinced that the Commission intended that Finding 1 should operate only prospectively, and should not have any application for the past, the point here to be made does not require elaboration. The principle, however, is clear. If

the Commission really intended that Finding 1 should apply to the past, and thus to declare a duty on the part of petitioner to consent to use of its cars in Seatrain service, then according to its own assumption of jurisdiction in the matter, it would be bound to go farther and define the obligations of the other parties to the transaction.

Even under the Commission's views as to its jurisdiction to
2660 require railroads to furnish their cars to Seatrain, the obligation so to furnish equipment is not an unqualified one, nor could there be any such obligation in the absence of an obligation on the part of Seatrain to make just compensation therefor. Nevertheless the fact is that petitioner has received nothing from Seatrain or the Hoboken for use of cars delivered to Seatrain by the Hoboken, or even from the Hoboken for its own detention of cars, since the inception of Seatrain's New York service.

In view of this situation, it would violate every sound principle were the Commission to assume for the past a partial jurisdiction for the purpose of declaring the obligation of one of the parties while at the same time failing fully to exercise the jurisdiction asserted by it so as to deal fully with the reciprocal rights and duties of all the parties to the transaction. Particularly is this so where such a partial exercise of jurisdiction might operate adversely to affect the rights of one of the parties to enforce pending claims in Court in respect of the same subject matter.

If the Commission intended to assert jurisdiction in any respect over petitioner's claims in suit, or in respect of Seatrain's use of petitioner's cars in the past, then it would seem that the Commission in fairness to the Court owes it a clear state-
2661 ment of the extent to which it asserts that jurisdiction.

Thus, if the Commission intends Finding 1 to have any application for the past whatsoever, it ought to define clearly the periods of time to which the finding relates, the points between which the through routes existed, and the traffic to which such through routes applied.[4] Furthermore, it should not stop with a determination of petitioner's duty to consent to use of its cars, but should go farther and determine the reasonable rates of per diem and reclaim which should obtain as among Seatrain, the Hoboken, and the petitioner in respect of petitioner's cars so used. Failure to deal fully with the matter would of itself contravene fundamental legal principles, even on the assumption of the Commission's jurisdiction over the subject matter. Furthermore, it would seem that if the Commission intended to make a finding which might operate to affect petitioner's ability to recover com-

[4] The through rates prescribed in No. 25727, *Seatrain Lines, Inc. v. Akron, C. & Y. Ry. Co.*, 229 I. C. C. 7, did not become effective prior to 1938.

pensation for use of its cars in Seatrain service, then such principles would dictate that it should so deal with the matter as to require the parties to make settlement as among themselves in accordance with such terms and conditions and such rates of compensation as it should so determine to be reasonable.

2662 III. CONCLUSION

For the reasons hereinabove indicated petitioner respectfully asks that the Commission modify Finding 1 of its report of October 13, 1941, so as to make it clear that it does not apply for any period of time in the past. If, however, the Commission really intended it to so apply, your petitioner asks, in the alternative, (a) that the Commission determine with precision the periods of time during which, the points between which, and the traffic to which through routes in connection with Seatrain were in effect from stations on the lines of petitioner, and (b) determine for such periods what was the reasonable rate of per diem for Seatrain's use of petitioner's cars, and what were the applicable or reasonable rates of reclaim to be received by complainant Hoboken from said petitioner during any past periods prior to January 1, 1937, and (c) that the Commission require the Hoboken and Seatrain to make settlement with and payment to petitioner in respect of unpaid per diem on the basis of the rates of per diem and reclaim so found reasonable or applicable for the past.

Respectfully submitted.

JOSEPH F. ESHELMAN, *Counsel.*

December 13, 1941. 1740 Broad St. Station Building, Philadelphia, Pa.

2663 CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each other party.

Dated at Philadelphia, Pa., this 13th day of December 1941.

JOSEPH F. ESHELMAN, *Counsel.*

2664 Before the Interstate Commerce Commission

Docket No. 25728

HOBOKEN MANUFACTURERS RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

Docket No. 25878

NEW ORLEANS & LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

Petition of New Orleans Public Belt Railroad for leave to intervene and for reconsideration and modification of findings and order embraced in the Commission's decision of October 13, 1941

Filed Jan. 7, 1942

Comes now your petitioner, New Orleans Public Belt Railroad, directly owned and operated by the City of New Orleans by and through the Public Belt Railroad Commission, and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene and become a party to said proceeding, and it also respectfully petitions the Commission to reconsider and modify the findings and order embraced in its decision herein of October 13, 1941;
2665 and for grounds for the proposed intervention, reconsideration, and modification says:

I. That the New Orleans Public Belt Railroad is located in New Orleans, Louisiana, and is a municipally owned and operated terminal switching line engaged in the performance of switching services within the New Orleans switching district, including switching service between industries, tracks, public wharves, interchange connections with trunk line railroads (as an intermediate carrier), on the one hand, and interchange connection with the New Orleans & Lower Coast Railroad Company in New Orleans, La., on the other hand.

II. Petitioner represents that it interchanges cars with the Seatrain Lines, Inc. (hereinafter called "Seatrain"), through the New Orleans & Lower Coast Railroad, which road connects with Seatrain at Belle Chasse, La., about ten miles below New Orleans, and that such cars are handled by petitioner to and from industries, tracks, public wharves, and connecting lines, reached by petitioner's rails, for the account of Seatrain.

III. Petitioner also represents that it receives for its
2666 services only a meager switching charge; that it allows under its established demurrage rules, properly filed with the Interstate Commerce Commission, 48 hours' free time for loading or unloading cars on its line; that it is a party to the Per Diem Agreement and is subject to the Car Service and Per

Diem Rules of the Association of American Railroads and thus pays car owners the existing $1.00 per diem on all foreign railroad-owned cars detained on its line.

IV. Petitioner further represents that on all cars it handles in switching service for the account of the rail carriers reaching New Orleans, with all of which petitioner has direct connections, it receives an arbitrary per diem reclaim of $2.46, which arbitrary is allowed by these rail carriers for the purpose of protecting petitioners switching revenue; that said arbitrary reclaim also is allowed petitioner by the New Orleans rail carriers on all cars interchanged through its line between those rail carriers and the coastwise break-bulk water carriers competing with Seatrain; that on traffic brought to the New Orleans public wharves by the said break-bulk water carriers competing with Seatrain,
2667 which traffic is loaded into cars and switched by petitioner for the account of said water carriers to industries and tracks on the New Orleans Public Belt Railroad, petitioner receives a car rental charge of 3.96 per car in addition to its regular switching charge, which car rental charge serves to protect petitioners switching revenue.

V. Petitioner represents further that Seatrain has consistently declined to allow any per diem reclaims whatsoever on cars switched by petitioner for Seatrain's account to industries, tracks, public wharves, and trunk line connections, reached by petitioner's rails, resulting in its switching revenue on such movements being dissipated, by reason of having to allow 48 hours' free time for unloading cars where petitioner is the delivering line, thus causing detention, and the payment to car owners of the existing $1.00 per diem.

In our opinion there is no justification in law or equity for saddling part of Seatrain's legitimate operating costs on a little switching line like ours. It is manifestly unreasonable and thoroughly selfish for Seatrain to receive hundreds of dollars revenue per car for its transportation service and then to refuse
2668 to allow us an arbitrary per diem reclaim to offset the $1.00 per diem we are compelled to pay the car owner on cars containing Seatrain's traffic; and to protect our meager switching revenue of $6.93 per car. If Seatrain desires to haul freight cars on steamships instead of on rails, in competition with the rail carriers, they should be made to assume the same responsibilities as do the rail carriers; and, in short, they should be required to observe without exception the same Car Service and Per Diem Rules of the Association of American Railroads and to the same extent as do railroad subscribers to the Car Service and Per Diem Agreement.

VI. And petitioner avers that demands frequently have been made upon Seatrain for monies due petitioner in settlement of per diem reclaims, which have been properly prepared and duly presented to Seatrain's New Orleans Office from time to time, without avail.

VII. Petitioner further represents that on cars received from its rail connections, handled over its line in intermediate switching service, for delivery to Seatrain through the New Orleans & Lower Coast Railroad, per diem reclaims, if any, are paid
2669 to petitioner by the delivering rail carrier; that on cars originating on petitioner's line for delivery to Seatrain petitioner furnishes the car and therefore is in position to assess and does collect its lawfully published car rental charge in addition to its switching charge, thus enabling petitioner to protect its switching revenues on such traffic. Petitioner is willing, however, and has so expressed itself to Seatrain, to make effective the Association of American Railroads' per diem rules and practices on all Seatrain traffic handled by it for Seatrain's account.

VIII. Petitioner has a vital interest in this proceeding, and it sympathizes with the petitioning defendants therein, and if authorized to intervene in the case it will undertake to support the position and prayers of the petitioning defendants, and also to properly support the facts above briefly stated respecting its own railroad.

Wherefore said New Orleans Public Belt Railroad prays leave to intervene and be treated as a party hereto, with the right to have notice of and appear at the taking of testimony, pro-
2670 duce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted; and if permitted to intervene petitioner prays that for reasons hereinabove indicated that the commission reconsider and modify the findings and order in its decision herein of October 13, 1941, so as to provide that Seatrain in its use of railroad-owned cars shall be subject without exception to the same Car Service and Per Diem Rules of the Association of American Railroads to the same extent as are railroad subscribers to the Car Service and Per Diem Agreement, and so as to make the order run against Seatrain Lines, Inc., as well as against railroads.

Dated at New Orleans, La., this 5th day of January 1942.

Respectfully submitted.

NEW ORLEANS PUBLIC BELT RAILROAD.
By J. D. YOUMAN,
J. D. Youman,
Traffic Research Counsel (Full time Officer of New Orleans Public Belt Railroad and Registered Practitioner).

MUNICIPAL BUILDING, *New Orleans, La.*

2671 VERIFICATION

STATE OF LOUISIANA, *Parish of Orleans, ss:*

J. D. Youman, being duly sworn, deposes and says: That he is Traffic Research Counsel of the New Orleans Public Belt Railroad of the City of New Orleans, La., the maker of the foregoing petition, has read and knows the contents thereof; that the facts therein stated are true to the best of his knowledge and belief.

J. D. YOUMAN.
J. D. Youman.

Subscribed and sworn to in my presence this 5th day of January 1942, at New Orleans, La.

[SEAL] ——— ———, *Notary Public.*

My commission expires at death.

2672 CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each such party.

Dated at New Orleans, La., this 5th day of January 1942.

J. D. YOUMAN.
J. D. Youman.

2673 [Order of March 2, 1942, omitted. Printed side page; 97 ante.]

2674 In the Supreme Court of the United States

October Term, 1944

No. 47

Statement of points to be relied upon and designation of parts of the record to be printed

Filed April 18, 1944

Come now the appellants and say that they will rely in brief and oral argument before this Court on the points made in their assignment of errors on their appeal in the above-entitled cause.

Appellants further state that the entire record in this cause as filed in this Court pursuant to praecipe for transcript of record, with the omissions indicated in a "Stipulation Designating Those Parts of the Record Unnecessary to be Printed" filed in this Court

on April 18, 1944, is necessary for consideration of the points specified above.

CHARLES FAHY,
Solicitor General
for the United States of America.

2675 DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.
PARKER MCCOLLESTER,
For Seatrain Lines, Inc.
H. H. LARIMORE,
For New Orleans and
Lower Coast Railroad Company.
JAMES D. CARPENTER, JR.,
For Forrest S. Smith, Trustee
of Hoboken Manufacturers' Railroad Company.

Service of a copy of the foregoing statement of points to be relied upon and designation of parts of the record to be printed acknowledged this 18th day of April 1944.

R. A. BAGLEY,
Counsel for Pennsylvania Railroad
Company, et al., Appellees.

[File endorsement omitted.]

2676 In the Supreme Court of the United States

October Term, 1944

No. 48

Statement of points to be relied upon

Filed April 17, 1944

Now come the appellants and say that they will rely in brief and oral argument before this Court on the points made in their assignment of errors on their appeal in the above-entitled cause.

JOHN VANCE HEWITT,
JOHN A. HARTPENCE,
JOSEPH F. ESHELMAN,
R. AUBREY BAGLEY,
Counsel for Appellants.

[File endorsement omitted.]

2677 In the Supreme Court of the United States

Stipulation designating those parts of the record unnecessary to be printed

Filed April 18, 1944

It is stipulated by the parties hereto that the following shall govern the printing of the Record of the District Court in the appeals in the above-entitled causes:

It is stipulated that the following be omitted from the printed Record as unnecessary for the consideration of the points on which the parties intend to rely:

Notice of motion of Hoboken Manufacturers' Railroad Company, dated May, 1942.

Notice of motion of New Orleans and Lower Coast Railroad Company for leave to intervene.

Orders of Commissioner Porter of the Interstate Commerce Commission dated May 25, 1942, October 2, 1942, December 26, 1942, February 25, 1943, May 14, 1943, July 9, 1943, July
2678 29, 1943, September 10, 1943, October 27, 1943, and November 9, 1943, extending the effective date of the order complained of.

Order of Chairman Alldredge of the Interstate Commerce Commission, dated December 11, 1943, further extending the effective date of the order complained of.

Petitioners' proposed findings of fact and conclusions of law.

Omit the following portions of the Record before the Interstate Commerce Commission, being Exhibit 1 introduced in evidence at the hearing before the statutory three Judge Court: The answers of—

The Akron, Canton & Youngstown Railway Company.

Chicago and North Western Railway Company.

Chicago, Saint Paul, Minneapolis and Omaha Railway Company.

Chicago, Indiana and Louisville Railway Company.

St. Louis, Southwestern Railway Company.

Union Pacific Railroad Company.

Wabash Railway Company.

Boston and Maine Railroad.

Chicago, Burlington & Quincy Railroad Company.

Lehigh Valley Railroad Company.

Boston and Albany Railroad (The New York Central Railroad Company, Lessee) et al.

The New York, New Haven and Hartford Railroad Company.

The Denver and Salt Lake Railway Company.

Northwestern Pacific Railroad Company, et al.
The Baltimore and Ohio Railroad Company.
Kansas, Oklahoma & Gulf Railway Company.
The Kansas City Southern Railway Company.
Great Northern Railway Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Alabama Great Southern Railroad Company, et al.
The Minneapolis & St. Louis Railroad Company (W. H. Bremner, Receiver).
St. Louis-San Francisco Railway Company.
Receivers of St. Louis-San Francisco Railway Company.
Rutland Railroad Company.
Erie Railroad Company, et al.
Maine Central Railroad Company.
Burlington-Rock Island Railroad Company.
Tennessee Central Railway Company.
Norfolk and Western Railway Company.
Illinois Central Railroad Company.
Minneapolis, St. Paul & Saulte Ste. Marie Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
2679 Pere Marquette Railway Company.
Reading Company, et al.
Bessemer and Lake Erie Railroad Company.
The Chicago, Rock Island and Pacific Railway Company, et al.

and it is stipulated that the answers so omitted raise substantially the same issues as the answer of The Pennsylvania Railroad Company, et al., and the answer of the Texas and New Orleans Railroad Company, which are to be printed.

Omit complaint of New Orleans and Lower Coast Railroad Company, filed March 9, 1933, and answers of all defendants thereto, and it is stipulated that the said complaint and answers raise substantially the same issues as the complaint of the Hoboken Manufacturer's Railroad Company and the answers thereto, which are being printed.

Omit petition of Chamber of Commerce of Shreveport, Louisiana, for leave to intervene and order of the Interstate Commerce Commission entered thereon May 10, 1933.

Omit all notices of the Commission for hearings.

Omit Exhibits 27, 34, 39, and 44, offered in evidence before the Interstate Commerce Commission in Dockets 25728 and 25878, at the hearings held November 2, 3, and 4, 1933.

Omit the following portions of the transcript of the Record in Docket 25565, Investigation of Seatrain Lines, Inc., and Docket 25546, Application of Missouri-Pacific Railroad Company and

Texas and Pacific Railway Company under Section 5 of the Interstate Commerce Act in the matter of installation of common carrier service by water, other than through the Panama Canal, which portions of the transcript from such Dockets were received in evidence by the Commission in Dockets 25728 and 25878, and the portions to be omitted being designated as pages 112–113, 177–178, 548 to 622, both inclusive, 625 to 699, both inclusive, 706 to 711, both inclusive, 772, 858, 872, 882 to 885, both inclusive, 980, 985, 986, 988, 991, 1082, 1093, 1095, 1096, 1101, 1102, 1107 to 1109, both inclusive, 1144, 1150, 1151, 1166, 1181, 1236, 1237, 1240, 1231, 1259, 1321 to 1339, both inclusive, 1346 to 1349, both inclusive, being pages of the transcript of the stenographer's notes of the hearings held in said Dockets 25565 and 25546 as aforesaid
2680 on November 10, 11, 12, and December 12, 13, 14, 15, 16, and 17, 1932, and April 24, 25 and 26, 1933, and also omit Exhibits 26, 29, 33, 34, 84, 85, and 86, which were offered in said docket numbers at said hearing.

Omit Exceptions of complainants et al. filed with the Commission April 27, 1934, in Dockets 25728 and 25878.

Omit reply of defendants filed May 7, 1934, in Dockets 25728 and 25878.

Omit motion of New Orleans and Lower Coast Railroad Company for entry of order, filed July 28, 1938, it being similar to the motion of the Hoboken Manufacturers' Railroad Company et al. for entry of an order, filed July 21, 1938, which is being printed.

Omit appendices B and C and supplemental circulars in Exhibit 57 and print pages 1–45 of Code of Per Diem Rules.

Omit Exhibit 58 (white sheet) and Exhibit 58 (black sheets), except the last half of page 3, beginning "Item No. 122" and extending to the end of said page, which half page is to be printed.

Omit exceptions of complainant Hoboken Manufacturers' Railroad Company filed September 19, 1939, except pages 4 to 8 thereof, which are to be printed.

Omit exceptions of certain defendants et al. filed September 29, 1939, except pages 1 to 3 thereof, which are to be printed.

Omit reply of certain defendants filed September 29, 1939.

Omit reply of complainant Hoboken Manufacturers' Railroad Company et al. filed September 30, 1939.

Omit motion of Hoboken Manufacturers' Railroad Company, et al. filed February 27, 1940.

Omit reply of certain defendants filed March 6, 1940.

Omit order of the Commission entered April 1, 1940, overruling said motion of Hoboken Manufacturers' Railroad Company et al.

Omit motion of New Orleans and Lower Coast Railroad Company filed April 5, 1940.

Omit motions for inclusion of addition facts in the
2681 Record and for limitation of issues of Hoboken Manufacturers' Railroad Company et al. and print only the Exceptions at pages 15 to the end thereof, being the Exceptions to report proposed by H. W. Archer and M. J. Walsh, Examiners.

Omit reply of complainant Hoboken Manufacturers' Railroad Company, et al. filed May 16, 1941.

Omit reply of certain defendants et al. filed May 16, 1941.

Omit separate and additional reply of certain defendants filed May 16, 1941.

Omit order of the Commission entered December 26, 1941, extending the effective date of the order complained of.

Omit reply of complainant in Docket 25878, filed January 15, 1942.

Omit reply of Seatrain Lines, Inc., et al. filed January 16, 1942.

Omit reply of Seatrain Lines, Inc., filed January 17, 1942.

Omit orders of the Commission entered March 27, 1942, and April 7, 1942, further extending the effective date of the order complained of.

With the exception of the above matters stipulated to be omitted, the entire record now on file shall be printed in the customary manner.

It is hereby agreed that this stipulation shall be printed by the Clerk as part of the record on appeal.

2682

CHARLES FAHY,
Solicitor General,
For the United States of America.
DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.
PARKER McCOLLESTER,
For Seatrain Lines, Inc.
H. H. LARIMORE,
For New Orleans and Lower Coast Railroad Company.
JAMES D. CARPENTER, JR.,
For Forrest S. Smith, Trustee of Hoboken Manufacturers' Railroad Company.
R. AUBREY BAGLEY,
JOHN VANCE HEWITT,
For The Pennsylvania Railroad Company, et al.

[File endorsement omitted.]

2683

Supreme Court of the United States

Nos. 47 & 48, October Term, 1944

Order noting probable jurisdiction

May 8, 1944

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

On consideration of the returns to the rule to show cause why the cases should not be dismissed as moot, it is ordered that the rule to show cause be, and the same is hereby, discharged.

[Indorsement on cover:] File No. 48338, 48329. D. C. U. S., New Jersey. Term No. 47. The United States of America, Interstate Commerce Commission, Seatrain Lines, Inc., et al., Appellants vs. The Pennsylvania Railroad Company, et al. Enter Joseph F. Eshelman. Term No. 48. The Pennsylvania Railroad Company, et al., Appellants vs. The United States of America, Interstate Commerce Commission, Seatrain Lines, Inc., et al. Filed April 4, 1944. Term No. 47 O. T. 1944, 48 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., APPELLEES

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLEES

Stipulation and addition to record

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the attached certified copy of order of the Interstate Commerce Commission in its dockets numbered 25728 and 25878, dated the 14th day of October 1944, be incorporated in the record before this Court in the above entitled proceedings, and that this stipulation, with certified copy of order attached, be printed and added to the printed record herein.

CHARLES FAHY,
Solicitor General,
For the United States of America.

DANIEL W. KNOWLTON,
EDWARD M. REIDY,
For the Interstate Commerce Commission.

LORD, DAY & LORD,
For Seatrain Lines, Inc.

H. H. LARIMORE,
For New Orleans and Lower Coast Railroad Company.

JAMES D. CARPENTER, JR.,
For Forrest S. Smith, Trustee of Hoboken Manufacturers' Railroad Company.

JOHN VANCE HEWITT,
JOSEPH F. ESHELMAN,
JOHN A. HARTPENCE,
B. AUBREY BAGLEY,
For the Pennsylvania Railroad Company, et al., appellees in No. 47 and appellants in No. 48.

ORDER

INTERSTATE COMMERCE COMMISSION

No. 25728

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

No. 25878

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL.

In the matter of the postponement of the effective date of the order in the above-entitled proceedings.

Present: Claude R. Porter, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon consideration of the proceedings in court in these dockets, which proceedings require a postponement of the effective date of the order herein, and good cause appearing:

It is ordered, That the effective date of the order of October 13, 1941, in said proceedings be, and it is hereby, further postponed from December 15, 1944, to March 15, 1945.

Dated at Washington, D. C., on this 14th day of October 1944.

By the Commission, Commissioner Porter.

[SEAL.] W. P. BARTEL, *Secretary.*

A true copy:

W. P. BARTEL,

Secretary of the Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE 1944

FILE COPY

No. [redacted] 47

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

vs.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the District of New Jersey

CIVIL ACTION No. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

AND

THE INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., INTERVENING DEFENDANTS

JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The defendant-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended

581627—44——1

by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804, February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. The statute of a state, or the statutes or treaty of the United States, the validity of which is involved

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved, except that the lower court held that there was nothing in a statute of the United States, namely, the Interstate Commerce Act, empowering the Interstate Commerce Commission to direct railroads to furnish freight cars to Seatrain Lines, Inc., a common carrier by water, because Seatrain,

in its operations, takes such cars outside the territorial waters of the United States.

C. Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented

The decree sought to be reviewed was entered on December 8, 1943. The petition for appeal was presented and allowed on January 28, 1944, together with the assignment of errors.

D. Nature of case and of rulings below

This is an appeal from a final decree of the United States District Court for the District of New Jersey, entered December 8, 1943, setting aside in part an order of the Interstate Commerce Commission dated October 13, 1941, in *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Ry. Co.*, et al., 248 I. C. C. 109, wherein the Commission prescribed the terms and conditions, including compensation and period of time therefor, upon which defendant railroads which participate in through routes with Seatrain Lines, Inc.,[1] a common carrier by water, should be required to interchange their freight cars with Seatrain.

The question presented is whether the Commission, when it found that "the operation of Sea-

[1] For a description of Seatrain's operations, see *Interstate Commerce Commission* v. *Hoboken Manufacturers' Railroad Co.*, No. 43, October Term, 1943, decided by the Supreme Court on December 6, 1943.

train is in the public interest and is of advantage to the convenience and commerce of the people," could require the railroads to furnish freight cars owned by such railroads to Seatrain, so as to make such operations really effective.

The Hoboken Manufacturers' Railroad is a single-track, terminal-switching line extending along the waterfront of Hoboken, New Jersey, and Seatrain Lines, Inc., is a common carrier by water subject to the Commission's jurisdiction. *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215. Since October 6, 1932, Seatrain has operated vessels, on which it transports freight in railroad cars, between Hoboken, New Jersey, and Belle Chasse, Louisiana, via Havana, Cuba.

On November 15, 1932, the American Railway Association promulgated Car Service Rule No. 4,[2] effective on that date, which provided:

> Cars of railroad ownership must not be delivered to a steamship, ferry, or barge line for water transportation, without permission of the owners, filed with the Car Service Division.

Following the promulgation of said Rule 4, the Hoboken Manufacturers' Railroad filed with the Commission a complaint (*Hoboken Manufacturers Railroad Co.* v. *Abilene & Southern Ry. Co.*,

[2] That Car Service Rule No. 4 was aimed at Seatrain's operations is apparent from the fact, as stated (206 I. C. C. 328, 330,) by the Commission, that it was filed "Shortly after inauguration of service by Seatrain * * *."

et al., 237 I. C. C. 97; 248 I. C. C. 109) wherein it was alleged that this rule was unlawful under Section 1 (4) and (11), Section 3 (1) and (3), and Section 7 of the Interstate Commerce Act (49 U. S. C. 1 (4) and (11), 3 (1) and (3), 7). On March 9, 1933, the New Orleans & Lower Coast Railroad filed with the Commission a complaint substantially similar to that of the Hoboken. Both complaints, Docket Nos. 25728 and 25878, were consolidated by the Commission, and hearings thereon were had on one record.

After the usual proceedings, the entire Commission decided the case, on February 5, 1935, finding, *inter alia,* that (206 I. C. C. 328, 332)—

> Seatrain's vessels are designed primarily for the handling of railroad cars in non-break-bulk transportation, and the cooperation of railroads is essential to their successful operation. * * *

The report of the Commission discusses Car Service Rule No. 4 and the practices of the carriers thereunder. It was shown that, as of March 1933, most of the railroads had refused to permit delivery of their cars to Seatrain, although twenty-six railroads consented to the delivery of their cars to Seatrain without restriction and several others had granted such consent with restriction. The Commission stated that "No railroad had refused to permit delivery of their cars to any of the other 11 water lines listed in a circular of

the Association as coming within the intendment of the rule." 206 I. C. C. 328, 337. Moreover, the Commission found that the sole object of Car Service Rule No. 4 was to prevent the diversion of traffic from the all-rail routes to Seatrain. *Ibid.*

The railroad defendants contended that they could not be required to interchange cars with Seatrain unless such cars were required for transportation over through routes to which they were parties or which might be required by the Commission. The Commission agreed with the rail defendants and stated (206 I. C. C. 328, 343):

> We find nothing in the Act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where such through routes between such rail and water carriers do not exist.

The Commission also pointed out that the record disclosed that Seatrain participated in through routes and joint rates with Missouri Pacific System and the Texas & Pacific Railway Company, but said "whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record. Whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided." *Ibid.*

The case last referred to, Docket No. 25727, entitled *Seatrain Lines, Inc.*, v. *Akron, C. & Y. Ry.*, 226 I. C. C. 7, was decided on January 28, 1938. The primary relief sought by Seatrain was an order requiring the establishment of through routes with the railroads operating in the East, South, and Southwest where such through routes did not already exist, and the establishment of joint rates in connection with such through routes (226 I. C. C. 7, 9). In its decision, the Commission pointed out that through routes between points in the Southwest and points in trunk-line and New England territories existed for many years in connection with the break-bulk lines operating between north Atlantic ports and New Orleans and Texas Gulf ports (226 I. C. C. 7, 12). On the ground that Seatrain's route between Hoboken, New Jersey, and Bell Chasse, Louisiana, was via Havana, Cuba, the railroad defendants questioned the Commission's jurisdiction to prescribe through routes and joint rates via a foreign country, but the Commission, after full discussion, overruled this contention.

The Commission's findings, insofar as here material, were that through routes in connection with the Seatrain existed between points in trunk-line and New England territories on the one hand and Southwestern territory on the other, and that the public interest required the establishment and maintenance of through routes and joint rates in

connection with Seatrain between certain portions of official territory on the one hand and Southwestern territory and a portion of southern territory on the other.[3]

On November 21, 1938, the Commission reopened Nos. 25728 and 25878, *supra*, "for further hearings to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener, Seatrain Lines, Inc."[4] After full hearing, the Commission filed a supplemental report (237 I. C. C. 97) reaffirming its conclusion that it had jurisdiction to require the railroads to interchange their cars with Seatrain whenever through routes exist between Seatrain and defendants. The Commission was of the "view that the period of time during which, and the manner in which, Seatrain should pay for the use of cars, the amount of compensation it should pay, and any other condition which the evidence adduced shows would be an appropriate condition to attach to an order requiring (rail) defendants to interchange their cars with Seatrain" (237 I. C. C. 97, 102) were matters in issue, upon which evidence had

[3] It is admitted in paragraph XV of the amended petition filed in the District Court that the rail defendants, including the Pennsylvania Railroad and some of the petitioners herein, established the through routes so prescribed in Docket No. 25727, and participated therein as directed by said order, and that said through routes were in full force and effect.

[4] Exh. F of amended petition filed in the District Court.

not been received. Accordingly, the proceedings were reopened, and the Commission issued an additional report (248 I. C. C. 109 in Dockets Nos. 25728 and 25878, dated October 13, 1941.

Confining its report[5] of October 13, 1941, to the compensation which the railroad defendants, required to interchange their cars with Seatrain, should receive for the use of such cars, and to what other terms and conditions should be imposed, the Commission concluded (248 I. C. C. 109, 114):

> In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the $1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars is decreased approximately 10 cents per day while they are in its possession.

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[5] In discussing, in the report, its power to make a finding which would require the defendants to turn over to Seatrain, cars for use in its Cuban traffic, the Commission quoted the following excerpt from *St. Louis, B. & M. Ry. Co.* v. *Brownsville Nav. District*, 304 U. S. 295, 300.

"The (Interstate Commerce) Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. But that freedom from obligation does not imply, that in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. * * *"

The ultimate findings of the Commission were (248 I. C. C. 109, 119):

> 1. We find that the defendants in these proceedings listed in the appendix, according as they participate in through routes with complainants and Seatrain, have failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operations, in violation of section 1 (4) of the Interstate Commerce Act by refusing to agree to the interchange of freight cars owned by them with complainants for delivery to Seatrain for use in interstate commerce between points in the United States.
>
> 2. We find further that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain.

On the same day, the Commission entered the order which is the subject of this suit.

The amended petition was filed in the three-judge District Court on April 15, 1942, and alleges that the Commission's order[*] is void and

[*] Suit was brought against the United States. The Interstate Commerce Commission, the Hoboken Manufac-

beyond its statutory power in requiring the railroads to permit the use of their cars by Seatrain; that the Commission's decision was based upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission; that the order is beyond the Commission's statutory power in requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, and that neither the Interstate Commerce Act nor any other statute authorizes the Commission to require railroads to permit the use of their cars except by other railroads; that the order is void in that it requires the rail carriers to permit the use of their cars by Seatrain in and through a foreign country and in and through foreign waters; and that the order is in excess of the Commission's powers in that the rate of $1 per car per day for such period only when the cars are in Seatrain's actual possession is so low as to be confiscatory.

At the argument, it was suggested to the District Court by the parties that the case might be moot because Seatrain's vessels have been in Government service since February 1942, and Seatrain's service has been discontinued. See *Interstate Commerce Commission* v. *Hoboken Manu-*

turers' Railroad Company, Seatrain Lines, Inc., and the New Orleans & Lower Coast Railroad Company intervened in support of the order.

facturers' Railroad Co., No. 43, October Term, 1943, decided December 6, 1943.

On October 9, 1943, the District Court rendered its decision sustaining the defendant-apellants except in its fourth and fifth conclusions of law which provided:

> 4. The said orders of the Commission are beyond the statutory power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation in and through a foreign part and in and through foreign waters and neither the Interstate Commerce Act nor any other statute authorizes the Commission to require railroad carriers to permit such use of their cars.
>
> 5. The said orders of the Commission are based upon a mistake of law in that in making them the Commission erroneously assumed that petitioners were under a duty to permit the interchange of their cars with and for the use by Seatrain for transportation in and through a foreign part and in and through foreign waters, although petitioners were under no duty to permit their cars to be interchanged with and so used by Seatrain.

And, relying on *Federal Trade Commission* v. *Goodyear*, 304 U. S. 257, the Court held that the case was not moot.

On December 8, 1943, the District Court filed a supplemental opinion finding the $1 per diem

rate, applicable to cars in actual possession of Seatrain, prescribed by the Commission to be a just and reasonable rate, and not confiscatory. The Court's decree was entered on the same day.

The questions presented by this appeal are substantial. It involves an interpretation and application of the Interstate Commerce Act in relation to operations by Seatrain, which would put that company out of business, as the District Court itself recognized, when it said:

> We think we should state that we can see no practical way in which Seatrain can operate its ships between Hoboken and Belle Chasse without going outside of the territorial waters of the United States. We appreciate the effect which this ruling, if it be sustained by the appellate tribunal, must have upon Seatrain transportation. The remedy, however, must lie with Congress.

Aside from the situation of Seatrain, immediately affected, the decision of the lower court, if allowed to stand, would establish principles relating to and impinging upon the jurisdiction of the Commission, which would have a far-reaching effect. Since the decision appears contrary to prior decisions and principles announced by the Supreme Court (see, *e. g., St. Louis, B. & M. Ry. Co.* v. *Brownsville Nav. District,* 304 U. S. 295, 300; *Chicago, R. I. & P. Ry.* v. *United States,* 274 U. S. 29; *United States* v. *N. Y. Central R. Co.,* 272 U.

S. 451), it is important that the Supreme Court review this decision. However, the Court may, at least preliminarily, wish to order that the briefs and arguments be limited to the question of mootness. Such a procedure would avoid the necessity of reviewing a lengthy record and passing upon complicated issues of statutory construction,[7] in case it should be determined that the District Court erroneously held the case not to be moot[8] and that its decree should accordingly be reversed.

E. Cases sustaining the Supreme Court's jurisdiction of the appeal

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

[7] It would also avoid the expenditures entailed in printing a voluminous record and wasted effort on the part of the Court and counsel, if the case is to be held moot.

[8] In this connection, it should be noted that there are pending in the United States District Court for the Southern District of New York, two actions brought by petitioner Pennsylvania Railroad for compensation for its freight cars delivered to Seatrain during the period from 1932 to 1942. *Pennsylvania Railroad Company* v. *Seatrain Lines, Inc. and Hoboken Manufacturers' Railroad Company*, Civil No. 6-414; *idem*, Civil No. 19-307. These cases have been held on the suspense calendar of the court and have not been brought to trial (as the result of stipulation and orders of the court), awaiting the determination of the Commission herein as to the measure of reasonable compensation, and pending the decision in the present action as to the validity of the Commission's determination and order.

Florida v. *United States*, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74;

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1;

Interstate Commerce Commission v. *Union Pacific Ry Co.*, 222 U. S. 541;

New England Division Case, 261 U. S. 184;

Alton R. Co. v. *United States*, 287 U. S. 229;

United States v. *Lowden*, 308 U. S. 225;

Hudson & Manhattan R. Co. v. *United States*, 313 U. S. 98;

Interstate Commerce Commission v. *Railway Labor Executives Association*, 315 U. S. 373; and *Interstate Commerce Commission* v. *Hoboken Manufacturers' Railroad Co.*, No. 43, October Term, 1943, decided December 6, 1943.

F. Opinion and decrees of the District Court

Appended to this statement are: (1) copies of the opinion, findings of fact and conclusions of law of the District Court dated October 9, 1943, and (2) copies of the supplemental opinion and final decree of said court sought to be reviewed, dated December 8, 1943.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated January 7, 1944.

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Charles Fahy,
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THORN LORD,
United States Attorney.

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In the District Court of the United States for the District of New Jersey

CIVIL No. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
PETITIONERS

vs.

UNITED STATES OF AMERICA, DEFENDANT

AND

THE INTERSTATE COMMERCE COMMISSION, ET AL.,
INTERVENERS-DEFENDANTS

OPINION

Before BIGGS, *Circuit Judge,* and FAKE and SMITH, *District Judges*

FACTS

BIGGS, *Circuit Judge.*

The suit at bar was brought under the provisions of Acts of Congress approved June 18, 1910 (36 Stat. 539), March 3, 1911 (36 Stat. 1148) and October 22, 1913 (38 Stat. 219), 28 U. S. C. A., Secs. 41 (28) and 43 to 48 inclusive, by some fifteen trunk line rail carriers to set aside an order of the Interstate Commerce Commission entered by the Commission in its proceedings at

Nos. 25728 and 27878 on October 13, 1941. Though the amended petition complains of two other orders, they are supplementary to or in aid of the order of October 13, 1941, and therefore it is the order of October 13, 1941, with which we are really concerned. Since the case at bar requires extensive findings of fact we shall endeavor to reduce this opinion to essentials in an endeavor to make a complicated factual situation plain. The findings of fact filed with this opinion will state the facts more fully.

The order of October 13, 1941 [1] requires some fifty-two rail carriers, accordingly as they partici-

[1] As follows:

ORDER

No. 25728

Hoboken Manufacturers Railroad Company v. *Abilene & Southern Railway Company et al.*

No. 25878

New Orleans and Lower Coast Railroad Company v. *The Akron, Canton & Youngstown Railway Company et al.*

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report together with the prior reports, 206 I. C. C. 328 and 237 I. C. C. 297, are hereby referred to and made a part hereof:

It is ordered, That the defendants listed in the appendix to said report on further hearing, according as they par-

pate in through-rail and water routes with Seatrain Lines, Inc., in interstate commerce between Belle Chasse (New Orleans), Louisiana, and Hoboken, New Jersey, to cease and desist from prohibiting the interchange of their freight cars with Seatrain. The order also requires the rail carriers to establish reasonable rules for freight car interchange with Seatrain at a per diem rate of $1.00 per day per car but provides also that the per diem is to be paid by Seatrain only for such periods of time as the cars are in its actual posses-

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ticipate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.

It is further ordered, That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day: provided, however, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

And it is further ordered, That this order shall continue in effect until the further order of the Commission.

sion. The Interstate Commerce Commission, Seatrain, New Orleans & Lower Coast Railroad Company, hereinafter referred to as Lower Coast, and Hoboken Manufacturers Railroad Company, hereinafter referred to as Hoboken Railroad, have intervened in this proceeding as parties defendant.

Seatrain is a common carrier by water subject to the Commission's jurisdiction. Investigation of Seatrain Lines, Inc., 195 I. C. C. 215. A description of the manner in which Seatrain operates is set out fully in an opinion of this court reported in 47 F. Supp. 779, at p. 781. Seatrain operates ocean going vessels having four decks, each deck in turn having four sets of standard-gauge railroad tracks. By means of a special loading device, consisting of a crane and cradle, provided at three ports (Hoboken, New Jersey, Belle Chasse, Louisiana, and Havana, Cuba), loaded freight cars with their contents are put on board Seatrain ships without breaking bulk and are thus transported in commerce. Seatrain's transportation usually takes the cars and their contents into the port of Havana, Cuba, en route to or from Hoboken or Belle Chasse. The loading facilities for Seatrain ships are located at Belle Chasse on the property of Lower Coast, a terminal-switching railroad, a subsidiary of the Missouri-Pacific Railroad Company, connecting in turn with the Southern Pacific and the Texas-Pacific Railroad Company. The loading facilities at Hoboken are located on the property of Hobo-

ken Railroad. Hoboken Railroad is a short, single-track terminal-switching line which runs along the water front of Hoboken and connects with the Erie Railroad, and via the Erie, with other trunk lines reaching New York harbor.

From 1929 to 1932 Seatrain and its predecessor company operated its ships between Belle Chasse and Havana exclusively. During this period most of the petitioners in the case at bar allowed their cars to be delivered freely to Seatrain ships to be delivered to Cuban railroads. In 1931 Seatrain contemplated the extension of its operations into interstate commerce by the use of the Port of New York and in 1932 made arrangements to effect that end with Hoboken Railroad. These arrangements are described at length in our prior opinion. See 47 F. Supp. at p. 783. Just prior to the inauguration of Seatrain's interstate service, the American Railway Association (to which trunk line railroads including the petitioners belonged) promulgated a car service rule which was intended to eliminate Seatrain as a competitor. The rule (Rule 4) provides, "Cars of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division."

The promulgation of this rule by the American Railway Association and the refusal of many of the petitioners to permit the delivery of their cars to Seatrain brought an immediate reaction. Ho-

boken Railroad and the Lower Coast filed two separate complaints with the Commission and attacked the refusal of the railroads to allow their freight cars to be used by Seatrain. Seatrain was permitted to intervene in both proceedings. The two complaints were subsequently consolidated and the consolidated cause has been before the Commission for hearings and argument on at least three different occasions. In 1935 the Commission held in its report in Investigation of Seatrain Lines, Incorporated, at No. 25565[2] (206 I. C. C. 328) that Seatrain was a common carrier by water and subject to the jurisdiction of the Commission; that the service of Seatrain between Hoboken and New Orleans was in the public interest and (most important of all insofar as the legal questions presented in this case are concerned) that where through routes existed between rail carriers and water carriers the Commission had jurisdiction to require rail carriers who were parties to such through routes to interchange cars with water carriers if such was the reasonable and appropriate method of interchanging traffic moving over such

[2] The report also embraced No. 25546, Application of Missouri-Pacific Railroad Company and Texas & Pacific Railway Company under Section 5 (19-21) of the Interstate Commerce Act in the Matter of Installation of Common-Carrier Service by Water Other Than Through Panama Canal, No. 25728, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company*, and No. 25878, *New Orleans & Lower Coast Railway Company* v. *Akron, Canton & Youngstown Railway Company*.

through routes. The Commission stated, "We find nothing in the act imposing any duty upon or giving us jurisdiction to require a rail carrier to permit delivery of its cars to a water carrier where through routes between such rail and water carriers do not exist." The Commission also went on to say, "Whether defendants [including some of the petitioners in the case at bar] who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record."

Thereafter, on January 28, 1938, in a proceeding at No. 25727, known as the "Seatrain Through-Route Case," *Seatrain Lines, Incorporated,* v. *Akron, Canton & Youngstown Railway Company* (226 I. C. C. 7), the Commission found that through routes existed between certain rail carriers (including some of the petitioners) in connection with Seatrain "between points in trunk-line and New England territories, on the one hand, and southwestern territory on the other hand"; "That the public interest requires the establishment and maintenance of through routes and joint rates" by certain trunk-line rail carriers (including the petitioners) in connection with Seatrain between designated points in official territory, and southwestern territory; and that these connections were in the public interest. The Commission then proceeded to prescribe maximum joint rates. These joint rates were modified following a further hearing

of the same proceeding in 1940 (243 I. C. C. 199) so as not to exceed the joint rates over comparable routes between rail carriers and break-bulk water lines. The latter, of course, do not use railroad cars on their ships. It is important to have in mind that The Pennsylvania Railroad and certain of the other petitioners thereupon established the through routes prescribed by the Commission and, as the amended petition alleges, those through routes are now in full force and effect.

The Commission reopened for further hearing the proceedings at Nos. 25728 and 25878, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company*, and *New Orleans & Lower Coast Railroad Company* v. *The Akron, Canton & Youngstown Railroad Company*, to determine on what terms and conditions, including compensation, the petitioners should be required to interchange their freight cars with Seatrain. On October 13, 1941, after completing its hearings the Commission announced its final decision (248 I. C. C. 109) and entered the cease-and-desist order of October 13, 1941, complained of in this proceeding. The Commission reaffirmed its jurisdiction to require rail carriers, parties to through routes with Seatrain, to permit the use of their freight cars in Seatrain's service.[3] The Commission found

[3] As we have already stated, in its interstate commerce Seatrain usually carried cars destined for Belle Chasse or Hoboken to Havana, Cuba. This is a fact which is conceded by all the parties.

that the rail carriers' refusal to permit interchange of cars between themselves and Seatrain was a violation of the Interstate Commerce Act and that the current code of per diem rates governing the interchange of freight cars between the various railroads, including the current inter-railroad rate of $1.00 per day, should be payable by Seatrain, though only for such periods as the rail-carriers' cars were in its actual possession.[4] On the same day the order complained of was entered by the Commission.[5]

The petitioners contend that the order of October 13, 1941, should be set aside or at least mitigated for three reasons. First, they assert that there is no duty on rail carriers to deliver their freight cars for the use of, or to interchange their cars with, a water carrier and that the Commission has no authority to direct such delivery or interchange. Second, they contend that the Commission is without power to require rail carriers to permit their cars to be taken and used on ocean-going vessels of a water carrier for trans-

[4] Seatrain has no cars of its own though it has indicated its willingness to buy freight cars. It already rents a substantial number of privately owned cars.

[5] The Commission ordered the proceeding at No. 25565 to be discontinued, the proceedings at Nos. 25728 and 25878 to be dismissed without prejudice to the filing by Hoboken Railroad and Lower Coast of a petition for further consideration or for filing of new complaints after the proceeding at No. 25727 had been disposed of, if the situation then warranted such action.

portation from place to place in the United States, such transportation going into a foreign port and through foreign waters. They assert last that the compensation fixed by the Commission for the use of the rail carriers' freight cars by Seatrain is confiscatory and that the orders of the Commission "exempting" Seatrain from paying for the use of railroad cars held for acceptance by it (as distinguished from cars actually in its possession) are unreasonable and arbitrary.

LAW

I

The parties have suggested to the court that this case may be moot because of circumstances brought on by war. This point was raised, we believe, merely for the purpose of fully informing the court as to present conditions governing Seatrain's service. Without going into details as to the nature of this service, it is sufficient to state that the order of the Commission is presently in effect and that that order requires the petitioners not only to abstain from enforcing present rules, regulations and practices which prohibit the interchange of their freight cars for transportation by Seatrain in interstate commerce, but also requires the petitioners to establish on or before a specified date, and thereafter to observe, rules and regulations with respect to the interchange of their freight cars for transportation by Seatrain in interstate commerce.

We conclude that there is a justiciable controversy before this court within the purview of the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. A. Sec. 41 (28) and Secs. 43 to 48, inclusive. The Commission's order is a continuing one and embraces not only a negative duty upon the petitioners but requires affirmative conduct upon their part as well. Though the circumstances of Seatrain's service have been changed by the war, the case is not moot and the petitioners are entitled to a review of the order complained of. See *Federal Trade Commission* v. *Goodyear*, 304 U. S. 257, and the cases cited therein.

II

The petitioners contend that the history of the Interstate Commerce Act demonstrates that common carriers by rail have no duty to interchange cars with common carriers by water and the Commission has no power to direct interchange of cars between such carriers. If this be true the relief sought by the petitioners must be granted. To ascertain the correctness of this legal proposition a brief history of the Interstate Commerce Act and of some of the amendments to it is necessary.

Section 1 of the original Act of February 4, 1887, 24 Stat. 379, defined the term "railroad." We shall deal more specifically with other provisions of Section 1 at a later point, under heading III, of this opinion. Section 3 provided in part

that "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, * * *." The provisions quoted have remained in substance in the Act since 1887. Section 12 set forth the duties of the Commission which were largely those of an investigatory body.

The Hepburn Act of June 29, 1906, 34 Stat. 584, increased the powers of the Commission and made it to some extent a regulatory as well as an investigatory body. The Hepburn Act also enlarged the definition of a railroad to include water carriers when both are used for continuous carriage or shipment in interstate commerce. The term "railroad" was defined to include the facilities required for "transportation" and the term "transportation" was itself defined so as to include cars. Section 1 of the Hepburn Act provided that it should "be the duty of every carrier subject to the provisions of this Act * * * to establish through routes and just and reasonable rates applicable thereto." The Hepburn Act required connections between lateral or branch-line railroads and trunk line carriers and required cars to be furnished for the movement of through

traffic. The Commission was not expressly given the power to compel carriers to exchange cars.

The Mann-Elkins Act of June 18, 1910, 36 Stat. 539, 545, again amended the Interstate Commerce Act. Section 7 of the Mann-Elkins Act broadened the definition of "transportation" as contained theretofore in Section 1 of the Interstate Commerce Act. The section also provided that the carriers subject to the Act should establish through routes with applicable rates and make reasonable rules and regulations with respect to the "exchange, interchange and return of cars" used on such through routes.

The Interstate Commerce Act was amended further by the Esch Car Service Act of May 29, 1917, 40 Stat. 101. This statute employed the term "car service" which it defined as including the "exchange, interchange and return of cars" used by any carrier subject to the provisions of the Interstate Commerce Act. It required every carrier subject to the Interstate Commerce Act to establish reasonable rules and regulations for car service used in connection with through routes and specifically gave the Commission power to establish reasonable rules and practices in respect to car service if a carrier failed to do so. It also provided a penalty to be imposed if a carrier refused to comply with orders or directions of the Commissioner as to car service. The Commission was empowered by general or special order to require all carriers to file rules and regulations in

respect to car service and also was given power, "* * * after hearing, on a complaint or upon its own initiative without complaint [to] establish reasonable rules, regulations and practices with respect to car service, * * *."

The petitioners take the position that even the Esch Car Service Act did not expressly impose on carriers by railroad a duty to exchange cars and did not impose any duty on carriers by rail to exchange cars with carriers by water. They contend further that the Esch Car Service Act did not give the Commission authority to require such service of them. These contentions cannot be sustained for the contrary clearly appears from the express words of the Esch Car Service Act. After the passage and approval of the Esch Car Service Act the Commission had the power to compel the exchange, interchange and return of cars between carriers subject to the Act. Since rail carriers and water carriers were subject to the Act, the Commission had the power to compel the interchange of cars between a rail carrier and a water carrier such as Seatrain.

An important change was worked in the Interstate Commerce Act by the Transportation Act, 1920, 41 Stat. 456. Section 400 (4) of Title IV of the Transportation Act, 1920, amended Section 1 of the Interstate Commerce Act and provided that every common carrier subject to the Interstate Commerce Act should establish through

routes and reasonable rates applicable thereto, should provide reasonable facilities for operating through routes and should make reasonable rules and regulations with respect to the operation of such through routes. It will be noted that the express provision of the Mann-Elkins Act which required common carriers subject to the Interstate Commerce Act "* * * to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars * * *" to be employed in connection with through routes, was omitted from the Transportation Act, 1920, in favor of the provisions of the next referred to.

Section 402 of the Transportation Act, 1920, amended the paragraphs added to Section 1 of the Interstate Commerce Act by the Esch Car Service Act to read, in part, as follows:

> (10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return to locomotives, cars * * * by any carrier by railroad subject to this Act.
>
> (11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; * * *
>
> * * * * *
>
> (13) The Commission is hereby authorized by general or special orders to require

all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

The petitioners lay particular emphasis on the provisions of Section 1 (10) (11) (13) and (14) of the Interstate Commerce Act as amended by the Transportation Act and point out that it became the duty of "every carrier by railroad" to furnish safe and adequate "car service." The petitioners argue that since the "car service" provisions of the Act as amended expressly imposed the duty to furnish car service on carriers by railroad and did not impose that duty on carriers by water (the Mann-Elkins Act having expressly imposed

this duty on rail and water carriers alike), rail carriers were required, after the enactment of the Transportation Act, 1920, to interchange their cars only with rail carriers and not with water carriers. In short, the petitioners contend that despite the fact that water carriers as well as rail carriers were then subject to the provisions of the Interstate Commerce Act and were required to establish through routes, the duty of car service was limited by the Transportation Act, 1920, to carriers by railroad who were required only to exchange cars with carriers by railroad. The petitioners assert that their argument is strengthened by the fact that while Section 402 (13) of the Transportation Act expressly conferred on the Commission the power to compel a carrier by railroad to furnish its lines with adequate facilities for fulfilling the requirement of car service imposed by the Transportation Act, 1920, it gave no like power to the Commission to compel water carriers to supply such facilities, and that, therefore, it was the intention of Congress not to compel the exchange of cars between carriers by rail and carriers by water.

The Transportation Act of 1940, 54 Stat. 898, recast the Interstate Commerce Act. Provisions respecting railroads were put in part I; those relating to motor carriers, in part II; and those affecting water carriers were placed in part III.

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Part III, commonly called the Water Carrier Act, 49 U. S. C. A. §§ 901, *et seq.*, Section 2 (c) of the Transportation Act of 1940, 49 U. S. C. A. Sec. 1 (4), amended Section 1 (4) of the Interstate Commerce Act. Subsections 10, 11, and 13 of Section 1 of the Interstate Commerce Act remained unchanged by the amendments of the Transportation Act of 1940, 49 U. S. C. A. Sec. 11 (10), (11), and (13). Subsection (14) of Section 1 of the Interstate Commerce Act was altered. Section 1 (14) (a), reads as follows, "The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

The petitioners contend that the Transportation Act of 1940 and in particular those provisions just quoted, makes it clear that they have no duty to interchange cars with a carrier by water, and that the Commission possesses no power to compel them to do so; that the duty to interchange cars with carriers by water imposed on them by the

Esch Car Service Act and allegedly obliterated by the amendment to the Interstate Commerce Act embodied in the Transportation Act, 1920, were not reimposed upon them. They concede that Section 1 (4), 49 U. S. C. A. § 1 (4), requires the establishment of through routes by carriers by rail with carriers by water, but they go no further.

Putting aside the prior decisions of the Commission and of the courts[6] which are not helpful

[6] We think that we need not discuss the decision of the Interstate Commerce Commission in *Missouri and Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39, decided in 1911 and cited with approval by the Supreme Court in 1931 in *Chicago, Rock Island & P. Ry. Co.* v. *United States*, 284 U. S. 80, 91. The Interstate Commerce Commission in the cited case had before it Section 7 of the Mann-Elkins Act of June 18, 1910, 36 Stat. 539, 545, which specifically provided as we have stated that it was the duty of every common carrier subject to the provisions of the Act, not only to provide reasonable facilities for operating through routes but also "* * * to make reasonable rules and regulations in respect to the exchange, interchange and return of cars used therein, * * *." We have not discussed such decisions as *Colorado Coal Traffic Ass'n* v. *C. & S. Ry. Co.*, 24 I. C. C. 618, or *Omaha Grain Exchange* v. *Great Northern Ry Co.*, 47 I. C. C. 532, decided respectively in 1912 and 1917, for similar reasons. These are cases in which the Commission reiterated its authority to require car interchange between carriers by railroad where they were parties to through routes. The provisions of Section 7 of the Mann-Elkins Act were applicable when the first case was decided and those of the Esch Car Service Act, 40 Stat. 101, were pertinent in the latter case. For substantially similar reasons we have omitted also any discussion of such cases as *Flour City C. C. Co.* v. *Lehigh Valley R. Co.*, 24 I. C. C. 179, decided in 1912, and *Chat-*

in view of the present form and substance of the Interstate Commerce Act and restricting ourselves to the words of the Interstate Commerce Act, we are unable to agree with the contentions of the petitioners for the reasons which follow.

Section 1 (1) (a) of the Act, 49 U. S. C. A. § 1 (1) (a), provides that the provisions of part I shall apply to common carriers engaged in the transportation of property "* * * partly by railroad and partly by water when both are used under * * * [an] arrangement for a continuous shipment * * *." The word "both" as used is a term of art. It means that the provisions of part I except where expressly inapplicable by reason of specific terms in some of its sections, are made to apply to common carriers by water where they are engaged in transporting goods as part of the continuous shipment in cooperation with a carrier by railroad.

Section 1 (3) (a), 49 U. S. C. A. § 1 (3) (a), defines the term "common carrier" as including all persons "engaged in such transportation as aforesaid as common carriers for hire." The

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tanooga Packet Co. v. *Illinois Central R. Co.*, 33 I. C. C. 384, decided in 1915.

We shall not deal with the provisions of the Panama Canal Act of August 24, 1912, 37 Stat. 568, in this phase of our decision because that portion of it remaining in the Interstate Commerce Act (Section 6 (11), 49 U. S. C. A. § 6 (11)) is more pertinent to the subject considered under the next heading of this opinion.

transportation previously described is that set out in Section 1. Section 1 (3) (a) defines transportation as including "* * * cars * * * and other vehicles * * *, and all instrumentalities and facilities of shipment * * *, irrespective of ownership * * *."

Section 1 (4), 49 U. S. C. A. § 1 (4), provides: "It shall be the duty of every common carrier subject to * * * [part I] to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

The petitioners and Seatrain are subject to the provisions of part I of the Act since they perform transportation services of the kind described in Section 1 (1) (a). Such carriers are required to furnish "transportation" which may include cars as specified by Section 1 (3) (a) needed for the maintenance of through routes. Carriers by railroad are expressly required by Section 1 (4) to establish through routes with carriers by water and the subsection provides also that "every such common carrier [by rail or by water engaged in continuous shipments] * * * establishing through routes to provide reasonable facilities for operating such routes * * *." Cf. Section 305 (b), 49 U. S. C. A. § 905 (b), relating fo carriers by water under part III.

We think that it follows that rail carriers are required by the Interstate Commerce Act to supply cars which may go upon the lines of other carriers, including carriers by water, as may be necessary for the maintenance of through routes for continuous shipments at least insofar as the transportation takes place within the United States or its territorial waters. This is so because of the definition of "transportation" contained in Section 1 (3) (a) and because of the further fact that cars indubitably are "facilities" of carriage as described in Section 1 (4). Cf. *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422.[7]

[7] It must be noted that the Supreme Court and Mr. Justice Roberts, the author of the opinion in the cited case,

Such is the duty of common carriers by rail, but that is not to say that Congress has given the Commission authority to compel reluctant carriers to fulfill this duty. To ascertain the authority of the Commission in this respect it is necessary to turn to the "car service" provisions of the Act. Subsection 10 of Section 1 defines the term "car service" as including the use, control, supply, movement and distribution of cars. Subsection (11) provides that it shall be the duty of "every carrier by railroad" subject to part I to furnish car service. The subsection is notably silent in that it does not state to what carriers (subject to part I) the rail carriers shall supply car service. As we have already indicated, common carriers by water are subject to the provisions of part I upon the existence of the specified conditions of continuous carriage and through routes. We think therefore that carriers by railroad are required to exchange cars with carriers by water where both carriers are engaged in the transportation of property under an arrangement for continuous shipment on through routes. Subsection (13) authorizes the Commission "by general or special orders to require all carriers by railroad" subject to part I to file rules

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were construing the provisions of Section 15 (13) of the Act, 49 U. S. C. A. Sec. 15 (13) which relates to the allowance to the owner of property transported who furnishes an instrumentality for the transportation. But referring to 49 U. S. C. Sec. 1 (3), Mr. Justice Roberts said, 308 U. S. 428, "Freight cars are facilities, as defined by the Act."

and regulations with the Commission in respect to car service, and, in the Commission's discretion, to direct that these rules and regulations shall be incorporated in the rail carriers' schedules. Subsection 14 (a) gives the Commission authority on a complaint or upon its own initiative without a complaint, to establish rules and regulations and practices in respect to car service.[8] We think that it is clear that in view of the provisions of subsections (13) and (14) (a) that the Commission possesses the power to require carriers by railroad to supply common carriers by water with cars when necessary to effect transportation by rail and water routes for continuous shipment over through routes in interstate commerce insofar as that transportation takes place within the United States or its territorial waters.

Broad construction is required. A "National Transportation Policy" was declared by the sections preceding Sections 1, 201, and 301 of the Interstate Commerce Act, 49 U. S. C. A. §§ 1, 301, and 901, added by the Transportation Act of 1940. Congress intended the Act to develop, coordinate, and preserve "a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal

[8] See also subsections (15), (17) (a) and (21). These subsections are auxiliary to and in aid of subsections (10) to (14), inclusive.

Service, and of the national defense." The National Transportation Policy as stated by Congress requires all of the provisions of the Interstate Commerce Act to be "administered and enforced" with a view to carrying out this intention.

III

The petitioners also take the position that the Commission is without power to require rail carriers to permit their cars to be taken and used on the ocean-going vessels of a carrier by water such as Seatrain, through foreign waters, the vessels of the carrier by water docking during the course of the voyage at a foreign port. The facts are not in dispute. Seatrain carries cars of the petitioners from Hoboken, New Jersey, to Belle Chasse, Louisiana, and from Belle Chasse to Hoboken, frequently operating by way of Havana, Cuba. Graham M. Brush, president of Seatrain, made the character and scope of Seatrain's operations very plain. His testimony is set out in the margain.* The Commission found, 226

*See p. 21 of the transcript in I. C. C. Docket No. 25565, which was made part of the record in I. C. C. Docket No. 25728 and No. 25878 (I. C. C. Tr. 240–6; Exhibit 36).

Mr. Brush testified in this connection as follows:

"Q. Your ships are now operating in what service or in what services, Mr. Brush?

"A. Our present operation is from New York to Havana, thence to New Orleans, returning from New Orleans to Havana to New York; the ships leaving New York and

I. C. C. 7, 13–14, that "* * * the undisputed facts are that the ordinary route of Seatrain between Hoboken and Belle Chasse is via Havana; that over such route the vessels operate in part through foreign waters and touch a foreign port; that occasionally the call at Havana is omitted, in which instances the route is in part outside the territorial waters of the United States; that when the vessels call at Havana, cars containing interstate freight are placed under United States customs seals at the port of departure and remain so until arrival at the port of destination, and the freight contained in such cars is not made accessible to the Cuban authorities; that three sets of manifests are made out at the port of departure, one required by the Cuban authorities and another required by the United States customs relate to freight for Cuba, and the third, which shows only the cars moving in interstate commerce, is given the Cuban customs inspector as a matter of information; that no Cuban official

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clearing for the foreign ports, entering Havana and again clearing from Havana for a foreign port.

"Q. What is the length of the voyage from New York to Havana?

"A. In time the voyage is three and a half days under the present operating schedule from New York to Havana, a distance of approximately 1200 nautical miles.

"Q. And from Havana to New Orleans?

"A. From Havana to New Orleans the running time is approximately two days, a distance of 600 nautical miles.

"Q. In those voyages do your ships go out to sea?

"A. Yes, sir. * * *

has ever attempted to take jurisdiction over the interstate freight; and that there are no Cuban regulations affecting Seatrain's operations, but its vessels while at Havana are subject to all Cuban laws and regulations, such as those relating to quarantine and health, applicable to vessels of foreign register." It is conceded that Seatrain transports a very substantial number of empty cars, routing them preferably by Havana, in the hope that there they may pick up loads.

The Commission based its jurisdiction to require the petitioners to deliver their cars to Seatrain for transportation on its routes via Havana, on the provisions of what was formerly Section 6 (13) (b) of the Interstate Commerce Act, read in conjunction with former Section 5 (19)[10] of the Act. The Commission held that the phrase used in Section 6 (13) "through the Panama Canal or otherwise" was the equivalent of the phrase employed in Section 5 (19), "through the Panama Canal or elsewhere." Section 5 (14) prohibits the ownership or control by a railroad of a competing water carrier operating "through the Panama Canal or

[10] Paragraph (b) of subsection (13) of Section 6 was repealed by the Transportation Act of 1940. See 54 Stat. 910 and Section 6 (11) of the present Act, 49 U. S. C. A. § 6 (11). Subsection (11) was incorporated in the Transportation Act of 1940 and by it was made part of the present Interstate Commerce Act. See Section 5 (14), 49 U. S. C. A. § 5 (14). These provisions were part of the Panama Canal Act of 1912. See Sections 6 (13) (b) and (11) of the Act of August 24, 1912, c. 390, 37 Stat. 566.

elsewhere." We think that the Commission's conclusion that the phrase of Section 6 (13) has the same meaning as that quoted from Section 5 (19), is correct.[11] The Commission has repeatedly construed Section 5 (19) as being applicable to carriers by water operating to or via foreign ports (see *New Orleans and Havana Car Ferry Service*, 188 I. C. C. 371) and did so in the Seatrain Through Route Case before the Transportation Act of 1940 was enacted.

The respondents assert that the provisions of old Section 6 (13) (b) were in substance reenacted and broadened by Section 15 (3) and Section 307 (d), 49 U. S. C. A. §§ 15 (3) and 907 (d), of the Interstate Commerce Act as constituted after the enactment of the Transportation Act of 1940. The respondents go a step further, however. They take the position that Sections 1 (4) and 3 (4) of the Interstate Commerce Act, 49 U. S. C. A. §§ 1 (4) and 3 (4) as constituted by the Transportation Act of 1940, gave carriers by water the benefit of the obligations imposed upon carriers by railroad. The Interstate Commerce Commission took a similar view in the rehearing at No. 25728. See 248 I. C. C. 109.

Section 302 (d), 49 U. S. C. A. § 902 (d), defines a "common carrier by water" as "any person which holds itself out to the general public to engage in the transportation by water in inter-

[11] Compare *Chicago, R. I. & P. Ry. v. United States*, 274 U. S. 29.

state or foreign commerce of passengers or property * * *."

Section 302 (i), 49 U. S. C. A. § 902 (i), defines "interstate or foreign transportation" or "transportation in interstate or foreign commerce" as used in part III as transportation of property "(2) partly by water and partly by railroad * * *, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof such terms shall include transportation by railroad * * * only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States; * * *" Do the words of subparagraph (i) (2) extend the jurisdiction of the Commission to transportation throughout its whole course from a place to a place within the United States despite the fact that that course of transportation transverses extra-territorial waters and goes into a foreign port? We conclude that this was the intention of Congress. We think therefore that the Commission has jurisdiction over transportation such as that carried on by the petitioners and Seatrain, from state to state in the United States, throughout the whole course of that transportation even if it passes through foreign waters and into foreign ports. But the fact that the Commission has

jurisdiction of such transportation does not necessarily mean that the Commission can compel carriers by railroad to provide carriers by water with cars for routes passing through extraterritorial waters and into a foreign port.[12] What must be our conclusions as to this question?

As we have already stated, part III of the Interstate Commerce Act deals primarily with carriers by water. It expressly contemplates the establishment of through routes by common carriers by water with common carriers by railroad. See Section 305 (b), 49 U. S. C. A. § 905 (b), which repeats with one very pertinent exception, referred to hereinafter, the substance of Section 1 (4), part I of the Act. Section 305 (b) provides that common carriers by water are required "* * * to provide reasonable facilities for operating such through routes, * * *," i. e., to provide facilities for operating through routes with carriers by railroad. Section 302 (l), 49 U. S. C. A. § 902 (l), provides that the term "common carrier by railroad" means "a common carrier by railroad subject to the provisions of part I." In short, the "common carriers by railroad" referred to in Section 305 (b), with which it is the duty of common carriers by water to establish through routes, are the common carriers by railroad defined in and subject to the provisions of

[12] Compare the decision of the Supreme Court in *Chicago R. I. & P. Ry.* v. *United States*, 274 U. S. 29, which was based on old Section 6 (13) (b).

Part I. Section 1 (1) of part I defines the transportation to which the provisions of part I are applicable as the transportation of property partly by railroad and partly by water under arrangement for a continuous shipment "from any place in the United States through a foreign country to any other place in the United States * * *, but only in so far as such transportation takes place within the United States." This limitation placed upon the nature of the transportation embraced by Section 1 (1) does not limit the definition of transportation contained in Section 302 (i) (2). This is obvious for the scope of the transportation defined in part III, Section 302 (i) (2) is much broader than the concluding phrase of Section 1 (1). But the common carriers by railroad subject to part III are those which, by express definition, are subject to the provisions of part I, and if cars are to be gotten from carriers by railroad for the use of carriers by water, it must be by virtue of the provisions of part I. Does it follow, therefore, that the car service provisions of the Act, subsections (10) to (14) of Section 1 of part I are applicable to compel common carriers by railroad to interchange cars with common carriers by water *only* for the transportation defined in Section 1 (1); that is to say, for such transportation as takes place within the United States or its territorial waters? This is the gist of the question now before us.

We held under heading II that a common carrier by railroad has the duty to interchange cars with common carriers by water when necessary for the operation of an integrated transportation system as required by the National Transportation Policy declared by Congress. The transportation there dealt with was transportation within the United States or its territorial waters, viz, that described in Section 1 (1) of part I of the Act. We are dealing now with the transportation carried on by Seatrain in conjunction with the petitioners under arrangements for continuous carriage or shipment from place to place in the United States but through extraterritorial waters and via the port of Havana. Conceding that the provisions of the Interstate Commerce Act are entitled to the broad interpretation which is necessary to effect the National Transportation Policy stated by Congress, should we reach the conclusion that the provisions of the Act compel carriers by railroad to furnish cars to carriers by water for such transportation?[13]

[13] We are not unmindful of the decisions of the Commission referred to in note 11, supra, or to that of the Supreme Court in *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29. In the case last cited the Supreme Court held only that paragraph 13 of Section 6 of the Interstate Commerce Act read in conjunction with paragraph 4 of Section 15 of the Act (both sections being part of the Panama Canal Act as it existed prior to the enactment of the Transportation Act of 1940) gave the Commission power to compel a carrier by railroad to

Are there other provisions of parts I or III of the Act that will compel the petitioners to furnish cars to Seatrain for Seatrain's extraterritorial transportation? The respondents point to the provisions of Section 305 (b) and the words of that subsection which require common carriers by water to establish through routes with common carriers by railroad "and to provide reasonable facilities for operating such through routes * * *." But, assuming that cars are to be considered as facilities of transportation under this section, the duty is one which is imposed only upon carriers by water and not upon carriers by railroad. The sentence of Section 1 (4), "It shall be the duty of every such common carrier [by railroad and water] * * * to provide reasonable facilities for operating such

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embrace in a through route by rail and water, through the Panama Canal, the transportation of passengers and of freight. The decision did not deal at all with any requirement of car service. Contrast the decision of the Supreme Court in *St. Louis, etc., Ry. Co.* v. *Brownsville Dist.*, 304 U. S. 295, 300, decided in 1938. In the cited case, Mr. Justice Butler, after setting out the car service provisions of the Interstate Commerce Act as they existed prior to the passage of the Transportation Act of 1940 (unchanged by the latter Act except as to Section 6 (14), stated, "The Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation or tariff to furnish cars for transportation in Mexico." The Supreme Court, however, was dealing only with transportation by rail and not with transportation by rail and water.

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[through] routes * * *" is absent from Section 305 (b) and there is therefore no conjoint duty imposed by it on carriers by railroad and carriers by water. The respondents therefore cannot maintain any position on the strength of the contents of Section 305 (b).

Does the Panama Canal Act as now constituted in part I, Section 6 (11), 49 U. S. C. A. Sec. 6 (11), serve to support the respondents' position and that of Hoboken Railroad? The latter company lays particular emphasis on the provisions of the Panama Canal Act and has constructed a singular ingenious argument in aid of its point of view. It points to the provisions of Section 6 (11) as they now exist,[14] and in particular to that clause of the first paragraph which says when

[14] Section 6 (13) of the Panama Canal Act as amended by the Transportation Act, 1920, provides, "When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, * * * the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

"(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made * * *

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

the transportation is from point to point in the United States by rail and water through the Panama Canal or otherwise, and not entirely within the limits of a single State, the "* * * Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in addition to the jurisdiction given by * * *" the Interstate Commerce Act as amended, "* * * in the following particulars * * *", viz., those set out in subparagraphs (a) and (b). The Hoboken Railroad lays emphasis on the phrase "in addition to the jurisdiction given by * * *" the Interstate Commerce Act and contends that these words enlarge the powers given to the Commission under the Act. This is true, but that enlargement of jurisdiction goes only to the particulars set out in subparagraphs (a) and (b). Subparagraph (a) deals with the establishment of physical connection between the lines of the rail carrier and the dock of the water carrier. Subparagraph (b) requires the establishment of proportional rates between the rail carrier and the water carrier. There is no aid here for the respondents. The fact is that the Panama Canal Act has been emasculated. If the statute stood as it did in former Section 6 (13) (b) and the Commission had retained the power "* * * to determine all the terms and conditions under which such lines [rail and water] shall be operated in the handling of the traffic embraced * * *"

the respondents' position would be a much stronger one.

Another argument can be made, however, which perhaps, will indicate with some sharpness the issue of statutory interpretation presented for our determination. Section 303 (a), 49 U. S. C. A. § 903 (a) provides: "In the case of transportation which is subject both to this part and part I, the provisions of part I shall apply only to the extent that part I imposes, with respect to such transportation, requirements not imposed by the provisions of this part." These are words of limitation. They mean that the provisions of part I shall be applicable to transportation subject both to parts III and I only to the extent that part I makes them applicable.

Turn again to Section 1 (1). May it be said that if transportation by rail to the port of ship-loading (say Hoboken) and transportation by rail from the port of ship-unloading (say Belle Chasse) takes place within the United States, carriers by railroad *must* interchange cars with Seatrain at these points, the whole of the ensuing transportation by water (most of which takes place outside the territorial waters of the United States), becoming subject to all of the provisions of part I, those of Section 1 (4) as well as the car service provisions contained in Section 1 (10), (11), (13), and (14)? In other words, should Section 1 (1) be construed as if some such phrase

as "by rail" were inserted between the words "transportation" and "takes" in its final clause?

We think that there are several answers to this argument. The first is that the last clause of Section 1 (1), "but only insofar as such transportation takes place within the United States * * *" modifies the whole sentence of which it is a part and therefore must be deemed to limit the application of the provisions of part I to transportation "from any place in the United States through a foreign country to any other place in the United States." The clause of limitation certainly does not limit only the phrase immediately preceding it. Second, the provisions of Section 1 (1) by its own terms applies to transportation of property "partly by railroad and partly by water" and therefore it is manifestly improper to insert some such phrase as "by rail" as we have suggested. Such an interpretation would amount to rewriting the statute. Last, Section 1 (2), 49 U. S. C. A. Sec. 1 (2), reiterates the identical limitation enunciated in Section 1 (1) and does so unqualifiedly.

It may be argued that the phrase of Section 1 (1), "from any place in the United States through a foreign country to any other place in the United States," possesses little meaning when read with the clause of limitation. With this we may agree. The original Act to Regulate Commerce, 24 Stat. 379, while it made use

of the phrase "from any place in the United States through a foreign country to any place in the United States," contained no phrase of limitation such as that under consideration. In the Act of June 29, 1906, 34 Stat. 584, amending Section 1 of the Interstate Commerce Act, the phrase last quoted was used again without any words of limitation. The clause of limitation was brought into the Act by Section 400 of the Transportation Act, 1920, 41 Stat. 474. We can find no legislative history which informs us adequately why it was inserted, but we must give to it the effect which we think Congress intended.[15]

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[15] We have been unable to find any legislative history adequately explaining the inclusion of the clause "• • • but only insofar as such transportation takes place within the United States," first found in Section 400 (1) of the Transportation Act, 1920, 41 Stat. 474. We have examined those portions of the Congressional Record which report the discussions of the bills originally introduced in the Senate and in the House of Representatives. The House and Senate bills did not contain the clause. Both the Senate and the House submitted bills which did not contain the clause to the Conference Committee. The Conference Report sets out the clause under consideration for the first time. See House Report No. 650 to accompany H. R. 10453 (66th Congress, 2d Session, 59th Cong. Rec. Part III, pp. 3043 et seq.). The report of the Committee contains no explanation for the clause. We have been unable to find any transcript of hearings before the Conference Committee. Available indices contain no reference to such hearings and their absence indicates that there were none.

We can find no textbook which deals with this particular clause, and we have been unable to find any pertinent discussion in any law review article.

The following discussion, which relates to the similar

We conclude that it means precisely what it says however inconsistent its provisions may seem when read with the phrase "from any place in the United States through a foreign country to another place in the United States." The effect of the limitation is to restrict the operation of the provisions of part I of the Interstate Commerce Act to transportation taking place within the

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provision of what became Section 400 (2) of the Transportation Act, 1920, took place in the House of Representatives on November 14, 1919. See 58 Cong. Rec. p. 8256.

"Mr. EDMONDS. Mr. Chairman, I would ask the chairman of the committee a question. I move to strike out the last word.

"On page 39, sections (a) and (b), is it the intention of the committee to include our foreign commerce under the Interstate Commerce Commission, or to make rates and supervise and regulate?

"Mr. ESCH. That does not change the existing law. It has been the law for years.

"Mr. EDMONDS. That is true; but has the Interstate Commerce Commission operated in foreign Commerce?

"Mr. ESCH. No. Its jurisdiction would not extend beyond the 3-mile limit anyhow.

* * * * *

"The gentleman will find the limitation as to transportation over which the committee has exercised jurisdiction on line 3, page 40, to the effect insofar as such transportation and transmission takes place within the United States. The words "within the United States" would not permit it to go beyond the 3-mile limit.

"Mr. EDMONDS. That does not apply then, as I understand it, to the transportation of passengers or property outside the 3-mile limit?

"Mr. ESCH. No."

The discussion quoted related as we have stated to the provision of subparagraph (2) of Section 400 of the Trans-

United States. It follows that the provisions of Section 1 (4) and Section 1 (10), (11), (13), and (14), the car service provisions, are applicable to transportation "only insofar as such transportation takes place within the United States." To conclude that the provisions of part I apply throughout the whole of a course of transportation, which, though it goes from place to place within the United States, in part moves outside of the United States and its territorial waters, would be casuistry.

We can find no provision in the Interstate Commerce Act that imposes a duty upon carriers by railroad to exchange cars with carriers by water engaging as does Seatrain in transportation through extraterritorial waters and through a foreign port and we can find nothing in the Act which

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portation Act, 1920, viz, "The provisions of this Act shall also apply to such transportation of passengers and property * * *, but only insofar as such transportation * * * takes place within the United States." The specific clause of subparagraph (1) was not included in the bill at the time the discussion took place, but it would seem that it must have been the intention of Congress to attribute the same meaning to identical clauses. Congressman Esch thought that the jurisdiction of Congress did not "go beyond the 3-mile limit" in respect to foreign commerce and that this view was generally accepted by his colleagues. Would it not follow, therefore, that the clause of subparagraph (1) should be given the same limiting effect? See the dissenting opinion of Mr. Esch, as a Commissioner of Interstate Commerce in *International Nickel Company* v. *Director General*, 66 I. C. C. 631.

authorizes the Commission to impose such a duty on the petitioners.[16]

The Commission's order must be read against the background of the record. The record is clear as to the nature and extent of transportation of cars by Seatrain beyond the United States and its territorial waters. We have decided that the provisions of the Interstate Commerce Act do not compel the petitioners to interchange cars with Seatrain for such service, nor do they confer authority upon the Commission to compel such interchange. Insofar as the order of the Commission relates only to transportation within the United States or its territorial waters, it will be sustained. Insofar as it serves to compel the petitioners to interchange cars with Seatrain for transportation beyond the United States and its territorial waters, in foreign waters or to a foreign port, it must be modified and limited.[17]

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[16] We are not unmindful of the rule of the ship's flag and that the nationality of American flag vessels by rule of law, comity and practice of nations remains that of the United States. See Taylor, International Public Law, Section 268. The doctrine, however, will not serve to extend the jurisdiction of the Interstate Commerce Act or the authority of the Commission.

[17] We think we should state that we can see no practical way in which Seatrain can operate its ships between Hoboken and Belle-Chasse without going outside of the territorial waters of the United States. We appreciate the effect which this ruling, if it be sustained by the Appellate Tribunal, must have upon Seatrain transportation. The remedy, however, must lie with Congress.

In reaching these conclusions we have endeavored to give to the Interstate Commerce Act the broadest justifiable construction in view of the intention of Congress as declared in the National Transportation Policy. We cannot legislate, however.

What we have said renders it unnecessary to discuss the last point raised by the petitioners; the question of whether the compensation fixed by the Commission for the use of the petitioners' cars is confiscatory.

An order may be submitted.

Findings of fact and conclusions of law are filed with this opinion in accordance with Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A. following § 723c.

JOHN BIGGS, Jr.,
United States Circuit Judge.

GUY L. FAKE,
United States District Judge.

WILLIAM F. SMITH,
United States District Judge.

OCTOBER 9, 1943.

Filed Oct. 9, 1943, at 11 o'clock A. M. William H. Tallyn, Clerk.

FINDINGS OF FACT

1. This suit is brought under the provisions of Title 28, United States Code, Sections 41 (28) and 43–48, inclusive, to enjoin, set aside, annul, and suspend orders of the Interstate Commerce Commission which require certain railroads, including petitioners, to permit the interchange of their cars wth Seatrain Lines, Inc. The said orders were entered in the Commission's Docket No. 25728, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company et al.*, and its Docket No. 25878, *New Orleans & Lower Coast Railroad Company* v. *The Akron, Canton & Youngstown Railway Company et al.*, and are as follows:

Order of October 13, 1941, which incorporates therein the Commission's report of the same date, 248 I. C. C. 109, together with its prior reports of February 5, 1935, 206 I. C. C. 328, and January 8, 1940, 237 I. C. C. 97;

Order of March 2, 1942, which denied various petitions indicated therein; and

So much of the order of the Commission of February 5, 1935, dismissing the complaints in said Docket Nos. 25728 and 25878 as incorporates and makes a part thereof Finding 6 in its report of the same date, 206 I. C. C. 328, 344.

2. All of the petitioners are common carriers of property by railroad subject to the Interstate Commerce Act, were defendants in the proceedings before the Interstate Commerce Commission in said Dockets Nos. 25728 and 25878, and are parties to the said orders entered by the Commission therein.

3. The United States of America is made a defendant herein by virtue of said statutes. The Interstate Commerce Commission, Hoboken Manufacturers Railroad Company, New Orleans & Lower Coast Railroad Company, and Seatrain Lines, Inc., intervened as defendants herein.

4. The Hoboken Manufacturers Railroad is a single-track terminal-switching line extending along the water front of Hoboken, N. J., a distance of 1.632 miles and connecting, at its northern end, with the Erie Railroad and through the Erie with other trunk lines reaching New York Harbor. In addition to its main line, the Hoboken has numerous yard tracks and sidings, a freight house, and team tracks. It serves numerous piers, at which various steamship lines regularly dock, and about 20 industries.

5. New Orleans & Lower Coast Railroad Company, a corporation of the State of Louisiana, herein sometimes called the Lower Coast, is a common carrier by railroad and makes the physical connection with the dock at which vessels of Seatrain receive and deliver railroad cars at Belle Chasse, La., and acts as an intermediate switching

railroad between Seatrain and the trunk line railroad carriers at New Orleans. It is an affiliate of Seatrain.

6. Seatrain Lines, Inc., is a common carrier by water subject to the Commission's jurisdiction. (*Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215.) Since October 6, 1932, Seatrain has operated vessels, on which it transports freight in railroad cars, between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba. Belle Chasse is on the west bank of the Mississippi River about 17 miles south of New Orleans. The method of interchanging freight with Seatrain is described in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 219.

7. The Seatrain vessels could not operate without the loading devices that make possible the transfer of cars between the tracks of the vessels and the tracks of the Hoboken and of the New Orleans & Lower Coast, or without the use of railroad cars, or without the cooperation of the railroad at each of these terminals.

8. From January 1929 to October 6, 1932, Seatrain and its predecessor operated vessels in foreign service between New Orleans (Belle Chasse), Louisiana, and Havana, Cuba, transporting freight in railroad cars on vessels and interchanging cars with Cuban railroads at Havana. During this period cars of all railroads, including petitioners', were delivered to Seatrain or its predecessor for movement from New Orleans to Havana without

objection by petitioners or other owners. 18,159 loaded cars moved over this route, upon which per diem at the per diem rates of the American Railway Association was paid to the owning roads by the Lower Coast for the time the cars were in its possession and that of Seatrain or the Cuban railroads. During that period there was no car-service rule requiring the consents of the owners of cars for their delivery to Seatrain.

9. In 1932, Seatrain entered into negotiations with the railroads serving New York Harbor, including petitioner The Pennsylvania Railroad Company, regarding the possibility of a service between New York Harbor and New Orleans via Havana for which Seatrain would construct two new vessels. No objection was made by the railroads to the interchange of their cars with Seatrain and the railroads expressed their desire that Seatrain should inaugurate the proposed service. Seatrain caused two new vessels to be constructed for this service and arranged for a New York Harbor terminal at Hoboken on the tracks of the Hoboken Manufacturers Railroad. In September 1932 a conference was had between the officials of Seatrain and the Chairman of the Car Service Division of the American Railway Association in regard to the interchange of cars. It was represented by the Chairman of the Car Service Division that the Hoboken, like the Lower Coast, would have to be responsible for the payment of per diem on cars delivered to Seatrain and that

if Seatrain should enter into a contract to reimburse the Hoboken for per diem and to handle cars in accordance with the Car Service Rules the interchange of cars of railroads, members of the Association, with Seatrain would be permitted. Such contract was entered into between Seatrain and the Hoboken.

10. Prior to October 6, 1932, when Seatrain began operating in service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, to wit: on or about October 3, 1932, petitioners, The Pennsylvania Railroad Company and The Long Island Rail Road Company, and other carriers by railroad had notified the Hoboken and Seatrain, respectively, in writing not to deliver, accept, or use their cars in Seatrain service.

11. The American Railway Association was an association of railroads each of which was a subscriber to an agreement known as the Car Service and Per Diem Agreement under which the subscribers thereto agreed to abide by the Codes of Car Service and Per Diem Rules promulgated by the Association. The American Railway Association on November 15, 1932 promulgated, effective as of that date, Car Service Rule 4 which had been adopted by the members thereof, reading as follows:

> Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation, without permission of the owners, filed with the Car Service Division.

Subsequent to November 1933, the American Railway Association was, by consolidation, succeeded by the Association of American Railroads. The petitioners herein, and also Hoboken Manufacturers Railroad Company and New Orleans & Lower Coast Railroad Company, interveners-defendants herein, are and were subscribers to the Car Service and Per Diem Agreement by which they agree and agreed to abide by the rules promulgated by the American Railway Association and its successor, the Association of American Railroads. Petitioners herein have not given their permission for the delivery of their cars to Seatrain for use between Hoboken and New Orleans.

12. Following the promulgation of Rule 4 the Hoboken, on December 30, 1932, filed with the Commission a complaint, known as Docket No. 25728, *Hoboken Manufacturers Railroad Co.* v. *Abilene & Southern Ry. Co., et al.,* and on March 9, 1933, the New Orleans & Lower Coast Railroad filed with the Commission a similar complaint, Docket No. 25878. Both complaints were consolidated by the Commission and the hearings therein were had on one record. Both complaints alleged that Car Service Rule 4 was unlawful under Section 1 (4) and (11), and other sections, of the Interstate Commerce Act.

13. A petition by Seatrain for intervention was submitted on November 2, 1933, and was allowed on the record and filed in said consolidated pro-

ceeding. Said petition alleged that Seatrain "is a common carrier by water engaged in the transportation of freight in railroad cars partly by railroad and partly by water between Hoboken, New Jersey, and Belle Chasse (New Orleans), Louisiana, and between each of these ports and Havana, Cuba." Seatrain therein adopted and realleged as its own the allegations of the complaints in Docket Nos. 25728 and 25878, and joined in and adopted the prayers for relief contained therein. After the said intervention was allowed and before any testimony was taken, the defendants therein moved to dismiss the complaints therein on the ground that the Commission was without authority to grant the relief sought and was without jurisdiction of the matters complained of. Thereafter testimony was taken on November 2, 3, and 4, 1933, and thereafter and on or about March 30, 1934, the Examiner issued his report in which he concluded that the Commission should find that it had no jurisdiction of the matter in controversy and that even if the Interstate Commerce Act could be construed as conferring jurisdiction, the rules, regulations, and practices assailed were not unreasonable, unduly prejudicial, or otherwise unlawful, and that the complaints should be dismissed.

14. Following extensive hearings, the filing of briefs and oral arguments, on February 5, 1935, the Commission decided the consolidated Dockets

Nos. 25728 and 25878. The Commission rejected the conclusions of the Examiner and made the following pertinent findings:

(a) Seatrain's vessels are designed primarily for the handling of railroad cars in non-break-bulk transportation, and the cooperation of railroads is essential to their successful operation.

(b) For its supply of railroad cars, Seatrain depends in part upon contracts with the New Orleans & Lower Coast Railroad, a wholly owned subsidiary of the Missouri Pacific and of the Texas & Pacific Railroad Company.

(c) The only through routes that Seatrain has been able to establish between Hoboken and points to the Southwest are via the lines of the Missouri Pacific and the Texas & Pacific and some of their short-line connections. Both the Missouri Pacific and the Texas & Pacific have a direct and active interest in the operation of Seatrain in that thereby they are afforded through routes by water between points in the Southwest and points on the Atlantic Seaboard, in competition with similar routes afforded by subsidiaries of the Southern Pacific Company.

(d) Where the rates are substantially the same the traffic will ordinarily move all rail because of the faster service and other advantages, whereas if the rail-water rates are substantially less than the all-rail rates the traffic will move over the rail-water routes, unless shorter time in transit or some other factor requires all-rail service.

(e) The Seatrain's policy has been to maintain rates no higher than those charged by the break-bulk water lines and its service thus affords the same advantage of lower rates as the break-bulk lines. The Seatrain has advantages over the latter because of its more expeditious service, and because of its non-break-bulk service, enabling it to handle all traffic that rail carriers can handle.

(f) One of its disadvantages is that transportation of Seatrain takes longer, usually from 1 to 7 days between representative points, than all-rail routes.

(g) It is manifest from this and other evidence of record that the all-rail routes actively compete with the break-bulk water-routes and that Seatrain with its many advantages and no disadvantage over the break-bulk water-routes, can more effectively compete with the all-rail routes.

(h) The operation of Seatrain is in the public interest and is of advantage to the convenience and commerce of the people.

15. In this decision in respect to transportation between United States ports and Cuba, the Commission said:

> We have no jurisdiction over the rates and practices of Seatrain in its strictly foreign commerce between United States ports and Cuba. There is nothing of record to indicate that its rates and practices respecting foreign commerce are used as cloaks or devices for according to shippers engaged

in both foreign and interstate commerce concessions from the tariff rates applicable to interstate commerce.

16. The report of the Commission discusses Car Service Rule No. 4, the practices of the carriers thereunder, and shows that as of March 1933, 26 railroads had consented to the delivery of their cars to Seatrain without restriction; several others had granted such consent with restriction, but that most of the railroads had refused to permit delivery of their cars to the Seatrain. The Commission further stated that "No railroad had refused to permit delivery of their cars to any of the other 11 water lines listed in a circular of the Association as coming within the intendment of the rule."

17. In this report the Commission found that the sole object of Car Service Rule No. 4 "is to prevent the diversion of traffic from the all-rail routes to Seatrain" and that for four years prior to the inauguration of this service cars were delivered to Seatrain or to its predecessor Overseas for movement from New Orleans to Havana without objection by any of the railroads, during which time 18,159 loaded cars moved over that route.

18. In this report the Commission also found that Rule 4 is not strictly observed by the Hoboken and New Orleans & Lower Coast Railroad Companies.

19. Finding No. 6 of the Commission reads as follows: "That we have jurisdiction to require

the establishment of through routes between rail and water carriers, and, where such through routes are established pursuant to our order or voluntarily, to require the rail carriers parties thereto to interchange cars with the water carrier, if that is the reasonable and appropriate method of interchanging traffic moving over such through routes."

20. The Commission in its report discussed the question as to whether it had any jurisdiction over the interchange of cars with Seatrain, reviewed pertinent provisions of the Interstate Commerce Act, decisions of the Commission and of the courts thereunder, amendments made to the Act over a period of years and the broadening of the control of the Commission over rail-and-water transportation, and reached the conclusion that it had the authority to require the interchange of cars by the rail defendants with Seatrain. The Commission concluded that it had jurisdiction to require the establishment of through routes between rail-and-water carriers and where such through routes are established, pursuant to its order or voluntarily, to require the rail carriers parties thereto to interchange cars with the water carrier if that is the reasonable and appropriate method of interchanging traffic moving over such through routes.

21. The Commission found in its report that the record showed that Seatrain lines participated in through routes and joint rates with the Missouri

Pacific and the Texas & Pacific Railroad Companies, but added "whether defendants who refuse to permit delivery of their cars to Seatrain participate in through routes with Seatrain cannot be determined upon this record." It directed attention to the fact that whether such through routes exist and, if not, whether they should be established are issues in No. 25727, not yet decided.

22. On or about February 20, 1935, the defendants in Docket Nos. 25728 and 25878 filed their petition with the Commission for a reconsideration of Finding No. 6 in its report of February 5, 1935, 206 I. C. C. 328, and of the legal conclusions upon which the Commission based its order of the same date. On April 1, 1935, the Commission entered its order denying the said defendants' petition.

28. The report of the Commission of February 5, 1935, referred to, relied upon, and adopted parts of its prior report dated July 11, 1933, in its Docket No. 25565, 195 I. C. C. 215, and in particular the following findings therein: "Upon consideration of the evidence, we are of the opinion and find (1) that Seatrain Lines, Incorporated, is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act, (2) that Seatrain Lines, Incorporated, is a common carrier by water engaged in the transportation of property partly by railroad and partly by water, that Seatrain Lines, Incorporated, and the Hoboken Manufacturers

Railroad Company are used under a common control, management, and arrangement for continuous carriage or shipment of property in railroad cars, in interstate and foreign commerce, that Seatrain Lines, Incorporation, and the New Orleans & Lower Coast Railroad Company are used under a common arrangement for such continuous carriage, and, therefore, that Seatrain Lines, Incorporated, is subject to all the provisions of the act applicable to such a carrier, (3) that Seatrain Lines, Incorporated, is not a 'carrier' within the meaning of section 20a of the act, and (4) that the Hoboken Manufacturers Railroad Company does not and may not compete for traffic with Seatrain, and therefore neither is subject, because of any community of interest between them, to the provisions of section 5 (19–21) of the act." Docket No. 25565 was an investigation by the Commission in a proceeding entitled "Investigation of Seatrain Lines, Inc.," instituted on its own motion October 4, 1932, prior to the inauguration by Seatrain of its service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, with a view to determining the lawfulness thereof and in said proceeding Seatrain and Hoboken Manufacturers Railroad Company were made respondents.

24. In the case entitled *Seatrain Lines, Inc.*, v. *Akron, C. & Y. Ry. Co.*, Docket No. 25727, the primary relief sought by Seatrain was an order requiring the establishment of through routes with

the railroads operating in the East, South, and Southwest where such through routes do not already exist, and the establishment of joint rates in connection with such through routes. This case, following full hearings, was decided January 28, 1938, and is reported in 226 I. C. C. 7. In this case, so far as here material, the Commission found that through routes existed in connection with the Seatrain between points in trunk line and New England territories on the one hand and Southwestern territory on the other, and that the public interest required the establishment and maintenance of through routes and joint rates in connection with Seatrain between certain portions of official territory on the one hand and Southwestern territory and a portion of southern territory on the other. It is not denied that the rail defendants, including some of the petitioners in this case, established the through routes so prescribed in Docket No. 25727, and now participate therein as directed by said order, and that said through routes are now in full force and effect.

25. By motion dated July 20, 1938, and filed with the Commission jointly by the Hoboken as complainant and Seatrain as intervener in Nos. 25728 and 25878, said Hoboken and Seatrain sought an order therein requiring the defendants therein, including petitioners herein, to permit their cars to be used in Seatrain service. A similar motion dated July 26, 1938, was filed therein by the Lower Coast. The reply, dated July 29,

1938, of the Pennsylvania Railroad Company and certain other petitioners herein to said motions asserted that the Commission was without authority to enter the order requested, but without waiving such contention, urged that, if the Commission should adhere to its opinion that it had such authority, a further hearing would be necessary in order that appropriate compensation might be fixed for such use of railroad-owned cars in Seatrain service, and that without prior compensation or responsible assurance of such compensation an order of the Commission requiring such interchange of cars would contravene the requirements of due process under the Fifth Amendment to the Constitution of the United States.

26. By its order of November 21, 1938, the Commission reopened Nos. 25728 and 25878 "for further hearing to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc." Thereafter further hearings were held in 1939 and on January 8, 1940, the Commission made its Report on Further Hearing, 237 I. C. C. 97, wherein it clarified the issues and again reopened the proceedings for further hearing, which was had in 1940.

27. After full hearing following the reopening, on October 13, 1941, the Commission made its Second Report on Further Hearing in Docket Nos. 25728 and 25878 and on the same day entered

its final order in which there were incorporated its said Second Report, 248 I. C. C. 109, and its Reports of February 5, 1935 (206 I. C. C. 328) and January 8, 1940 (237 I. C. C. 97).

28. In its report on further hearing in Dockets Nos. 25728 and 25878, the Commission considered the issue as to what terms and conditions, including compensation, should be required in the interchange of cars with Seatrain, reaffirmed its earlier conclusion that it had jurisdiction to require the railroads to interchange their cars with Seatrain when through routes between Seatrain and rail carriers exist, pointed out that in addition to the amount of compensation which the rail defendants should receive for use of their cars by Seatrain, other terms and conditions were in issue, upon which evidence has not been received, and, therefore, the proceedings should be reopened.

29. The Commission issued a second report on further hearing, 248 I. C. C. 109, dated October 13, 1941, wherein it again affirmed its conclusion that it had power to require the rail defendants to permit use of their cars by Seatrain.

30. The Commission found that Seatrain had offered to acquire cars for interchange with the railroads if desirable from the standpoint of car supply of the country, and that it also rents a substantial number of privately owned cars. For almost 4 years prior to the inauguration of its coastwise service, the railroads freely inter-

changed cars with Seatrain and its predecessor in the Belle Chasse-Havana service. Moreover, a large number of railroads operating in official and southwestern territories, some of which are defendants in these proceedings, have voluntarily consented to the delivery of their cars to Seatrain. Also, 19 defendants which have not consented to the use of their cars by Seatrain in its coastwise traffic permit such use in its Cuban traffic.

31. With respect to the contention that in furnishing equipment for transportation beyond the United States over the Florida East Coast Railroad Company, the rail carriers violated Sections 3 (1) and 3 (4) of the Act, the Commission overruled these claims stating: "We therefore adhere to the view that we have no power to make a finding which directly or indirectly would require defendants to turn over their cars to complainants for use by Seatrain in its Cuban traffic."

32. The ultimate findings of the Commission based on subsidiary findings, before referred to, were in part: "1. We find that the defendants in these proceedings listed in the appendix, according as they participate in through routes with complainants and Seatrain, have failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operations, in violation of section 1 (4) of the Interstate Commerce Act, by refusing

to agree to the interchange of freight cars owned by them with complainants for delivery to Seatrain for use in interstate commerce between points in the United States.

33. On October 13, 1941, the Commission entered an order, which after referring to its reports in 206 I. C. C. 328, 237 I. C. C. 297 and 248 I. C. C. 109, read as follows:

> *It is ordered,* That the defendants listed in the appendix to said report on further hearing, according as they participate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.
>
> *It is further ordered,* That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in inter-

state commerce corresponding with the current code of per diem rules governing the interchange of freight cars between the said defendants and other rail carriers, *Provided, however,* That such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

And it is further ordered, That this order shall continue in effect until the further order of the Commission.

The order has been subsequently amended to become effective October 5, 1942. The Commission has denied various applications of the petitioners for a reconsideration and clarification of its order.

34. On April 15, 1942, the amended petition was filed by plaintiffs in this case, and in it it was alleged that the Commission's order is void and beyond its statutory power in requiring the railroads to permit the use of their cars by Seatrain; that the Commission's decision was based upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission; that the order is beyond the Commission's statutory power in requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, and that neither the Interstate Commerce Act nor any other statute authorizes the Commission to require rail-

roads to permit the use of their cars except by other railroads; that the order is void in that it requires the rail carriers to permit the use of their cars by Seatrain in and through a foreign country and in and through foreign waters; and that the order is in excess of the Commission's powers in that the rate of $1 per car per day for such period only when the cars are in Seatrain's actual possession is so low as to be confiscatory.

It was also alleged that the Commission erred in refusing to overrule certain rulings by its examiner and that the order is void in imposing obligations upon the petitioners but does not run against or impose any obligations on Seatrain, with respect to its use of, or for the return of, cars of petitioners. The New Orleans & Lower Coast and Seatrain Lines, Inc., were permitted to intervene, and answers were filed by the United States, the Interstate Commerce Commission and intervening defendants, denying the material allegations of the amended petition.

35. A three-judge court was convened pursuant to the provisions of the statute, 28 U. S. C. A. § 41, and the court has jurisdiction to entertain and pass upon the issues involved in this case.

36. The entire record upon which the Commission's report and order of October 13, 1941, is based has been introduced and is before the court for its consideration in reaching a decision herein.

CONCLUSIONS OF LAW

1. The case is not moot.

2. The Commission acted within its statutory power in requiring the railroads to permit the use of their cars by Seatrain insofar as such transportation is within the United States or its territorial waters.

3. The Commission did not base its decision upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission insofar as such through routes are within the United States or its territorial waters. In requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, the Commission did not exceed the authority conferred upon it by statute.

4. The orders of the Commission are beyond the statutory power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port. Neither the Interstate Commerce Act nor any other statute authorizes the Commission to require carriers by railroad to permit such use of their cars.

5. The orders of the Commission are based upon a mistake of law in that in making them the Com-

mission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars for the transportation referred to in the preceding paragraph.

JOHN BIGGS, JR.,
United States Circuit Judge.

GUY L. FAKE,
United States District Judge.

WILLIAM F. SMITH,
United States District Judge.

OCTOBER 9, 1943.

Filed October 9, 1943, at 11 o'clock, A. M. William H. Tallyn, Clerk.

In the District Court of the United States for the District of New Jersey

CIVIL NO. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., PETITIONERS

vs.

UNITED STATES OF AMERICA, DEFENDANT

AND

THE INTERSTATE COMMERCE COMMISSION, ET AL., INTERVENERS-DEFENDANTS

OPINION ON ARGUMENT IN RESPECT TO FORM OF FINAL DECREE

Before BIGGS, *Circuit Judge*, and FAKE and SMITH, *District Judges*

BIGGS, *Circuit Judge*.

In our original opinion we stated that the conclusions reached by us rendered it unnecessary to discuss the last point raised by the petitioners; the question of whether the compensation fixed by the Commission for the use of the petitioner's cars is confiscatory. Counsel for Seatrain has now suggested the possibility, however impractical, that Seatrain might be able to maintain

routes from Hoboken to Belle Chasse entirely within the United States and its territorial waters.[1] If this be the case, the issue of whether the compensation fixed by the Commission for the use by Seatrain of the petitioners' cars is confiscatory is not moot. There is also the consideration that if on appeal our decision that the Commission was without authority to compel the petitioners to interchange their cars with Seatrain for transportation beyond the United States and its territorial waters should be reversed, a remand would be necessary to permit this court to decide the issue of confiscation. We feel, therefore, that we should decide it now.

The order of the Commission imposes on Seatrain an obligation to pay to the petitioners $1 per day for each car supplied by them to Seatrain but provides also that this rate shall be paid by Seatrain only for the period in which the car is in the actual possession of Seatrain. The Commission thus has relieved Seatrain of the obligation to compensate the petitioners for the period of time during which a car may be held by Seatrain's connecting railroad carriers because there is no ship immediately available to receive the car at Hoboken or at Belle Chasse. The nature of this exception in Seatrain's favor is made plain by an

[1] There is no evidence in the record from which an opinion in respect to this question can be formed. Navigation maps and similar documents of which we may take judicial notice seem to indicate that such routes would be impractical.

examination of Rule 15 of the Car Service and Per Diem Agreement of the trunk line carriers. The rule is set out below.[2]

As the Commission states, there are two faces to the problem. See *Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.*, 248 I. C. C. 117–119. The Commission points out that the period of detention of cars before acceptance by Seatrain, longer in fact than the period of detention required by railroad, is the consequence of the nature of Seatrain's operation, ships sailing less frequently than trains run. Seatrain might well be obliged to assume the obligations imposed by its method of operation. But, as the Commission says, Seatrain's position in respect to car detention is analogous to that of the break-bulk carriers by water. The disability of the break-bulk water carriers to accept merchandise promptly in all instances is reflected in the demurrage rates and presumably also in the rail rates and divisions applicable to traffic between them and the railroads. The Commission concludes that Seatrain's car detentions are properly a matter for consideration in connection with the rates and divisions to be made between Seatrain and the petitioners rather than in determining the per diem rate which Seatrain should pay. The result, as the

[2] The pertinent provisions of Rule 15 are as follows: "(a) A road failing to receive promptly from a connection cars on which it has laid no embargo, shall be responsible to the connection for the per diem of the cars so held for delivery, including the dome cars of such connection."

Commission points out, will be, or should be, much the same in either event for if the railroads are relieved by per diem payments by Seatrain of the burden of car detention which they bear on traffic interchanged with the break-bulk lines, the railroads will "* * * be entitled to relatively lower divisions of through rail-water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination." The Commission goes on to state that, "Considerable difficulty, however, would be encountered in making any such adjustment. From a practical point of view, therefore, the simple and desirable way of handling the matter is to leave the burden of car detention with * * * (the petitioners) when traffic is interchanged with Seatrain just as when it is interchanged with the break-bulk lines." The finding set out below followed.[2]

A careful consideration of the record and the briefs of the parties convinces us that the determination of the per diem rate and of its method of application rested with the Commission in the

[2] The pertinent finding of the Board was as follows:

"2. We find further that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain."

exercise of its expert administrative judgment. We conclude that the per diem rate and the condition of its application are not confiscatory or even unreasonable. The rate and the condition of its application as ordered by the Commission in fact are not confiscatory even if petitioners' cars be carried from Hoboken to Belle Chasse via Havana. The per diem rate is applicable throughout the whole of the time that the cars are upon the Seatrain ships. The nonpayment of the per diem rate during detention periods at Hoboken and Belle Chasse forms the substance of the petitioners' complaint.[1] We think that the findings and conclusions of the Commission have an adequate basis in the facts and in the law.

Additional findings of fact, additional conclusions of law and the final decree are filed with this opinion.

_____ _____,
United States Circuit Judge.

_____ _____,
United States District Judge.

_____ _____,
United States District Judge.

DECEMBER , 1943.

[1] As we have indicated, as we construe the Commission's opinion, findings and order, the Commission would permit Seatrain to transport the petitioners' cars by through routes from Hoboken to Belle Chasse and from Belle Chasse to Hoboken via Havana, the cars remaining on the Seatrain ships at Havana, and not entering into commerce on Cuban railroads.

ADDITIONAL FINDINGS OF FACT

1. The Commission's report of October 13, 1941, considered the question of what compensation the railroad defendants required to interchange their cars with Seatrain should receive for the use of such cars, and what other terms and conditions should be imposed. It pointed out that the Association of American Railroads published rules governing the settlement of railroad-owned freight cars between all common-carrier railroads, known as the Code of Per Diem Rules, Rule 1 of which provided that the rate for the use of freight cars shall be $1 per car per day, and that this has been the per diem rate for many years and is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses and 6 percent interest on the investment.

2. The Commission's report on further hearing points out that the reasonableness of the per diem rate is not here questioned insofar as it applies between the railroads; that Seatrain is willing to pay that rate, although believing that the cost of maintenance is less when the cars are in its possession, because they are not in motion and therefore are not subject to the stress incidental to train movements, and are, in some degree, protected

from the elements. The Association and defendants contended that repairs are responsible for a large proportion of the cost of car ownership, and the railroad defendants conceded that about 61.5 percent of the average running-repair expenses of 16 cents per car per day, or about 9.8 cents, are avoided when cars are not moving. The carriers' claim that this saving was more than offset by the corrosive effect of the ocean atmosphere on steel cars was considered by the Commission and rejected.

3. The Commission's report on further hearing, in discussing the rail carriers' contention that the Seatrain should pay per diem not only for the time the car was actually in its possession but in addition that an allowance for the time in which the car is idle or unproductive should be made, found that the record in this case showed that the present cost of ownership and maintenance did not exceed the average of $1 per car per day for the period in which the cars were actually in service, concerning which contention the Commission said:

> A similar burden results from the fact that many cars must return empty after moving under load. While foreign lines pay per diem to the car owner for such empty movements over their rails, such receipts are offset by corresponding payments to the foreign lines.

4. The Commission found that Seatrain had offered to acquire cars for interchange with the rail-

roads if desirable from the standpoint of car supply of the country, and that it also rents a substantial number of privately owner cars. Even as between railroads themselves, the Commission found that there is no such thing as balancing of burdens, and that not all railroads own cars. It further found that ownership is not always proportionate to car use. Further findings of the Commission in the report last referred to on this question were stated as follows:

> The car-hire rules do not differentiate between railroads because of such differences in conditions. It is also the fact that these rules have always been applied uniformly where cars are interchanged voluntarily with water lines such as the various so-called car ferries. For almost 4 years prior to the inauguration of its coastwise service, the railroads freely interchanged cars with Seatrain and its predecessor in the Belle Chasse-Havana service, at the regular per diem rate. Moreover, a large number of railroads operating in official and southwestern territories, some of which are defendants in these proceedings, have voluntarily consented to the delivery of their cars to Seatrain at that rate.
>
> In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the #1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars

is decreased approximately 10 cents per day while they are in its possession.

5. At Belle Chasse, the Lower Coast has a tariff providing that it will receive cars from connecting railroads for movement over Seatrain only upon written delivery orders from Seatrain and then only subsequent to 12:01 a. m. of the day prior to the scheduled sailing date from that point. In this way the Lower Coast obligates itself to pay only 1 day's per diem, for which it is reimbursed through the payment to it by its line-haul rail connections of a switching reclaim averaging 54 cents per car under the prevailing per diem rule governing the payment of reclaims to an intermediate switching road.

6. At New Orleans, when carload freight is interchanged with a break-bulk steamer, there must be unloading from the railroad cars and when the traffic moves on joint water-rail rates the line-haul railroads perform this work, which fact is taken into account in determining their divisions. This detention may be somewhat less than that of the cars interchanged with Seatrain, totalling 2.58 days as compared with 3.3 days per car in the case of interchange with Seatrain. The periods used in arriving at these averages were not the same.

7. In the case of the interchange at Hoboken, there is no controversy with the line-haul railroads, including the New York Central, the Erie, the Delaware, Lackawanna & Western, the Central Railroad of New Jersey and the Lehigh Valley.

These companies have entered into an agreement with complainants before the Commission under which they undertake to assume the per diem charges and other expenses of detention of cars held at Hoboken awaiting delivery to Seatrain. The Pennsylvania Railroad, however, has had a controversy of long standing with the Hoboken involving the payment of per diem and reclaims on Seatrain traffic prior to January 1, 1937.

8. The report on further consideration finds that payment of rental for use of freight cars by railroads other than those owning the cars has been an established transportation practice for over 70 years; that under the system of per diem charges now in force, the line-haul rail carrier using the cars of another pays the owner according to the time covered by its use of the car; that the fact or the amount of the payment is not conditioned on the profitability of that use; that a break-bulk water carrier does not have occasion to use railroad cars and accordingly is not required to pay per diem rental; that Seatrain's operation is anomalous in that it requires the use of railroad freight cars, and that the purpose of the complaints is to permit it to use railroad cars owned by others upon terms comparable to railroad cars available generally. The Commission concluded:

> We have found that it is entitled to the privilege of such use, and on the theory stated above, it should also be willing to assume the obligations incident thereto.

9. The Commission in its report on reconsideration recognized that while in cases where the detention was one attributable to Seatrain's mode of transportation, in one view of the matter the rail carriers should not be compelled to assume the cost of this detention, but pointed out that

> On the other hand, it is clear that, on traffic interchanged with the break-bulk lines, defendants bear a burden through car detention which is analogous to the burden which they would bear on traffic interchanged with Seatrain if the latter should pay per diem only when the cars are in its actual possession,

and that it was also clear that this car detention in the case of traffic interchanged with water lines, due to infrequent service, is a disability which has always been recognized and which is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic. The Commission continued:

> From this point of view, such detention is a matter for consideration in connection with these rates and divisions, rather than in determining the pier diem rates which Seatrain should pay.

10. In this connection the Commission concluded that the result will be about the same in either event because if the rail defendants are relieved by per diem payments of Seatrain from a burden of car detention which they bear on traffic

interchanged with the break bulk lines, theoretically they will be entitled to relatively lower divisions of through rail-water rates with Seatrain than with the break-bulk lines, or to relatively lower local or proportional rates to or from the ports where the through rates are made on combination. It found that considerable difficulty would be encountered in making any such adjustment, and that the simple and desirable way of handling the matter is to leave the burden of car detention with the rail carriers when traffic is interchanged with Seatrain, just as when it is interchanged with the break-bulk lines. The Commission further found that under this method, Seatrain would pay per diem only when the cars are in its actual possession or are being held for its use awaiting loading at the ports. Accordingly, reinforcing this view by a statement that the Seatrain's line-haul connections at Hoboken have agreed to this method, the Commission stated it would make no findings having the effect of forcing Seatrain to assume the payment of reclaim to complainants' on cars being held at the ports for delivery to its vessels.

ADDITIONAL CONCLUSIONS OF LAW

1. The findings of the Commission in respect to the compensation to be paid by Seatrain to the petitioners for the use of the petitioner's cars find adequate support in the evidence, as do the Commission's conclusions in the law.

2. The rate of compensation ordered by the Commission to be paid by Seatrain to the petitioners for the use of petitioner's freight cars interchanged with Seatrain, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, is not confiscatory but is reasonable.

JOHN BIGGS, JR.,
United States Circuit Judge.

GUY L. FAKE,
United States District Judge.

WILLIAM F. SMITH,
United States District Judge.

DECEMBER 8, 1943.

In the District Court of the United States for the District of New Jersey

CIVIL NO. 2092

THE PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE BOSTON AND MAINE RAILROAD, MERREL P. CALLAWAY, TRUSTEE OF CENTRAL OF GEORGIA RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, THE LONG ISLAND RAIL ROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, MAINE CENTRAL RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TEXAS AND NEW ORLEANS RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, PETITIONERS

against

UNITED STATES OF AMERICA, DEFENDANT

AND

THE INTERSTATE COMMERCE COMMISSION, HOBOKEN MANUFACTURERS RAILROAD COMPANY, SEATRAIN LINES, INC., NEW ORLEANS AND LOWER COAST RAILROAD COMPANY, INTERVENERS-DEFENDANTS

FINAL DECREE

This cause coming on to be heard before a specially constituted Court of three judges, duly assembled pursuant to the Urgent Deficiencies Act, 28 U. S. C., Secs. 41, 43–48, and having been submitted for final decree, and the pleadings, evidence, and arguments having been heard and considered, and the Court having been fully advised in the premises, and having filed its opinion, findings of fact, and conclusions of law, it is

ORDERED, ADJUDGED, AND DECREED that the order of the Interstate Commerce Commission, dated October 13, 1941, in the proceedings entitled Docket No. 25728, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company, et al.*, and Docket No. 25878, *New Orleans and Lower Coast Railroad Company* v. *Akron, Canton & Youngstown Railway Company, et al.*, as from time to time amended, insofar as said order directs petitioners to permit the interchange of their freight cars with or for the use of Seatrain Lines, Inc., for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port, is erroneous and beyond the lawful authority of the Interstate Commerce Commission and is void, and to the extent indi-

cated said order is hereby set aside, annulled and the enforcement thereof enjoined.

JOHN BIGGS, JR.,
United States Circuit Judge.

GUY L. FAKE,
United States District Judge.

WILLIAM F. SMITH,
United States District Judge.

Dated: December 8, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 846 48

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Civil No. 2092.

THE PENNSYLVANIA RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE BOSTON AND MAINE RAILROAD, MERREL P. CALLAWAY, TRUSTEE OF CENTRAL OF GEORGIA RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, THE LONG ISLAND RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, MAINE CENTRAL RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TEXAS AND NEW ORLEANS RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Defendant,

—and—

THE INTERSTATE COMMERCE COMMISSION, FORREST S. SMITH, TRUSTEE OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, SEATRAIN LINES, INC., NEW ORLEANS AND LOWER COAST RAILROAD COMPANY,

Intervenors-Defendants.

JURISDICTIONAL STATEMENT BY PETITIONERS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioners-appellants respectfully present the following statement disclosing the basis upon which it is con

tended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1914, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 836; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which Is Involved.

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved by this appeal by railroads petitioners.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Apppeal Was Presented.

The decree sought to be reviewed was entered on December 8, 1943. The petition for appeal was presented and allowed on January 31, 1944, together with the assignment of errors.

D. Nature of Case and of Rulings Below.

This is an appeal from a final decree of the United States District Court for the District of New Jersey, entered December 8, 1943, setting aside in part an order of the Interstate Commerce Commission dated October 13, 1941, in *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Ry. Co., et al.*, 248 I. C. C. 109, wherein the Commission ordered the defendants, including the railroads petitioners herein, according as they participate in through routes with the complainants therein and Seatrain Lines, Inc., via Belle Chasse, La., and Hoboken, N. J., to cease and desist and to abstain from observing and enforcing rules, regulations and practices which prohibit the interchange of petitioners' freight cars for transportation by Seatrain Lines, Inc., a carrier by water, and wherein the Commission ordered defendants therein, including railroads petitioners herein, to establish, observe and enforce rules, regulations and practices with respect to the interchange of their freight cars for transportation by Seatrain Lines, Inc., and wherein the Commission determined the compensation for the use of said freight cars.

The case presents the novel questions:

1. Whether railroad carriers are under any legal duty to deliver their freight cars for transportation by a water carrier.

2. Whether the railroads are under any legal duty to deliver their freight cars for transportation by a water carrier beyond the United States and its territorial waters or into and through foreign waters or where the water carrier docks at a foreign port.

3. Whether the Commission has authority to direct the railroads to deliver their freight cars for such purposes.

4. Whether the compensation fixed by the Commission for use of the railroads' freight cars by Seatrain, a water carrier, is arbitrary, unreasonable, confiscatory and based upon mistake of law.

The District Court concluded that the Commission acted within its statutory power in requiring the railroads to permit the use of their freight cars for such purposes by a water carrier in so far as the transportation of the freight cars by the water carrier was within the United States or its territorial waters and that the Commission did not base its decision upon a mistake of law in that respect. The District Court held that the orders of the Commission were beyond the statutory power of the Commission in so far as they required the railroads to permit the interchange of their cars with and for the use of and to be transported by a water carrier beyond the United States and its territorial waters or to a foreign port; that neither the Interstate Commerce Act nor any other statute authorized the Commission to require railroad carriers to permit such use of their cars and that to that extent and in that respect the orders of the Commission were based upon a mistake of law. Finally, the Court held that the compensation, fixed by the Commission for the said use of the petitioners' freight cars, was not confiscatory or illegal.

The District Court entered a decree dated December 8, 1943, that the Commission's said order, in so far as it

directs the railroads petitioners to permit the interchange of their freight cars with or for the use of the defendant Seatrain, a carrier by water, for transportation beyond the United States and its territorial waters, or into extra-territorial waters, or to a foreign port, was erroneous and beyond the lawful authority of the Commission and was void, and to that extent the Commission's orders were set aside, annulled and enforcement thereof enjoined.

The railroads petitioners appeal from the said decree of the court below in so far as it fails to set aside the said Commission's order in its entirety.

Seatrain Lines, Inc. is a common carrier by water subject to the Commission's jurisdiction. *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215. Seatrain operates ocean-going vessels having four decks, each deck in turn having four sets of standard gauge railroad tracks. By means of a special loading device, consisting of a crane and cradle, provided at three ports (Hoboken, New Jersey, Belle Chasse, Louisiana, and Havana, Cuba), loaded freight cars with their contents are put on board Seatrain ships without breaking bulk and are thus transported in commerce. Seatrain's transportation takes the cars and their contents into the port of Havana, Cuba, en route to or from Hoboken or Belle Chasse. The loading facilities for Seatrain ships are located at Belle Chasse on the property of New Orleans and Lower Coast Railroad, herein termed Lower Coast, a terminal-switching railroad, connecting in turn with the petitioners Texas and New Orleans Railroad, Louisville and Nashville Railroad and Southern Railway. The loading facilities at Hoboken are located on the property of Hoboken Manufacturers Railroad, herein termed Hoboken Railroad. Hoboken Railroad is a short, single-track terminal-switching line which runs along the water front of Hoboken and connects with the Erie Railroad and

via the Erie with other trunk lines reaching New York harbor.

The American Railway Association (to which trunk line railroads including the petitioners belong) promulgated a car service rule (Rule 4) providing "Cars of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division."

Hoboken Railroad and the Lower Coast filed complaints with the Commission attacking the refusal of the railroads to allow their freight cars to be used by Seatrain. Seatrain intervened. The Commission held in its report in Investigation of Seatrain Lines, Incorporated, at No. 25,566 (206 I. C. C. 328) that Seatrain was a common carrier by water and where through routes existed between rail carriers and water carriers the Commission had jurisdiction to require rail carriers who were parties to such through routes to interchange cars with water carriers. Subsequently, the Pennsylvania Railroad and certain of the other petitioners, at the direction of the Commission, established through routes, and those through routes are now in full force and effect.

The Commission reopened for further hearing the proceedings at Nos. 25,728 and 25,878, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company*, and *New Orleans & Lower Coast Railroad Company* v. *The Akron, Canton & Youngstown Railroad Company*, to determine on what terms and conditions, including compensation, the petitioners should be required to interchange their freight cars with Seatrain. On October 13, 1941, after completing its hearings the Commission announced its final decision (248 I. C. C. 109) and entered the cease and desist order of October 13, 1941. The Commission held it had jurisdiction to require rail carriers, parties to through routes with Seatrain, to permit the use of

their freight cars in Seatrain's service although Seatrain has no cars of its own. The Commission found that the rail carriers' refusal to permit interchange of cars between themselves and Seatrain was a violation of the Interstate Commerce Act and that the rate of $1.00 per day should be payable by Seatrain, though only for such periods as the rail-carriers' cars were in its actual possession and not from the time of tender as was required of railroad carriers. On October 13, 1941, the order complained of was entered by the Commission.

The petitioners contend that the order of October 13, 1941, should be set aside or at least mitigated for three reasons: First, that there is no duty on rail carriers to deliver their freight cars for the use of, or to interchange their cars with, a water carrier and that the Commission has no authority to direct such delivery or interchange; Second, that the Commission is without power to require rail carriers to permit their cars to be taken and used on ocean-going vessels of a water carrier for transportation beyond the United States and its territorial waters or into a foreign port or into or through foreign waters. Petitioners assert that the Commission's order, in fixing the compensation for the use of petitioners' freight cars at the rate of $1 per car per day and for only the period of time after Seatrain's acceptance and while they were in its possession and relieving Seatrain from any obligation to pay for the use of the freight cars while they were held at port for its use and benefit, and in not requiring Seatrain to assume the obligation of returning the cars, was in that and other respects arbitrary, unreasonable, confiscatory and based upon a mistake of law.

The petitioners on April 15, 1943, filed in the three-judge District Court their amended petition to enjoin, set aside, annul, and suspend the Commission's said order.

On October 9, 1943, the District Court rendered its decision that it was unnecessary to determine the question of

confiscation and otherwise sustaining the petitioners-appellants except in its Conclusions of Law 2 and 3, which provide:

> "2. The Commission acted within its statutory power in requiring the railroads to permit the use of their cars by Seatrain in so far as such transportation is within the United States or its territorial waters.
>
> "3. The Commission did not base its decision upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission in so far as such through routes are within the United States or its territorial waters. In requiring the rail carriers to permit the use of their cars by Seatrain, a carrier by water, the Commission did not exceed the authority conferred upon it by statute."

Thereafter on December 8, 1943, the District Court rendered an opinion on the argument in respect to the form of decree and made the following Additional Conclusions of Law:

> "1. The findings of the Commission in respect to the compensation to be paid by Seatrain to the petitioners for the use of the petitioner's cars find adequate support in the evidence, as do the Commission's conclusions in the law.
>
> "2. The rate of compensation ordered by the Commission to be paid by Seatrain to the petitioners for the use of petitioner's freight cars interchanged with Seatrain, including the current rate of $1 per day payable by Seatrain for such period as the cars are in its actual possession, is not confiscatory but is reasonable."

The Court's decree was entered on the said December 8, 1943.

The questions presented by this appeal are substantial. Whether railroad carriers are under any duty to deliver their freight cars for transportation by carriers by water, has not heretofore been decided by this Court.

Whether the Interstate Commerce Commission has any statutory authority to compel railroad carriers to deliver their freight cars for transportation by carriers by water has not been decided by this Court.

The foregoing questions involve the construction of Section 1 (4), (10) and (11) and other provisions of the Interstate Commerce Act. They also involve the character of the duties of the railroads of the country as public carriers and the statutory authority of the Commission.

With respect to compensation, the result of the Commission's order is that Seatrain, a carrier by water, is permitted to take the freight cars of petitioners against their consent, for its own use and profit, and to pay therefor $1 per day but only for the time that the car is in Seatrain's actual possession. $1 per day is the rate paid by railroad carriers interchanging cars among themselves but the railroad carriers pay such per diem rate from the time that the car is tendered until it is accepted and thereafter while it is in their actual possession. Further, the railroads are under an obligation to return the car empty if no load therefor is available.

The Commission adopted the $1. per day rate for Seatrain because that was the per diem rate used by the railroads, but relieved Seatrain of the duty of paying it from the date of tender to the date of its acceptance of the car, and further, did not require Seatrain to return the car whether empty or loaded. For example, Seatrain is permitted by the order to take the loaded car at Hoboken, N. J. at the rate of $1. per day for its use while producing revenue for Seatrain, and then is permitted to abandon

the car at or beyond Belle Chasse, La., to be returned empty at the railroads' expense. The said order confers all the benefits of car ownership upon Seatrain without imposing upon it any of the burdens thereof.

In their jurisdictional statement, the appellant-defendants suggest that the case may be moot. With respect to a similar suggestion made upon the trial, the court, in its opinion, says:

> "The parties have suggested to the court that this case may be moot because of circumstances brought on by war. This point was raised, we believe, merely for the purpose of fully informing the court as to present conditions governing Seatrain's service. Without going into details as to the nature of this service, it is sufficient to state that the order of the Commission is presently in effect and that that order requires the petitioners not only to abstain from enforcing present rules, regulations and practices which prohibit the interchange of their freight cars for transportation by Seatrain in interstate commerce, but also requires the petitioners to establish on or before a specified date, and thereafter to observe, rules and regulations with respect to the interchange of their frieght cars for transportation by Seatrain in interstate commerce. We conclude that there is a justiciable controversy before this court within the purview of the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. A. Sec. 41 (28) and Secs. 43 to 48, inclusive. The Commission's order is a continuing one and embraces not only a negative duty upon the petitioners but requires affirmative conduct upon their part as well. Though the circumstances of Seatrain's service have been changed by the war, the case is not moot and the petitioners are entitled to a review of the order complained of. See *Federal Trade Commission* v. *Goodyear*, 304 U. S. 257, and the cases cited therein."

See also *Interstate Commerce Commission* v. *Hoboken Manufacturers Railroad Co.*, No. 43, October Term, 1943.

decided December 6, 1943; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 514, (1910); *Federal Trade Commission* v. *Goodyear Tire & Rubber Company*, 304 U. S. 257, 259 (1938), reversing 92 Fed. (2) 677; and *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271 (1938).

Furthermore, the Commission has continued to issue orders affecting service under like temporary suspension.

Investigation and Suspension Docket No. 4815 Wrought Pipe to the Southwest, decided April 13, 1942; 251 I. C. C. 405.

Agwilines, Inc. et al v. *Akron Canton & Youngstown Railway Co., et al.*, No. 27969, decided December 8, 1941, 248 I. C. C. 255.

Southern Steamship Company Common Carrier Application, Docket No. W-819, decided December 17, 1941.

E. **Cases Sustaining the Supreme Court's Jurisdiction of the Appeal.**

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.* 227 U. S. 88.

Interstate Commerce Commission v. *Hoboken Manufacturers' Railroad Co.* No. 43, October Term, 1943, decided December 6, 1943, — U. S. —.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499.

United States v. *Baltimore & Ohio Railroad Co.* 293 U. S. 454.

Florida v. *United States*, 282 U. S. 194.

Beaumont, Sour Lake & Western Railway Co. v. *United States*, 282 U. S. 74.

Ann Arbor Railroad Co. v. *United States*, 281 U. S. 658.

Interstate Commerce Commission v. *Union Pacific Ry. Co.* 222 U. S. 541.

F. Opinion and Decree of the District Court.

Appended to this statement are (1) copies of the opinion, findings of fact and conclusions of law of the District Court dated October 9, 1943, and (2) copies of the supplemental opinion and final decree of said court sought to be reviewed, dated December 8, 1943. *

We therefore respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated, January 31, 1944.

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*(Clerk's Note. These documents are printed as appendices to the Jurisdictional Statement in the case of *U. S., et al.* v. *Pennsylvania Railroad Company, et al.*, No. 845, October Term, 1943, and are not reprinted here.)

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No. 845 17

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

RETURN TO RULE TO SHOW CAUSE

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 845

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

v.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

RETURN TO RULE TO SHOW CAUSE

This return is filed pursuant to the Court's order of April 24, 1944, which provides:

> It is ordered by this Court that the parties herein show cause on briefs, returnable May 1, 1944, accompanied by supporting affidavits if so desired, why the cause should not be dismissed as moot. Reply briefs and affidavits may be filed not later than 12 noon, May 5, 1944.

The facts are more fully stated in appellants' jurisdictional statement, and a description of the

operations of Seatrain Lines, Inc., hereinafter called Seatrain, is contained in *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, decided this Term.

Appellants herein appeal from the holding of the lower court that although the provisions of the Interstate Commerce Act confer upon the Commission authority to require railroads to permit the interchange of their cars with Seatrain's vessels in the performance of through transportation in interstate commerce, and that the Commission is not deprived of such authority by reason of the fact that Seatrain is a water carrier, nevertheless such authority does not exist when the vessels of Seatrain, in transporting freight from one point to another point in the United States, pass outside the territorial waters of the United States, or call at Havana, Cuba, a foreign port. In a supplemental opinion, dated December 8, 1943, the lower court held that the $1.00 per day rate prescribed by the Commission for rail carriers generally provided reasonable compensation to the railroad appellees for the use of their cars while in the actual possession of Seatrain. From this latter holding, as well as from the decision that the fact that Seatrain is a water carrier does not deprive the Commission of authority to require railroads to permit the interchange of their cars with Seatrain, appellees have taken a cross appeal, which is No. 846, this Term.

On the question of whether the case is moot, there is no disagreement among the parties that Seatrain's vessels are now under requisition by the Government and that since early in 1942 Seatrain service has been discontinued. This is shown in the appended affidavit of Joseph Hodgson, Vice President of Seatrain, from which it also appears that Seatrain's discontinuance or suspension of operations is only temporary and that, upon the return of its boats, Seatrain will resume operations. It is clear from the affidavit that Seatrain has not permanently abandoned operations. The affidavit further shows that Seatrain's tariffs have not been canceled. Tariffs publishing joint through rates over the through routes formed by the Seatrain and the railroads remain on file with the Commission and in effect. The tariffs, however, give notice of the "temporary suspensions" of service of Seatrain and other coastwise steamship lines. For example, Agent Curlett's Tariff I. C. C. No. A–732, publishing joint, proportional and rail-water-rail class rates on behalf of a large number of rail and water carriers, including Seatrain, from New England and other eastern states to points in Louisiana, Texas, and other southwestern states, contains a provision, in Supplement No. 15, effective April 16, 1942, that "Due to interruptions of service over which the carriers have had no control, steamship services formerly used in the transportation of freight within the scope of this

tariff have been temporarily suspended to the extent indicated below * * *." This is followed by the statement that all coastwise service of Seatrain has been "temporarily suspended," but that "if and when ships and space are available, cargo will be accepted when covered by permit issued by the individual steamship lines."[1]

[1] The notice of temporary suspension referred to reads as follows:

"PARTIAL TEMPORARY SUSPENSION OF SERVICE OF ISSUING AND PARTICIPATING STEAMSHIP LINES

"Due to interruptions of service over which the carriers have had no control, steamship services formerly used in the transportation of freight within the scope of this tariff have been temporarily suspended to the extent indicated below:

"The Bull Steamship Line—All coastwise service temporarily suspended.

"Pan-Atlantic Steamship Corporation—All service within the scope of this tariff temporarily suspended.

"Seatrain Lines, Inc.—All coastwise service temporarily suspended.

"Southern Steamship Company—Northbound service from Houston, Texas, to Philadelphia, Pa., temporarily suspended.

"Therefore, shipments will not be accepted until further notice, either direct or from connecting carriers, for transportation over the routes via which service has been temporarily suspended; except, that if and when ships and space are available, cargo will be accepted when covered by permit issued by the individual steamship lines.

"Applications for permits must specify the kind and quantity of cargo, point of origin and destination, and ports of loading and discharge."

Supplement No. 16 to the tariff shows that all coastwise service of the Southern Steamship Company was subsequently temporarily suspended effective May 1, 1942.

The Commission's orders, both with respect to the interchange of cars between the railroads and Seatrain and also with respect to the maintenance of through routes and joint through rates, are in effect and outstanding.

The question whether this case is moot seems to turn upon the probability of resumption of operations by Seatrain. In *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, in considering the suggestion that that case might have become moot because Seatrain's vessels are in Government service and Seatrain's service has been discontinued, the Court said (320 U. S. at 376):

> We may assume that the resumption of the service is so uncertain as to render it conjectural whether the Commission's present determination will be given any future operation. * * *

The Court did not find it necessary, however, to determine the fact concerning Seatrain's resumption, because, even though it were established that Seatrain would not resume service, the *Hoboken R. Co.* case would not be wholly moot, since the Commission's determination of reasonable divisions was "decisive of appellee's request for adjustment of the divisions of joint rates prescribed by the Commission which have been collected

since the beginning of the present proceeding" (*ibid.*).[2]

It is submitted that the facts now at hand, as portrayed in the attached affidavit, are sufficient to justify the conclusion that this case is not moot and to distinguish it from *United States* v. *Hamburg-American Co.*, 239 U. S. 466. There a suit was brought to enjoin an agreement of certain trans-Atlantic steamship lines which fixed quotas of steerage passengers for each line and regulated the rates for their trans-Atlantic passage, which agreement was alleged to constitute an illegal combination in violation of the Sherman Antitrust Act. This Court refused to pass upon the questions at issue regarding the legality of the agreement "because of their absolute want of present

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[2] In this connection, the Court stated (*ibid.*):

"While the present record does not disclose the full extent to which joint rates, divisions of which are here sought, were prescribed by the Commission, it does appear that the Commission has in prior proceedings prescribed joint rail-water-rail rates between eastern trunk line and New England territories and southwestern territory applicable over Seatrain lines, to which Hoboken, Seatrain, and most if not all of the trunk lines which are appellants here are parties. *Seatrain Lines* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 243 I. C. C. 199. As to them decision of this case controls the division of rates for the period since appellee's complaint was filed with the Commission. To that extent at least the case is not moot."

See also *United States* v. *Rock Royal Co-Op.*, 307 U. S. 533, 555–556, and *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516, in which cases a similar principle was applied.

actuality, that is, because of their now moot character as an inevitable legal consequence springing from the European war which is now flagrant * * *" (239 U. S. at 475).[5] Concerning the suggestion that, in view of the character of the questions presented and the possibility or probability that on the cessation of war the parties would resume or recreate their asserted illegal combination, the controversy should be decided in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future would be rendered impossible, the Court said (239 U. S. at 475):

> But this merely upon a prophecy as to future conditions invokes the exercise of judicial

[5] The Court distinguished *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290 and *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, on the ground that in the *Trans-Missouri* case a combination between railroads charged to be illegal was dissolved by consent and it was held that in view of the continued operation of the railroads and the relations between them their mere consent did not relieve them of the duty to pass upon the pending charge of illegality under the statute of their previous conduct, since by the mere violation of the parties the combination could come into existence at any moment; and that, leaving aside some immaterial differences, in terms the ruling in the *Southern Pacific* case was based upon the decision in the *Trans-Missouri* case. The Court said, "Here on the contrary the business in which the parties to the combination were engaged has by force of events beyond their control ceased and by the same power any continued relation concerning it between them has become unlawful and impossible" (239 U. S. at 477).

> power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308, 314 * * *.

Although the *Hamburg-American* opinion does not expressly so state, the holding may well have been influenced by the fact that the agreement in question was about to expire. The opinion states (239 U. S. at 468) that the principal agreement was made in 1908 to last until February 28, 1911, and that on December 3, 1910, a month before the suit was filed, it was renewed for a period of five years. The agreement was thus to expire February 28, 1916, a short time after the decision which was rendered January 10, 1916, and there is nothing in the opinion to indicate that it had been or would be renewed.

United States v. *American Asiatic S. S. Co.*, 242 U. S. 537, is similar to the *Hamburg-American* case. The following quotation indicates that the holding that the case was moot was upon the ground that the agreements had been dissolved (242 U. S. at 538):

> At the time this action was taken by the court below, as the result of the European War, the assailed agreements had been dissolved and the questions raised by the bills were therefore purely moot, as directly decided to be the case as to a similar situa-

tion in *United States* v. *Hamburg-American Co.*, 239 U. S. 466.

The *Hamburg-American* and *American Asiatic* decisions appear to be in consonance with many others of this Court holding suits in equity to be moot where the act sought to be enjoined had, after the institution of the suit, been accomplished, as in *Mills* v. *Green*, 159 U. S. 651, or where a statute was passed pending appeal or some other happening supervened which destroyed the issues or rendered effective relief by a court impossible, as in *Berry* v. *Davis*, 242 U. S. 468; *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 375; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Norwegian Co.* v. *Tariff Commission*, 274 U. S. 106, *Standard Oil Co.* v. *United States*, 283 U. S. 163, 182; *Heitmuller* v. *Stokes*, 256 U. S. 359; *St. Pierre* v. *United States*, 319 U. S. 41; *Ohio* v. *United States*, 292 U. S. 498, 499. Compare *Duke Power Co.* v. *Greenwood Co.*, 299 U. S. 259, 267.

In *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, it was held that the case, involving the validity of an order of the Interstate Commerce Commission prescribing bills of lading, had been rendered moot by the subsequent passage of an amendment to the Interstate Commerce Act. The Court remarked (253 U. S. at 116) that "Where by an act of the parties, or a subsequent law, *the*

existing controversy has come to an end, the case becomes moot and should be treated accordingly." [Italics supplied.]

In the case at bar it cannot be said with certainty that the existing controversy has come to an end. The suspension of Seatrain's operations is only temporary; there is nothing to indicate that Seatrain has permanently ceased operations. It holds patents which facilitate the operations of its unique vessels (see 195 I. C. C. 215, 217), designed to transport freight in railroad cars without break of bulk. From a small beginning, its business has grown and its service has been extended and the Commission has found that its service is in the public interest (206 I. C. C. 328, 344). As the appended affidavit indicates, there appears to be no ground to suppose that it will fail to resume operations when its boats are released by the Government.

In the *Hamburg-American* case (239 U. S. 466), it seems to have been taken for granted that the trans-Atlantic steamship lines involved would resume operations after the end of the war, and the case was held moot because the Court could not find that the lines would again enter into a similar agreement. Here, since there is nothing to indicate that Seatrain has abandoned its business, and since it appears that it has merely suspended operations because of the requisitioning of its boats for an indefinite period for use by the Government in conducting

the war, it may safely be taken for granted that it will resume operations (see Appendix, *infra*, p. 20) when it is in a position to do so. In view of these facts, and the fact that the Commission's order is a continuing one, it is thought that the existing controversy has not come to an end.

In holding, in *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, that the controversy was not moot, the Court gave weight to the fact that the order of the Trade Commission involved was a continuing order, as is the order of the Interstate Commerce Commission here in question. In this connection, the Court said (304 U. S. at 260):

> Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 309, 310; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516; *National Labor Relations Board* v. *Pennsylania Greyhound Lines*, 303 U. S. 261; *Guarantee Veterinary Co.* v. *Federal Trade Commission*, 285 F. 853, 859, 860; *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. 2d 673, 686, 687. The Commission, reciting its findings and the conclusion that respondent had violated the Act, required respondent to cease and desist from the particular discriminations which

> the order described. That is a continuing order. Its efficacy, if valid, was not affected by the subsequent passage or the provisions of the amendatory Act. As a continuing order, the Commission may take proceedings for its enforcement if it is disobeyed. * * *

The present case seems also to be within the principle of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516, involving the validity of an order of the Commission which, when the case reached this Court, had expired by its terms. The contention that, because by operation of law the Commission's order had spent its force, the question for decision was moot, was overruled. The Court adverted (219 U. S. at 514–515) to its frequent previous holdings that it would "only decide actual controversies, and if, pending an appeal, something occurs without any fault of the defendant which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed." "But," the Court said (*ibid.*), "in those cases the acts sought to be enjoined had been *completely executed*, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected." [Italics supplied].[1]

[1] It was held that the case came within the rule announced in *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 308, and *Bois City Irr. & Land Co.* v. *Clark*, 131 Fed. 415 (C. C. A. 9).

The *Southern Pacific Terminal Co.* decision was based upon the further consideration that the Commission's order involved might "to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings." From the appended affidavit, it appears that the order of the Commission here involved may, similarly, be the basis of further proceedings. "But there is a broader consideration.", the Court said. "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review * * *." (219 U. S. at 515.)

At the time of the *Southern Pacific Terminal Co.* decision, the Commission's authority to make orders for the future was limited to a period of two years. Since then, the Act has been amended to authorize the Commission to make its orders operative for an indefinite period.[1] The order

[1] Section 15 (2) of Part I of the Interstate Commerce Act provides:

"Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction" (49 U. S. C. 15 (2)).

here involved is not limited in time, but applies broadly for the future or until suspended, or modified or set aside by the Commission. Though enjoined by the court below, it has not been suspended or set aside by the Commission, and, if sustained by this Court, will undoubtedly be in effect upon the resumption of operations by Seatrain.

In *Leonard & Leonard* v. *Earle*, 279 U. S. 392, appellants, oyster packers, attacked as unconstitutional a Maryland statute which required packers to pay a license fee and to turn over to the State at least ten percent of the shells from the oysters shucked in their establishments. It appears from the opinion that there was some doubt whether appellants would continue in business as oyster packers. Inasmuch as they could complain only of a grievance of their own (*Interstate Commerce Commission* v. *Chicago, R. I. & P. Ry.*, 218 U. S. 88, 109), it seems clear that if they discontinued the business, the case would be moot. In holding the case not moot, the Court said (279 U. S. at 398):

> Considering the nature of the controversy and the agreement between the parties touching appellants' purpose to continue in the packing business, it can not be said that the cause has become moot. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307, 308; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, 452;

Southern Pacific Terminal Company v. *Interstate Commerce Commission*, 219 U. S. 498, 514, 516; *McGrain* v. *Daugherty*, 273 U. S. 135, 182.

A question whether the controversy had become moot arose in *McGrain* v. *Daugherty*, 273 U. S. 135, because the Senate select committee which had issued the subpoena had ceased to exist, owing to the expiration of the 68th Congress which had ordered the investigation. If the committee were not reappointed nor a new committee appointed by the succeeding Congress, there would be no occasion for insisting upon the attendance of the witness. It was not absolutely certain that the new Congress would continue the investigation. To this extent, the case seems analagous to that at bar. Following the principle of the *Southern Pacific Terminal Co.* case (219 U. S. 498), and holding the case not moot, the Court said (273 U. S. at 180–182):

> Another question has arisen which should be noticed. It is whether the case has become moot. The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might deem advisable or necessary. * * *

> * * * So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. The situation is measurably like that in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516 * * *. Our judgment may yet be carried into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the *habeas corpus* proceedings. In these circumstances we think a judgment should be rendered as was done in the case cited.

The questions involved in the Commission's order here challenged are of course, as previously stated, continuing, and it seems that their consideration ought not to be defeated by the suspension, which appears to be only temporary, of Seatrain's operations, caused by exigencies of war beyond its control.

If, however, the Court holds that the case is moot, it is believed that the rule, applied in *United States* v. *Anchor Coal Co.*, 279 U. S. 812,

and cases cited, should be followed, namely, the reversal of the decision of the lower court annulling the Commission's order, with directions that the petition be dismissed as presenting no justiciable controversy. Otherwise, in the event Seatrain's vessels should be returned to it in the immediate future or should the Government cause them to be operated in their former services, which, as indicated by the appended affidavit of Seatrain, is possible, the parties would be confronted with a decree enjoining the Commission's order on grounds which have not been considered by this Court.[6]

Respectfully submitted.

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Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,

J. STANLEY PAYNE,
E. M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.

PARKER McCOLLESTER,
For Seatrain Lines, Inc.

H. H. LARIMORE,
For New Orleans & Lower Coast R. R.

MAY 1, 1944.

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[6] The substantiality of the questions presented by the appeal are discussed in our jurisdictional statement at pp. 13–14.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 845

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., APPELLEES

Appeal From the District Court of the United States for the District of New Jersey

Affidavit in Support of Return to Rule to Show Cause

STATE OF NEW YORK,
County of New York, ss:

Joseph Hodgson, being duly sworn, deposes and says:

1. I am Vice-President of Seatrain Lines, Inc. and am familiar with its business.

2. At various dates in 1941 and 1942 the United States Government through the War Shipping Administration requisitioned the use of the several vessels owned by Seatrain and diverted them

from their regular services in which they operated between the port of New York and the port of New Orleans to other services for which they were then needed in the prosecution of the war and in which, so far as deponent is informed, they are still employed.

3. With the requisitioning of its vessels, Seatrain on or about April 11, 1942 suspended its services until such time as its vessels should be returned or it should obtain other ships. However, Seatrain did not cancel its tariffs on file with the Commission naming its rates and defining the terms and conditions of its service, but under special permission from the Interstate Commerce Commission published a notice that its services were temporarily suspended subject to restoration on short notice. Seatrain has, indeed, from time to time filed supplements to its tariffs or concurred in supplements to tariffs of others publishing joint through rates via its route changing its rates to make them conform to general rate changes or established rate relationships, as it would do if its ships were in actual operation, in order that its rates and tariffs will be in order at any time for the resumption of its service.

4. Among the rates published for transportation via its line are joint through rates prescribed by the Interstate Commerce Commission by its order in its Docket No. 25727, which order is now in effect and whose continuing effect requires the maintenance of through routes for through transportation via Seatrain's line and prescribes the relationship of the through rates for such transportation to other rates.

5. Seatrain has continuously maintained its executive, traffic and operating organizations, looking to the resumption of its service.

6. Seatrain has no knowledge when its own ships may be returned to it or when other vessels may become available to it, but it is informed that since the Government has its vessels under requisition on a use or charter basis only which may be terminated at any time upon notice, one or more of its vessels may be returned to it at any time at the pleasure of the Government.

7. With its tariffs on file with the Commission Seatrain, pursuant thereto, will be obligated to perform its transportation service whenever it shall have ships for the purpose, and in the performance of such transportation the question of the obligation of appellee railroads to permit the interchange of their cars with Seatrain and the compensation to be paid to them therefor by Seatrain will become of great importance.

8. It is Seatrain's present intention to resume its service as soon as vessels are available to it for the purpose and conditions permit.

9. Moreover, the War Shipping Administration, without terminating the requisition charters and redelivering Seatrain's vessels to it, may at any time direct that one or more of these vessels be operated for the Government's account in their regular routes in the transportation of materials essential to the prosecution of the war. In that event, the question whether appellee railroads may refuse to permit the interchange of their cars with a water carrier and the compensation to which they are entitled for the use of their cars

will, as dependent believes, be of concern to the Government. This actually proved to be the situation with regard to operations between the United States and Cuba, where Seatrain formerly operated, when the Government, having requisitioned one of Seatrain's vessels, caused it to be operated for the Government's account between the United States and Cuba, retaining an affiliated company of Seatrain as its agent for the purpose.

10. Furthermore, this appellant is defendant in two suits pending in the United States District Court for the Southern District of New York, Civil 6–326 and 6–414, brought by the Pennsylvania Railroad Company, one of the appellants in No. 846, against Hoboken Manufacturers Railroad and Seatrain Lines, Inc. to recover compensation for the use or damages for the alleged conversion of cars of the Pennsylvania Railroad delivered by the Hoboken to the vessels of Seatrain. One of the issues in these suits is whether the so-called "Car Service Rule", involved in the present appeal, which rule purports to authorize the Pennsylvania Railroad to withhold its consent to the interchange of its cars with Seatrain as a water carrier in the performance of through transportation is a just, reasonable and lawful car service rule; and another issue is what will constitute a reasonable per diem charge to be paid by this appellant and Hoboken for the use of such cars when in their possession. Since these are administrative questions, as to which it is believed a determination of the Interstate Commerce Commission must first be had, these suits,

pursuant to orders of the court or by stipulation, have been adjourned from time to time or held on the suspense calendar of the court pending a determination of these administrative questions by the Interstate Commerce Commission in the proceeding involved in this action and thereafter pending final determination as to the validity of the Commission's order. If the present appeal is dismissed on the ground that the case has become moot, deponent is informed and believes that it will be necessary to present these administrative questions to the Commission in another proceeding, which will involve duplication of hearings and testimony and which may again invite judicial review of the Commission's determination before the New York District Court can proceed to a final decision in these two pending suits.

11. Seatrain Lines, Inc. owns all of the stock, except directors' qualifying shares, in Hoboken Manufacturers Railroad Company. In large part because of the loss of revenue to the Hoboken Manufacturers Railroad resulting from the temporary suspension of service by Seatrain, the Hoboken Manufacturers Railroad Company was compelled to file a petition for reorganization under the provisions of Section 77 of the Bankruptcy Act. This petition was allowed by order of the United States District Court for the District of New Jersey on July 26, 1943, and thereafter Forrest S. Smith was appointed Trustee and on or about November 12, 1943 qualified and entered into possession of the property of the railroad. Under the provisions of Section 77 of the Bankruptcy Act, the debtor corporation, Ho-

boken, of which Seatrain is the stockholder, is required to prepare and present within six months of the order allowing the petition for reorganization or within such further time as the Court may permit a plan of reorganization of the debtor railroad. With a large part of the Hoboken's revenues depending upon the handling of through traffic interchanged with Seatrain, and dependent in turn upon its right to interchange with the vessels of Seatrain cars owned by appellee railroads, it will be difficult, if not impossible, to prepare a plan of reorganization until a final determination of these questions is reached.

12. For the foregoing reasons, a dismissal of this case by the court, without deciding the issues raised by the appeals would seriously and adversely affect the interests of Seatrain both with regard to its own operations and as stockholder of Hoboken Manufacturers Railroad Company, would cause delay in the determination of pending proceedings and would make it difficult for Seatrain to make plans and arrangements for the resumption of its services.

JOSEPH HODGSON.

Signed and sworn to before me this 28th day of April 1944.

RAYMOND J. MARTIN,
Notary Public.

Kings County Clk's No. 57, Reg. No. 67-M-6; Bronx County Clk's No. 8, Reg. No. 18-M-6; Queens County Clk's No. 79, Reg. No. 28-M-6; N. Y. County Clk's No. 202, Reg. 125-M-6; Term expires March 30, 1946.

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Nos. 47–48

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

v.

PENNSYLVANIA RAILROAD COMPANY, ET AL.

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., APPELLANTS

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The two opinions of the United States District Court for the District of New Jersey (R. 109–129, 141–143) are reported in 55 F. Supp. 473.

The court appended findings of fact and conclusions of law (R. 129–140, 143–147) to its opinions. The report (R. 60–73) of the Interstate Commerce Commission assailed herein is reported in 248 I. C. C. 109. Related reports of the Commission (R. 423–443, 35–53, 55–60, and *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*) are reported in 195 I. C. C. 215, 206 I. C. C. 328, 237 I. C. C. 97, and 226 I. C. C. 7.

JURISDICTION

The final decree of the district court was entered on December 8, 1943 (R. 147–148). The petitions for appeal were presented and allowed on January 28, 1944 (R. 148–149) and on January 31, 1944 (R. 154–156).

Upon consideration of the jurisdictional statements, this Court, on April 24, 1944, issued a rule to show cause returnable May 1, 1944, as to why the case should not be dismissed as moot. Upon consideration of the jurisdictional statements and the returns to the rule, the Court on May 8, 1944, noted probable jurisdiction and discharged the rule to show cause (R. 1378).

Jurisdiction is conferred by the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 47, 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 345, par. (4)).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 49–61.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission has authority to require railroads, parties to through routes with a water carrier, to permit the use of their cars by the water carrier, for reasonable compensation.

2. Whether the Commission has jurisdiction to require railroads to permit use of their cars by a water carrier operating between American ports through extraterritorial waters and via a foreign port.

3. Whether the compensation fixed by the Commission for Seatrain's use of railroad cars is confiscatory or unreasonable.

4. Whether the Commission's order is invalid because not running in terms against Seatrain.

STATEMENT

Fifteen railroads (herein referred to as appellees) instituted the present suit (R. 5–19, 109–110) in a statutory three-judge district court to set aside an order (R. 73–74) of the Interstate Commerce Commission issued on October 13, 1941, and based on its report (R. 60–73) of the same date. The United States was the defendant below, and the Interstate Commerce Commission, Seatrain Lines, Inc. (herein referred to as Sea-

train), the New Orleans and Lower Coast Railroad (herein referred to as the Lower Coast), and the Hoboken Manufacturers' Railroad Company (herein referred to as the Hoboken), intervened as defendants (R. 91, 98–99, 103). The order attacked required some fifty-two railroads, according to their participation in through rail-and-water routes with Seatrain in interstate commerce between Belle Chasse, Louisiana, and Hoboken, New Jersey, to cease and desist from prohibiting the interchange of their freight cars for transportation by Seatrain in such interstate commerce. It also required the railroads to establish reasonable rules for such freight car interchange corresponding with the current code of per diem rules governing the interchange of freight cars between railroads, including the current rate of $1 per car per day, such per diem to be payable by Seatrain only for such periods as the cars were in its actual possession. (R. 73–74.)

From January 1929 to October 6, 1932, Seatrain and its predecessor operated vessels between Belle Chasse, Louisiana, and Havana, Cuba, on which freight was transported in standard railroad cars loaded on the vessels[1] (R. 427, 432, 37, 55–56). During this time, the railroads freely permitted use of their cars by Seatrain at the prevailing railroad per diem rate of $1 per day (R. 45, 65–66). On October 6, 1932, similiar service with

[1] For a description of Seatrain's operations, see *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368.

railroad cars was added by Seatrain in interstate commerce between Hoboken and Belle Chasse (R. 427, 37, 55–56). Most of these interstate vessels sailed by way of Havana, Cuba, but others sailed directly between the two American ports (R. 111).

The Seatrain loading facilities in New Jersey are owned by the Hoboken and, together with the piers and necessary supporting tracks, are leased by Seatrain. The Hoboken, a terminal switching railroad, connects with the Erie Railroad and through the Erie interchanges cars with all the trunk lines serving New York harbor. Seatrain's Belle Chasse loading facilities are on the property of the Lower Coast. The Lower Coast, a switching line, connects with the Southern Pacific and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans and through them interchanges cars with all railroads reaching New Orleans. (R. 37–38.) Seatrain's service is superior to that afforded by steamships of the ordinary type (R. 42–43; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 20–21).

Shortly after the inauguration of Seatrain's interstate service, the Association of American Railroads promulgated the following car service rule, aimed at Seatrain (R. 38, 44–45):

> Rule 4—Cars of railway ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owner filed with the Car Service Division.

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A large number of railroads, however, voluntarily consented to the delivery of their cars to Seatrain for use both in its Cuban and in its interstate service at the regular railroad $1 per diem rate. And nineteen railroads, including seven of the fifteen appellees (see R. 505–506, 1154), consented to the use of their cars by Seatrain at such rate in its Cuban, but not in its interstate, service. (R. 65–66.) The appellees are attacking the Commission's ruling in order to stifle Seatrain's competition with them for freight traffic to the Mississippi gateways (R. 43).

In 1932 and 1933, the Hoboken and the Lower Coast filed two separate complaints with the Commission attacking the refusal of the railroads to permit their cars to be used by Seatrain. Seatrain intervened in both these complaints. (R. 38.) These complaints, which were consolidated, have now come before the Commission on three different occasions (R. 133, 137). In *Investigation of Seatrain Lines, Incorporated*, 206 I. C. C. 328 (R. 35–53), the Commission, affirming its earlier conclusions in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215 (R. 423–443), held in 1935 that Seatrain was a common carrier by water subject to its jurisdiction; that Seatrain's interstate operations were in the public interest and "of advantage to the convenience and commerce of the people"; that the Commission had jurisdiction to require the establishment of through routes between rail and water carriers and, where such

through routes were established, to require the rail carriers, parties thereto, to interchange cars with the water carriers; and that it had no jurisdiction over Seatrain's Cuban service. The Commission, however, left open the question whether through routes existed between Seatrain and the railroads which refused to permit use of their cars by it, and, if not, whether such through routes should be established.

In the companion case, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, the Commission in 1938 found that certain through routes existed between railroads and Seatrain, and prescribed others,[2] together with joint rates. These joint rates were modified on further hearing in the same case in 1940 (243 I. C. C. 199) in order not to exceed the joint rates over comparable routes between the railroads and the so-called "break-bulk" water lines, which do not use railroad cars. It is not disputed that appellees are thus parties to through routes with Seatrain.

In 1940, the two original complaints seeking car interchange again came before the Commission in *Hoboken Manufacturers Railroad Co.* v. *Abilene & Southern Railway Company*, 237 I. C. C. 97 (R. 55–60). It was there held that the period of time and manner in which Seatrain should pay for the use of the railroad cars, the amount of

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[2] Those appellees ordered in 1938 to establish through routes with Seatrain have done so and participate therein (R. 11).

compensation it should pay, and any other appropriate conditions were all questions properly in issue in connection with car interchange, and that the case should be reopened for further hearing. On October 13, 1941, after such further hearing, the Commission, through Commissioner Eastman, issued its final decision (248 I. C. C. 109; R. 60–73). This decision reaffirmed the Commission's jurisdiction to require the railroads, parties to through routes with Seatrain, to permit the use of their cars by it in its interstate service, but not in its Cuban service. It found that the railroads' refusal to permit such interchange was in violation of the Interstate Commerce Act, and that the current code of per diem rules governing the interchange of freight cars between the various railroads, including the current inter-railroad rate of $1 per day to be payable by Seatrain for such periods as the cars were in its actual possession, would be reasonable for application to the interchange of cars with Seatrain. On the same date, the aforementioned cease and desist order now under attack was issued by the Commission to carry out the above findings (R. 73–74).

On October 9, 1943, the three-judge district court handed down an opinion (R. 109–129), together with findings of fact and conclusions of law (R. 129–140). In its conclusion of law, the court held (R. 140):

> 1. The case is not moot.
>
> 2. The Commission acted within its statutory power in requiring the railroads to

permit the use of their cars by Seatrain insofar as such transportation is within the United States or its territorial waters.

3. The Commission did not base its decision upon a mistake of law in holding that the rail carriers were under duty to permit their cars to be used by Seatrain where through routes existed or were prescribed by the Commission insofar as such through routes are within the United States or its territorial waters. In requiring the rail carriers to permit the use of their cars by Seatain, a carrier by water, the Commission did not exceed the authority conferred upon it by statute.

4. The orders of the Commission are beyond the statutory power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port. Neither the Interstate Commerce Act nor any other statute authorizes the Commission to require carriers by railroad to permit such use of their cars.

5. The orders of the Commission are based upon a mistake of law in that in making them the Commission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars for the transportation referred to in the preceding paragraph.

The court remarked (R. 129, fn. 17; R. 141) that it did not believe Seatrain could maintain routes

between Hoboken and Belle Chasse entirely within the United States and its territorial waters and that it appreciated the effect which its ruling, if upheld, would have upon Seatrain's transportation.

On December 8, 1943, the court handed down a supplemental opinion (R. 141–143), findings of fact (R. 143–146) and conclusions of law (R. 147), holding that the findings of the Commission as to the compensation to be paid by Seatrain to the railroad companies for the use of their cars are supported by the evidence, and that the rate of compensation of $1 per day to be paid by Seatrain to the railroads for the use of their freight cars while in the actual possession of Seatrain "is not confiscatory but is reasonable" (R. 147).

In No. 47, the Government and co-appellants assert that those parts of the opinion below embodied in Conclusions of Law, Nos. 4–5, *supra*, are erroneous (see R. 149–151). In No. 48, fifteen trunk-line railroads[1] (R. 5) complain that the district court should have set aside the Commission's 1941 order (R. 73–74) in its entirety (see R. 156–163).

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission has authority to require carriers by railroad subject

[1] For the sake of convenience, these railroads are termed appellees throughout this brief.

to its jurisdiction to permit the use of their cars by Seatrain, a common carrier by water, at reasonable compensation for such use, notwithstanding that Seatrain is not a rail carrier. This Court has recognized that by amendments to the Interstate Commerce Act, Congress has emphasized its intention to broaden the Commission's control over rail and water transportation. *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 274 U. S. 29, 36. Carriers by railroad, in the operation of through routes, may be obliged to permit their car equipment to be carried beyond their own lines (*Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 91), and there is nothing in the broadening provisions of the Act as amended to indicate that the Commission's authority as to car service and the interchange of cars is any the less where the interchange is between rail and water carriers. In fact, Section 1 (4) makes it the duty of certain common carriers, such as the appellees, to establish through routes with other carriers, to furnish transportation, which is defined as including cars, upon reasonable request, and "to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation." Furthermore, Section 3 (4) requires such carriers to afford all reasonable facilities for the interchange of traffic between their lines and connecting lines, and Section 15 (3) provides that the Commission may establish the terms

and conditions under which through routs shall be operated.

II

Section 15 (3) of the Interstate Commerce Act empowers the Commission to require rail carriers to interchange cars with a carrier by water whose interstate operations traverse extraterritorial and foreign waters. Because of the terminology of Section 15 (3), the restriction of the Commission's jurisdiction in Part I to transportation taking "place within the United States" (sec. 1 (1) (b)) is no bar. Cf. *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 274 U. S. 29. As the legislative history reveals, the Commission's power in this connection was not removed by the 1940 repeal of Section 6 (13) (b). The 1940 Act embodied the substance of that Section in new provisions and in effect confirmed the Commission's jurisdiction.

Even if the application of the statutory interchange obligation to the circumstances here presented is considered extraterritorial legislation, such legislation is neither unusual nor in excess of Congressional power. *Knott* v. *Botany Mills*, 179 U. S. 69; *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 129.

III

The rate of $1 per day fixed by the Commission for Seatrain's use of appellees' cars is, as the

court below held, neither confiscatory nor unreasonable. The past treatment of Seatrain by appellees indicates the appropriateness of this rate. The connecting carriers are also amply remunerated for per diem payments borne by them during the period cars are held for Seatrain. Since there is a rational basis for the Commission's decision, its order must be sustained. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

IV

While the order does not run against Seatrain, it is not therefore defective. Seatrain was not a defendant, but an intervening complainant. The violations of the Act were found to be caused by the rail defendants and not by Seatrain; consequently, the order could not properly be directed against the latter carrier. If appellees are not paid the $1 per day directed by the Commission in its 1941 order, they obviously do not have to permit the delivery of their cars to Seatrain.

ARGUMENT

I

THE INTERSTATE COMMERCE COMMISSION HAS AUTHORITY TO REQUIRE RAILROADS, PARTIES TO THROUGH ROUTES WITH A WATER CARRIER, TO PERMIT THE USE OF THEIR CARS BY THE WATER CARRIER, FOR REASONABLE COMPENSATION

On the ground that Seatrain is a carrier by water rather than a carrier by rail, appellees will

presumably contend, as they did below, that the provisions of the Interstate Commerce Act impose no duty upon them to permit their freight cars, for reasonable compensation, to be interchanged with Seatrain, whose operations, via through routes between it and the appellee railroads, the Commission found to be in the public interest (R. 43, 51, 57; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 20–21, 29, 34). However, the Commission's order requiring appellees to interchange their freight cars with Seatrain is amply supported by Sections 1 (4), 3 (4), and 15 (3) of Part I of the Act (Appendix, *infra*, pp. 51–52, 53, 56).

If Seatrain were a railroad, the appellees would not be justified in refusing to permit their cars to be delivered to it for the purpose of accomplishing the through transportation of freight, and the Commission would be fully authorized to require the establishment of reasonable rules and regulations as to such interchange and compel compliance therewith. *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 91; *Missouri & Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39. We submit that the duties of railroads in the public interest or the Commission's authority as to car service and interchange are the same where a water carrier[4] is concerned

[4] There are at least twelve water carriers equipped to participate in the through movement of freight in cars (R. 501).

as in the case of an interchange between rail carriers.[5]

In its report of February 5, 1935 (R. 35–51), the Commission fully discussed the question of its authority to require the appellees to supply Seatrain with equipment or to turn over such equipment to Hoboken and Lower Coast, the complainant terminal railroads, for Seatrain's use. In upholding its authority, the Commission relied (R. 46–50) upon Sections 1 (4), 1 (10–17) (known as the car service provisions), 3 (3) (now 3 (4)), and 6 (13) (known as the Panama Canal Act) of the Interstate Commerce Act as it existed in 1935. Although we believe that the Commission's interpretation of those provisions was correct, a discussion of them as they then stood would be academic in view of subsequent amendments which are of course controlling. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538. The present provisions should be broadly construed since they "emphasize the intention of Congress to broaden the control of the Interstate Commerce Commission over rail-and-water transportation and, generally, to extend the regulatory power of that body over all such transportation

[5] The duty of carriers to interchange freight with one another is not dependent upon a showing of discrimination between connecting carriers. *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 363.

in the public interest." *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 274 U. S. 29, 36; see also *Interstate Commerce Commission* v. *Railway Labor Executives Ass'n*, 315 U. S. 373, 376.

Section 1 (4) of Part I of the Act requires "every common carrier subject to this part", which of course includes appellee railroads, to "provide and furnish transportation [6] upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation, to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

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[6] Section 1 (3) (a) (49 U. S. C. 1 (3) (a)) defines "transportation" as including railroad "cars, and other vehicles * * * and all instrumentalities and facilities of shipment * * *, irrespective of ownership * * *."

By Section 3 (4) (which was formerly Section 3 (3)), carriers such as appellees are required to "afford all reasonable * * * facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines." Such carriers are not to "discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper." A "connecting line" is defined in the same Section as "the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III".

Section 15 (3) empowers the Commission to "establish through routes * * * applicable to the transportation of * * * property * * * by carriers by railroad subject to this part and common carriers by water subject to part III * * * and the terms and conditions under which such through routes shall be operated."

Because of these provisions, appellees, as the court below pointed out (R. 118), concede that they are required to establish through routes with carriers by water, but they do not concede that they may be required to interchange cars with such carriers.

In view of the statutory obligation of carriers to maintain through routes and facilities for

operating through routes (secs. 1 (4) and 3 (4)), the Commission frequently has held that it may require the interchange of cars between rail carriers where they are parties to a through route. *E. g., Missouri & Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39, cited with approval in *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 91; *Colorado Coal Traffic Ass'n* v. *C. & S. Ry. Co.*, 24 I. C. C. 618; *Chicago & North Western Ry. Reconsignment Rules*, 29 I. C. C. 620; *Doran & Co.* v. *N., C. & St. L. Ry. Co.*, 33 I. C. C. 523; *Omaha Grain Exchange* v. *Great Northern Ry. Co.*, 47 I. C. C. 532; *Car Supply Investigation*, 42 I. C. C. 657. It has held, too, that the railroads are under a duty to maintain through routes with common carriers by water and that it has jurisdiction to enforce this duty. *Colonial Navigation Co.* v. *New York, N. H. & H. R. R.*, 50 I. C. C. 625; *Pacific Navigation Co.* v. *Southern Pac. Co.*, 31 I. C. C. 472. Accordingly, in several cases rail carriers have been required to establish through routes with water carriers. *Flour City S. S. Co.* v. *Lehigh Valley R. Co.*, 24 I. C. C. 179; *Pacific Navigation Co.* v. *Southern Pac. Co.*, 31 I. C. C. 472; *Chattanooga Packet Co.* v. *Illinois Central R. Co.*, 33 I. C. C. 384. Sections 1 (4) and 3 (4), which are enforceable under Section 15 (3), impose as great an obligation to provide for the through transportation of freight by rail and water as by rail alone,

and also impose in both cases an equal obligation to provide the facilities reasonably required for the through movement of freight. In the present case, the Commission concisely stated the basis of its power, even before the enactment of Section 15 (3), to compel the delivery of railroad cars to water carriers (R. 48):

> As our power to enforce rules relating to the interchange of cars necessarily flows from the carriers' duty to establish through routes, and as the duty to establish through routes relates to water-rail routes as well as to all-rail routes, it seems apparent that our power to enforce rules relating to the interchange of cars between rail and water carriers, where such interchange might reasonably and appropriately be made, was, prior to the enactment of the Car Service Act (May 29, 1917) [Section 1 (10–17) of the Interstate Commerce Act] coextensive with our power to enforce rules relating to the interchange of cars between rail carriers.

Because Section 1 (4) provides that it is the duty of such carriers as appellees to furnish "transportation," which is defined in Section 1 (3) (a) as including cars, upon reasonable request, and "to provide reasonable facilities for operating such [through] routes [with carriers by water] and to make reasonable rules and regulations with respect to their operation routes", appellees' contention that they need not interchange cars with carriers by water would only be

tenable if the Section contained a proviso that no railroad should be under a duty to permit the interchange of cars with a water carrier or to make reasonable rules and regulations for such interchange even though the interchange of cars with a water carrier might constitute the most reasonable facility for operating through routes with the water carrier. Section 3 (4) requires that carriers such as appellees afford all reasonable facilities for the interchange of traffic between their lines and connecting lines, including those of water carriers. Appellees' contention would require reading into this Section a proviso that even if the delivery of cars should constitute a reasonable facility for the interchange of traffic, the Section would nevertheless impose no obligation upon a railroad to interchange cars in order to accomplish through transportation with a water carrier. Section 15 (3) gives the Commission the necessary power to compel appellees to fulfill the duty to interchange cars imposed upon them by Sections 1 (4) and 3 (4), for it permits the Commission to establish "the terms and conditions under which * * * through routes shall be operated."[1]

For a long period railroads and water carriers have interchanged cars (R. 48; see also

[1] Reciprocal obligations, enforceable under Section 307 (d), are imposed by Sections 305 (b) and 305 (d) upon water carriers with respect to rail carriers.

Pennsylvania Co. Operation of Transportation Co., 34 I. C. C. 47; *Grand Trunk Ry. Co. of Canada Operation of Car Ferry Co.*, 34 I. C. C. 49; *Buffalo, R. & P. Ry. Co. Operation of Car Ferry Co.*, 34 I. C. C. 52; *Grand Trunk W. Ry. Co. Operation of Car Ferry Co.*, 34 I. C. C. 54). In the instant case, the Commission found (226 I. C. C. 7, 29) that the reasonable and appropriate method of interchanging traffic moving over the appellees' and Seatrain's through routes was by the interchange of loaded cars. The correctness of this conclusion is even revealed by the past practices of appellees. For four years, they interchanged cars with Seatrain and its predecessor (R. 65). They have subsequently consented to the delivery of their cars to every water carrier except Seatrain (R. 503–506), and some of them have consented to their cars going to Cuba on Seatrain ships (R. 505–506, 1154).

The interchange of cars with water carriers, when this is the economical way of accomplishing through transportation is not only required by Sections 1 (4) and 3 (4) and enforceable under Section 15 (3) of the Act, but also to fulfill one of the underlying purposes of the Act, as disclosed in the National Transportation Policy (Appendix, *infra*, p. 49), *viz.*, to promote rail and water transportation. The power of the Commission to require railroads to interchange cars with water carriers is no more extreme than its power,

under Section 6 (11)[*], to require railroads to construct tracks to the piers of connecting water carriers and to provide other facilities for the unloading, handling and interchange of freight appropriate to break-bulk operations.

Without discussing Section 15 (3), the court below held (R. 120–121) that Sections 1 (10), 1 (11), 1 (13), and 1 (14) (a), which are among the car service provisions of the Interstate Commerce Act, enable the Commission to enforce the railroads' obligation to interchange cars. For the reasons given by the court below and by the Commission (R. 120–121, 48–49), the car service provisions do not diminish but rather facilitate

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[*] In an opinion dealing with Section 6 (11), the present Chief Justice remarked (*United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457, 462):

"The Panama Canal Act [see Section 6 (11) of the Interstate Commerce Act] is by its terms supplemental to the Act to Regulate Commerce, and its obvious purpose was to extend to rail carriers connecting with water carriers in interstate commerce the requirements of § 1, par. 9 of the earlier acts, c. 3591, 34 Stat. 585, 586, c. 309, 36 Stat. 547, for furnishing switching and car service to lateral branch railroads and private sidetracks. By § 6, par. 13 [now Section 6 (11) of the Interstate Commerce Act], so far as pertinent to the present inquiry, the commission is given authority to establish physical connection between the lines of the rail carrier and the dock of the water carrier, and to determine and prescribe the terms and conditions upon which the connecting tracks should be operated. It 'may either in the construction or the operation of such tracks determine what sums shall be paid to or by either carrier.'"

the Commission's ability to enforce appellee's statutory obligation to interchange cars. But the Commission had ample power to enforce this obligation before the enactment in 1917 (Esch Car Service Act, 40 Stat. 101–102) of the car service provisions (*Missouri & Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39, cited with approval in *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 91; *Colorado Coal Traffic Ass'n* v. *C. & S. Ry. Co.*, 24 I. C. C. 618; *Chicago & North Western Ry. Reconsignment Rules*, 29 I. C. C. 620, 624; *Doran & Co.* v. *N., C., & St. L. Ry. Co.*, 33 I. C. C. 523, 530; *Car Supply Investigation*, 42 I. C. C. 657, 672), and therefore the Commission's request for their enactment was not mainly motivated by this purpose (R. 48–49; see also *Car Supply Investigation*, 42 I. C. C. 657, 671). Contrary to appellees' assertion, the amendments to the car service provisions made by the Transportation Act of 1920 (41 Stat. 456, 476–477) did not lessen the Commission's jurisdiction but materially increased it. Hearings, H. Committee on Interstate and Foreign Commerce, H. R. 4378, 66th Cong., 1st sess., pp. 11–12; H. Rep. No. 456, 66th Cong., 1st sess., p. 17; 58 Cong. Rec. 8315–8316. In any event, Section 15 (3), as amended by the Transportation Act of 1940 (54 Stat. 899, 911), gives the Commission such power independently of the car service provisions.

II

THE COMMISSION HAS JURISDICTION TO REQUIRE RAILROADS TO PERMIT USE OF THEIR CARS BY A WATER CARRIER OPERATING BETWEEN AMERICAN PORTS THROUGH EXTRATERRITORIAL WATERS AND VIA A FOREIGN PORT

The Commission held it has no power to require appellees to deliver cars to Seatrain for use on Cuban railroads (R. 44, 59, 70–71). The United States and the Commission believe that this ruling is correct, for American railroads may not be required to furnish cars for use on foreign railroads. *St. Louis, B. & M. Ry. Co.* v. *Brownsville Nav. District*, 304 U. S. 295, 300. However, contrary to the Commission's rulings (R. 46–50; 59, 62; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 13–17), the statutory court, without discussing Section 15 (3) of the Act, accepted appellees' contention that the Commission lacks authority to require them to interchange cars with Seatrain in Seatrain's interstate operations between New Jersey and Louisiana via extraterritorial waters and Havana, Cuba. The court's theory was that Part I of the Act placed the statutory obligation to interchange cars upon railroads subject to that Part and that Section 1 (1) (b) renders Part I inapplicable to the transportation involved here. Section 1 (1) (b) limits the applicability of Part I to transportation which "takes" place within the United States". We maintain that this aspect of the decision below was erroneous in view of Section

15 (3), as amended by the Transportation Act of 1940 (54 Stat. 899, 911).

Section 15 (3) empowers the Commission to compel through routes and the terms and conditions under which such routes shall be operated, applicable to the transportation of property by "carriers by railroad subject to this part and common carriers by water subject to part III". It becomes necessary to refer to Part III to determine the meaning of "common carriers by water subject to part III". A "common carrier by water" is defined in Section 302 (d) of Part III as any person holding itself out to engage in the "transportation by water in interstate or foreign commerce". The latter term is defined in Section 302 (i) (2) as transportation of persons or property:

> * * * partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States.[9]

[9] The language of this Section is to be contrasted with the more restrictive language of Section 302 (i) (3), which deals

This definition of transportation by water in interstate or foreign commerce makes it apparent that the Commission has jurisdiction over water transportation "partly in the United States and partly outside thereof", but in such circumstances only "insofar as it takes place from a place in the United States to another place in the United States". Seatrain's interstate operation between Hoboken and Belle Chasse by way of Havana falls within the Commission's jurisdiction under this language, for it is transportation from a place in the United States to another place in the United States. If Congress had intended to mean that the Commission's jurisdiction was to be limited to water transportation entirely within the territorial waters in the United States, it would certainly have so provided expressly, as it has done with respect to the rail and motor portion of joint water-rail or water-motor transportation in the immedi-

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with transportation partly by water and partly by rail "from or to a place in the United States to or from a place outside the United States." The latter Section, as its language indicates, obviously is not pertinent to interstate transportation such as that here, where the foreign port is not the ultimate destination.

The House Committee report discusses Section 302 (i) as follows (H. Rep. No. 1217, 76th Cong., 1st sess., p. 20):

> In general terms the scope of regulation is all domestic water transportation or transportation by a combination of water, railroad, or motor vehicle, and also such transportation in foreign commerce to the extent that there is a movement from a point in the United States to another point in the United States either before or after transhipment at a place within the United States. * * *

See also H. Rep. No. 2832, 76th Cong., 3d sess., p. 82.

ately preceding language of this same Section. The language was chosen with care; it expresses clearly an intention that the Commission's jurisdiction should depend upon the origin and destination of the freight rather than upon whether the ship carrying it keeps its course entirely within United States territorial waters. And the present transportation is none the less from a place in the United States to another place in the United States because Seatrain vessels put in at Havana, Cuba, since the freight on the cars involved has an actual ultimate destination in another place in the United States, remains under United States customs seals and is not made accesible to Cuban authorities (see pp. ~~35-36~~ 36-37, *infra*). In a letter of March 20, 1939, to the House Committee on Interstate and Foreign Commerce, Commissioner Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission, voiced the Commission's objections to a provision in Part III (the water carrier provisions) of H. R. 2531, 76th Cong., 1st sess., which provided that the Act should apply to:

> (c) the transportation of passengers or property by water upon the inland, canal, or coastwise waterways of the United States, but shall not include common carriers engaged in the transportation of passengers or property upon the high seas, the Great Lakes, or in intercoastal commerce upon the Panama Canal.

His criticism was that this provision might be construed as repealing the jurisdiction the Commission had over railroad-controlled water carriers (such

as Seatrain) operating on the high seas. Hearings, H. Committee on Interstate and Foreign Commerce, H. R. 2531 76th Cong., 1st sess., pp. 1557, 1596. The present Section 302 (i) (2) was subsequently inserted by the House Committee and reported out four months later. 84 Cong. Rec. 9459, 9956. In this connection, the court below remarked (R. 123):

> Do the words of subparagraph (i) (2) extend the jurisdiction of the Commission to transportation throughout its whole course from a place to a place within the United States despite the fact that that course of transportation transverses extraterritorial waters and goes into a foreign port? We conclude that this was the intention of Congress. We think therefore that the Commission has jurisdiction over transportation such as that carried on by the petitioners and Seatrain, from state to state in the United States, throughout the whole course of that transportation even if it passes through foreign waters and into foreign ports.

Under appellees' contention, the applicability of Section 15 (3) would be restricted by Section 1 (1) (b) to transportation which "takes place within the United States", but "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, 215; *Kepner* v. *United States*, 195 U. S. 100, 125. Moreover, Section 6 (11) of the Act (formerly Sec-

tion 6 (13)), referring to transportation from point to point in the United States "through the Panama Canal or otherwise",[20] is also in Part I of the Act, and this Court did not hold it restricted by the general language of Section 1 (1) (b). *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 274 U. S. 29; see also *Lake and Rail Class and Commodity Rates*, 205 I. C. C. 101, 214 I. C. C. 93; *Consolidated Southwestern Cases*, 123 I. C. C. 203, 211 I. C. C. 601, 222 I. C. C. 229; *Luckenbach Gulf S. S. Co.* v. *Illinois Central R. Co.*, 163 I. C. C. 361. Still another departure in Part I from the general language of Section 1 (1) (b) may be found in Section 5 (14) (formerly Section 5 (19)) dealing with operations "through the Panama Canal or elsewhere." As the court below acknowledged (R. 122), the Commission has construed Section 5 (14) as applicable to carriers by water operating to or via foreign ports. *Peninsular and O. S. S. Co.*, 37 I. C. C. 432. The Commission has so held even after the Transportation Act of 1920 (41 Stat. 456, 474) established the present phraseology of Section 1 (1) (b). *New Orleans and Havana Car Ferry Service*, 188 I. C. C. 371; see also *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 15–16.

Three of the four decisions of the Commission in the instant case were handed down before the 1940 amendment of Section 15 (3), Appendix,

[20] The words "or otherwise" refer to transportation elsewhere than through the Panama Canal. *Augusta & Savannah Steamboat Co.* v. *O. S. S. Co.*, 26 I. C. C. 380, 384, 385.

infra, pp. 55–56. The Commission relied on Section 6 (13) as it then stood [11] in holding the interchange obligations of the Act (secs. 1 (4) and 3 (4)) applicable to appellees even though Seatrain's interstate operations between New Jersey and Louisiana are through extraterritorial waters and via a foreign port (*Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 14–16, R. 48, 49–50). Section 6 (13), which was enacted by the Panama Canal Act (37 Stat. 560, 568), then provided in part:

> When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten: * * *
>
> (b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

[11] This Section, as amended by the Transportation Act of 1940 (54 Stat. 899, 910), is now Section 6 (11).

Because Section 6 (13) (b) was repealed by the Transportation Act of 1940 (54 Stat. 899, 910), appellees assert that the Commission lacks power to require them to permit their cars to be used by a water carrier in transportation between American ports but via extraterritorial waters and a foreign port. The district court agreed with this contention, since it thought (R. 126) the Transportation Act of 1940 "emasculated" the Panama Canal Act.

The pertinent legislative history of the amendments made to the Panama Canal Act by the Transportation Act of 1940 (54 Stat. 899, 910) reveals that the amendments were not meant to "subtract" any of the Commission's power and that there was no Congressional intent "in any way to emasculate the Panama Canal Act", which contained Section 6 (13).[12]

Section 6 (13) (b), as it stood before its repeal by the 1940 Act,[13] became superfluous because

[12] See 86 Cong. Rec. 11270, 11273, 11274, 11285, 11541, 11611, 11612, 11630.

[13] Section 6 (13) (b) was removed by the House Committee on Interstate and Foreign Commerce, which advanced the following explanation (H. Rep. No. 1217, 76th Cong., 1st sess., pp. 12–13):

"Section 9 repeals subparagraph (b) of paragraph (13) of section 6. That subparagraph as now in effect limits the Commission's jurisdiction with respect to the establishment of through routes and joint rates by rail and water by providing that the Commission may prescribe only the maximum joint rate that may be charged. The bill gives the Commission full authority over rates by water carriers, including

under the 1940 Act its substance, insofar as empowering the Commission to determine "all the terms and conditions under which such lines [rail and water lines transporting property from point to point in the United States through the Panama Canal or otherwise] shall be operated", is embodied in the amended Section 15 (3) of Part I, together with Section 307 (d) of Part III (Appendix, *infra*, pp. 56, 60–61). In a letter to the Conference Committee considering the 1940 Transportation bill, Commissioner Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission, stated that the Commission did not object to the repeal of Section 6 (13) (b), for "other provisions of the bill [S. 2009, which became the Transportation Act of 1940] adequately cover this matter." Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., p. 23. In addition, it must be remembered that the 1940 Act was passed following the Commission's decisions herein holding that it had power to compel rail carriers to interchange cars with a water carrier even though the latter might traverse extraterritorial and foreign waters on its voyages between American ports.[*] The "well versed" Congressional Com-

authority to prescribe both the minimum and the maximum joint rail and water rates. It was necessary to repeal the subparagraph in paragraph (13) of section 6 which limits the authority as aforesaid."

[*] One of the factors motivating Senator Bennett Champ Clark's opposition to S. 2009, which became the 1940 Act, was

mittees on Interstate Commerce were presumably familiar with these decisions before the passage of the 1940 Act (see *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634, 642 (note 8), 648–649), and the Interstate Commerce Commission, which was instrumental in the drafting of the 1940 Act (see Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess.; 86 Cong. Rec. 10828, 10829, 11270, 11272, 11287, 11626, 11630, 11636, 11763), would certainly not have acquiesced in the diminution of its power suggested by appellees. In fact, the Commission regarded the 1940 Act as confirming its jurisdiction in the instant case (R. 62).

The construction for which we contend presents no real problem of extraterritorial exercise of Congressional power. All the carriers involved are American corporations doing business within the United States; all are admittedly subject, in general, to the Interstate Commerce Act; all car interchange would be accomplished within the United States; and there can be no doubt that all the Commission's orders in the premises can be effectively enforced against each party involved, including Seatrain.

Even if the application of the statutory interchange obligation to the circumstances here pre-

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his disagreement (86 Cong. Rec. 11613, 11635) with the Commission's 1935 decision (R. 35–53) in this case, but the bill was passed without the incorporation of his suggestions (86 Cong. Rec. 11766).

sented is considered extraterritorial legislation by Congress with respect to an American vessel on the high seas or in a foreign port, such legislation is not unusual or in excess of Congressional power. For example, Section 25 of the Interstate Commerce Act (repealed by the Transportation Act of 1940, 54 Stat. 899, 919) in certain contingencies required a railroad to issue a through bill of lading for property being transported by it and a water carrier to a destination in a foreign country and to deliver the freight to the vessel pursuant thereto (Appendix, *infra*, pp. 57–58). The Commission was, moreover, empowered to—

> make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading.

Under this provision the Commission undertook to prescribe a through export bill of lading, including provisions relating to water transportation to a foreign port. Other examples include the International Rules for Navigation at Sea (33 U. S. C. 61–142), the Carriage of Goods by Sea Act (46 U. S. C. 1300–1315), and the statutory provisions affecting the rights of crews and the obligations of masters of vessels with respect to seamen, which contain requirements and provide rights taking effect when American vessels are in foreign ports (46 U. S. C. 564–573). Also, certain provisions (46 U. S. C. 801, 815, 816, 821) of the Shipping Act of 1916 have been held applicable to prohibit

discriminations practiced by water carriers in a foreign country (*Compagnie Générale Transatlantique* v. *American Tobacco Co.*, 31 F. (2d) 663 (C. C. A. 2)), and Section 1 of the Harter Act (46 U. S. C. 190), making it unlawful for owners of vessels transporting property between American and foreign ports to contract out of liability for negligence in the handling of property committed to their charge, has been held applicable to negligent acts committed in foreign ports aboard a foreign vessel transporting property from foreign ports to an American port. *Knott* v. *Botany Mills*, 179 U. S. 69. Contrary to appellees' contention below, the power of Congress under international law to regulate American vessels on the high seas and in foreign ports was not denied, but was rather reaffirmed, in *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 129, where the Court said:

> In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. *Lord* v. *Steamship Co.*, 102 U. S. 541; *The Abby Dodge*, 223 U. S. 166, 176. But we do mean that the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limit its field of operation, like that of the

Amendment, to the territorial limits of the United States.

Admittedly, the local sovereign is not divested of authority over a foreign vessel in its port by the action of the foreign sovereign. But by international comity and practice the local authority is seldom exercised, in the absence of acts committed on board the vessel calculated to disturb the peace or dignity of the local country. *Wildenhus' Case*, 120 U. S. 1, 12. In the past, Cuba has exercised no authority over railroad cars in interstate service found on Seatrain vessels in Havana. As the Commission stated in *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 14:

> * * * that when the vessels call at Havana, cars containing interstate freight are placed under United States custom seals at the port of departure and remain so until arrival at the port of destination, and the freight contained in such cars is not made accessible to the Cuban authorities; that three sets of manifests are made out at the port of departure, one required by the Cuban authorities and another required by the United States customs relate to freight for Cuba, and the third, which shows only the cars moving in interstate commerce, is given the Cuban customs inspector as a matter of information; that *no Cuban official has ever attempted to take jurisdiction over the interstate freight*; and that there are no Cuban regulations affecting Seatrain's operations, but its vessels while

> at Havana are subject to all Cuban laws and regulations, such as those relating to quarantine and health, applicable to vessels of foreign register. [Italics supplied.]

The record is barren of anything affording a reasonable basis for the belief that this Cuban practice will be changed in the future, or that would justify the great apprehension which appellees professed below to feel for their interstate cars in Cuban waters.[15] But even the exercise of Cuban authority over these cars to some degree would not, after all, vitiate the concurrent Congressional power over American railroad cars on an American vessel in a Cuban port.

III

THE COMPENSATION FIXED BY THE COMMISSION FOR SEATRAIN'S USE OF RAILROAD CARS IS NOT CONFISCATORY OR UNREASONABLE

A. Appellees allege that the $1 per diem compensation fixed by the Commission for Seatrain's use of appellees' cars is confiscatory. The allegations of confiscation in the complaint (R. 12–13, 16, 17–18) do not meet the prescribed requirements of particularity (*Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447–448; *Beaumont, Sour Lake & W. Ry. Co.* v. *United States*, 282 U. S. 74,

[15] It should be noted that all the appellees from 1929–1932 permitted without objection their cars to be delivered to Seatrain for discharge at Havana and interchange with Cuban railroads (R. 65). Seven of the appellees permit such delivery at the present time (R. 505–506, 1154).

88–89; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53), but in case the Court chooses to overlook this procedural defect, we are discussing herein the confiscation issue. It is submitted, as the court below held (R. 141–147), that the $1 per diem rate is reasonable.

Appellees' argument that the standard interrailroad $1 per diem is confiscatory, when applied to use of their cars by Seatrain, may be summed up in the following propositions. It is contended (see R. 13) that this $1 per day rental, as between railroads, actually covers only the cost of ownership of cars when they are in "active and productive service." It is said (*idem*) not to cover the cost of car ownership when the cars are inactive or unproductive (*i. e.*, while cars are undergoing repairs, during slack periods when cars are idle for lack of demand, while cars are being switched in origin or destination switching service, while cars are held for consignors or consignees for loading or unloading, and while cars are moving empty). This additional burden for idle time, it is urged, the various railroads mutually and reciprocally share, either by owning and maintaining a fair share of cars for the national supply, or by paying for the use of other's cars during the remainder of the idle time, as, *e. g.*, when hauled empty. But it is pointed out (see R. 64) that Seatrain does not itself own and main-

tain any cars,[16] that it moves comparatively few empty cars,[17] that it does no switching, and that it does not need to hold cars for consignors and consignees situated on its line. Thus it is concluded (*idem*) that the $1 per diem rate to be paid by Seatrain does not result in Seatrain's bearing a fair share of the burden of car ownership in idle time.

The principal fallacy here lies in the fact that the inter-railroad per diem does cover the cost of

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[16] The Commission made the following statement concerning Seatrain's ownership of cars (R. 65):

"So far as car ownership is concerned, Seatrain has offered of record to acquire cars for interchange with the railroads if and when such acquisition is desirable from the standpoint of the car supply of the country. The witness from Car Service Division who testified on behalf of the association was unwilling, upon inquiry, to state that such acquisition would be desirable under the then existing circumstances. It appears, also, that Seatrain rents a substantial number of privately owned cars."

[17] The Commission made the following statement concerning Seatrain's movement of empty cars (R. 65):

"So far as the movement of empty cars is concerned, Seatrain holds itself ready to move in the home direction cars which it has moved in the opposite direction under load. It argues that it should not be penalized because it happens to have a well-balanced traffic and consequently can furnish loads for many such cars, or because the delivering railroads prefer to return others by rail. Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense."

car ownership, not only during periods of productive service, but also during idle periods. This is manifest from the following statement made by the Commission in 1925 in *Rules for Car-Hire Settlement*, 160 I. C. C. 369, 378, which was quoted in the Commission's 1941 decision in the present case (R. 62; see also R. 64):

> The per diem rate is supposed to reflect the average cost, to the owner, of freight-car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 per cent interest on the investment. From the evidence of record, it is estimated that the cost of car ownership and maintenance averaged 83.812 cents per car day and $305.91 per car unit in the calendar year 1925, and approximately $1 per car day in that year for the periods cars were actually in service. Cars were idle a portion of the year, due in part to unserviceable condition, and in part to the fact that the supply of cars exceeded the demand.

The Commission pointed out in its 1941 report (R. 64) that the present cost does not exceed the $1 per day found reasonable in 1925. There has been no recommendation for a change in the per diem rate of $1 a car, and the Car Service Division of the Association of American Railroads has made no recommendation to the Board of Directors for a different per diem rate in connection with cars interchanged with Seatrain (R. 859, 843).

That the present inter-railroad per diem rate is not based upon the scheme of distribution of idle time burden by means of mutual car ownership and the other methods suggested by appellees, is established by the following excerpt from the Commission's 1941 report (R. 65):

> Of equal importance is the fact that as between railroads there is no such balancing of burdens as defendants would imply. Not all railroads own cars. Granting that the more important are car owners, there is no reason to believe that the ownership is always proportionate to car use. There are also railroads which, by reason of location, are essentially bridge carriers with much less than the normal amount of car origination, termination, and intermediate switching. There are railroads which, by reason of well-balanced traffic, have much less than the normal proportion of empty-car movement. The car-hire rules do not differentiate between railroads because of such differences in conditions.

The past treatment of other water carriers and of Seatrain itself, by the railroads, is another strong indication that the present $1 per diem would not be confiscatory as applied to Seatrain. Thus the Commission found (R. 65) that the regular railroad per diem rules and rates have been applied uniformly where cars are interchanged voluntarily with water lines, such as the various car ferries, which obviously do not own railroad cars and are comparable to Seatrain.

The Commission found, too, that all the railroads for nearly four years prior to inauguration of the interstate service by Seatrain freely interchanged cars with it and its predecessor in their Cuban service at the regular $1 per diem rate; that a large number of railroads, some of which were defendants before it, had voluntarily consented to the delivery of their cars to Seatrain at that rate for use even in its interstate service; and that 19 defendant railroads (seven of whom are appellees here; see R. 505–506, 1154) had continued to consent to the use of their cars by Seatrain in its Cuban service, though not in its interstate service, at the prevailing rate (R. 65–66). The fact that carriers voluntarily perform certain services at one charge for one group of individuals, has been recently recognized as a strong indication that an order of the Commission is not confiscatory which merely requires them to perform comparable services for others at the same charge. *Northern Pacific Ry. Co.* v. *United States*, 41 F. Supp. 439, 446 (D. Minn.), affirmed *per curiam*, 316 U. S. 346. The same principle is applicable here.

The considerable saving to the owner on car repair bills with respect to cars used by Seatrain cannot be overemphasized as a clear indication that the regular per diem rate paid by railroads is not confiscatorily low when paid by Seatrain. In this connection, the Commission found (R. 63) that repairs accounted for a large proportion of the cost of car ownership. It further found

(*ibid.*) that the railroads conceded that about 61.5 percent of the average running-repair expenses of sixteen cents per car per day, or about 9.8 cents, was avoided when cars were not moving, as when in use on Seatrain's vessels, and that the corrosive effect of the ocean atmosphere on the cars was negligible.

B. The Commission has found that since Seatrain is a water carrier with limited sailings, cars must be held at the ports of Hoboken and Belle Chasse awaiting arrival of its vessels (R. 66). The average detention of cars for Seatrain at Belle Chasse was found to be 3.3 days per car during the last six months of 1938 (R. 67). The Commission's order limited the time that Seatrain was to pay per diem to such periods as the cars were in its actual possession (R. 74). Since the switching railroad lines (the Hoboken and the Lower Coast) connecting with Seatrain do not bear the per diem rental paid to the owners of the cars for the periods they are held for Seatrain, the Commission's order means that such per diem cost must be borne by the connecting line-haul carriers (R. 145). Except for the Pennsylvania, the line-haul carriers serving Seatrain at Hoboken have consented to bearing such cost[18] (R. 68).

[18] The controversy between the Pennsylvania and the Hoboken as to the payment of per diem on Seatrain's traffic is the subject of pending litigation (R. 68). *Pennsylvania Railroad Co.* v. *Seatrain Lines, Inc., and Hoboken Manufacturers Railroad Co.*, Civil No. 6-414; *idem*, Civil No. 19-307, United States District Court for the Southern District of New York.

But appellees contend (see R. 67) that the Commission's order, in relieving Seatrain of paying the per diem on cars thus held for it at New Orleans is an arbitrary and confiscatory departure from the practice followed between railroads. They cited below (see R. 67) Rule 15 (a) of the Code of Per Diem Rules (R. 1003) as showing the inter-railroad practice. That rule provides that a railroad failing to receive cars promptly from a connection shall be responsible to the connection for the per diem of the cars so held for delivery, including the home cars of such connection. It should be noted at the outset that the only railroads among appellees having any standing to raise this issue are the four[19] which serve Belle Chasse. The other car owners receive their per diem during such time in any event, and it is obviously immaterial to them whether they receive it from Seatrain or from the connecting Belle Chasse carriers. Only the connecting Belle Chasse carriers must either pay per diem for the cars of others or forego the use of their own cars, held during such periods for Seatrain (see R. 69).

Regardless of appellees' arguments, as the Commission's 1941 decision shows (R. 67, 69), the connecting carriers are amply remunerated for per diem payments borne by them during this holding period. The Commission found (R. 67–68, 69) that to place the burden of car detention

[19] Southern Railway, Louisville & Nashville, Southern Pacific, and Texas & New Orleans.

for Seatrain upon the connecting railroads would be to place a burden, closely analogous to the car detention burden involved with the "break-bulk" water carriers at New Orleans, on the same parties as bore it in connection with the "break-bulk" traffic.[20] Thus the decision indicates that cars had to be held for loading and unloading with the "break-bulk" carriers nearly as long as for Seatrain, even though the cars were not actually used by the "break-bulk" carriers. And, in addition, if the cars were not actually held, then the contents had to be stored awaiting arrival of the "break-bulk" vessels. These "break-bulk" car holding and storage expenses were in either event borne by the connecting railroads, the Commission found. (R. 67-68.) Furthermore, the Commission concluded (R. 69) that "this car detention in the case of traffic interchanged with water lines, caused by their infrequent service as compared with rail service, is a disability which has always been recognized and which is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic." The connecting railroads are thus specifically recompensed for the cost of detention of cars for Seatrain and the "break-bulk" lines either in their

[20] The reasonableness of treating Seatrain on a parity with the "break-bulk" lines is apparent when it is recalled that the two are close competitors and that in *Seatrain Lines, Inc. v. Akron, C. & Y. Co.*, 226 I. C. C. 7, the Commission ordered that Seatrain should have no higher joint rates with railroads than the "break-bulk" lines had.

divisions of joint rates or in their own proportional rates. Since the Commission's decision recognizes that the problem of car detention is one to be handled in the fixing of rates or divisions, if in the future it should develop that one of the New Orleans carriers is not in fact adequately remunerated for this car detention burden under existing rates, the carrier has the right to have the Commission make a proper adjustment in its rates (R. 69).

As we have shown, this case involves no "free use" of the railroad equipment of another as was the situation in *Chicago Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, 96–97, relied upon below by appellees. Because there is a rational basis for the Commission's decision, its order must be sustained (*Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286–287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146), as it was below in this respect (R. 141–147).

IV

THE COMMISSION'S ORDER IS NOT INVALID BECAUSE NOT RUNNING IN TERMS AGAINST SEATRAIN

The complaint alleges that the order is arbitrary because it does not "run against or impose any obligation upon Seatrain" (R. 17). The order (R. 73–74) is to all intents a cease and desist order and runs against those railroads (R. 72–73) violating provisions of the Interstate Commerce Act. It does not and should not run

against Seatrain, an intervener in support of the complaint (see R. 98). The claim that the order does not impose an obligation on Seatrain to pay the $1 per diem compensation for the use of appellees' cars is without merit, because the order reads (R.74).

> * * * provided, however, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

If appellees are not paid the $1 per diem rate, they obviously are not required to permit the delivery of their cars to Seatrain.

Seatrain was informed by the Association of American Railroads that it was not eligible to membership in the Association (R. 214, 444). Appellees, by becoming parties to the Car Service and Per Diem Agreement (R. 450–451), have bound themselves to accept payment for their cars only from members (R. 216, 228, 330, 450, 519–820). Seatrain was denied the privilege of becoming a party to this Agreement (R. 214, 216, 820). Accordingly, it was unnecessary for the Commission to require Seatrain to make reports of its detention of cars directly to the owning lines and to make settlement of the per diem charges directly with them instead of through the complainants Hoboken and Lower Coast (R. 71). Seatrain has announced its willingness to become a party to the per diem rules agreement and to make direct settlement for car-hire with the

owners of the cars if appellees and other members of the Association amend their rules and articles of agreement to do so (see *idem;* see also R. 819–820, 540). Thus the Association of which appellees are members, under the order of the Commission, has the power to bring about the direct settlement which all parties seek (see *idem*).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below should be reversed insofar as it set aside any part of the Commission's orders involved herein, and sustained in all other respects.

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DECEMBER 1944.

APPENDIX

The National Transportation Policy, as set forth in the Transportaion Act of 1940, is as follows (54 Stat. 899):

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carry out the above declaration of policy.

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (1) (a) and (b) provides in part:

> That the provisions of this part shall apply to common carriers engaged in—
>
> The transportation of passengers or property wholly by railroad, * * *;
>
> * * * * * *
>
> —from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States. (49 U. S. C. 1 (1) (a) and (b).)

Section 1 (3) (a) provides:

> The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transporta-

tion of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof. (49 U. S. C. 1 (3) (a).)

Section 1 (4) provides:

It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to Part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regula-

tions with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers. (49 U. S. C. 1 (4).)

Section 1 (10) provides:

The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part. (49 U. S. C. 1 (10).)

Section 1 (11) provides:

It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. (49 U. S. C. 1 (11).)

Section 1 (13) provides:

The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules

showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto. (49 U. S. C. 1 (13).)

Section 1 (14) (a) provides:

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. (49 U. S. C. 1 (14) (a).)

Section 3 (4) provides:

All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. (49 U. S. C. 3 (4).)

Section 5 (14) provides:

> Notwithstanding the provisions of paragraph (2), from and after the 1st day of July 1914, it shall be unlawful for any carrier, as defined in section 1 (3), or (after the date of the enactment of this amendatory section) any person controlling, controlled by, or under common control with, such a carrier to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense. (49 U. S. C. 5 (14).)

Section 6 (11) provides:

> When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate com-

merce, as amended June eighteenth, nineteen hundred and ten: (49 U. S. C. 6 (11).)

Section 15 (3), before amendment by the Transportation Act of 1940 (54 Stat. 899, 911), provided:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this chapter shall be subject to the laws and regulations applicable to

transportation by water. (49 U. S. C. A. 15 (3).)

Section 15 (3) provides:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section. (49 U. S. C. 15 (3).)

Section 25, as amended by the Act of April 16, 1936, 49 Stat. 1207, 1212, and before its repeal by the Transportation Act of 1940 (54 Stat. 899, 919), provided in part:

> (1) *Schedules to be filed by carriers by water in foreign commerce.* Every common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States, shall file with the Commission, within thirty days after this section becomes effective and regularly as changes are made, a schedule or schedules showing for each of its steam vessels intended to load general cargo at ports in the United States for foreign destinations (a) the ports of loading, (b) the dates upon which such vessels will commence to receive freight and dates of sailing, (c) the route and itinerary such vessels will follow and the ports of call for which cargo will be carried.
>
> * * * * *
>
> (4) *Bills of lading; form and contents; liability of initial carrier.* When any consignor delivers a shipment of property to any of the places so specified by the Commission, to be delivered by a railway carrier to one of the vessels upon which space has been reserved at a specified rate previously ascertained, as provided herein, for the transportation by water from and for a port named in the aforesaid schedule, the railway carrier shall issue a through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge; but the carrier by railroad shall not be liable to

the consignor, consignee, or other person interested in the shipment after its delivery to the vessel. The commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier. *Provided, however,* that in so far as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act. (49 U. S. C. A. 25; 49 Stat. 1212.)

Part III of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended. Section 302 (d) provides:

> The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 902 (d).)

Section 302 (i) (2) provides:

> (i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce", as used in

this part, means transportation of persons or property—

* * * * *

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States;

* * * * *

(49 U. S. C. 902 (i) (2).)

Section 303 (a) provides:

In the case of transportation which is subject both to this part and part I, the provisions of part I shall apply only to the extent that part I imposes, with respect to such transportation, requirements not imposed by the provisions of this part. (49 U. S. C. 903 (a).)

Section 305 (b) provides:

It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for

reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers. (49 U. S. C. 905 (b).)

Section 305 (d) provides:

> All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to part I. (49 U. S. C. 905 (d).)

Section 307 (d) provides:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable

to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15. (49 U. S. C. 907 (d).)

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., *et al.*, Appellants, *v.* THE PENNSYLVANIA RAILROAD COMPANY, *et al.*	No. ~~845~~ 47
THE PENNSYLVANIA RAILROAD COMPANY, *et al.*, Appellants, *v.* THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., *et al.*	No. ~~846~~ 48

Return on Behalf of Forrest S. Smith, Trustee of Hoboken Manufacturers' Railroad Company, Appellant, to Order to Show Cause Dated April 24, 1944.

1. The Hoboken Manufacturers' Railroad Company was original complainant in the proceedings before the Interstate Commerce Commission in the matter involved in this appeal. It filed its complaint because of a Car Service Rule and Action of the Pennsylvania Railroad and other appellants pursuant thereto in refusing to permit the Hoboken to deliver their cars loaded with freight to the

vessels of Seatrain Lines, Inc. in the performance of through transportation. The interchange arrangement with Seatrain substantially increased the revenues of the Hoboken Manufacturers' Railroad Company and have been vital to its continued operation. Attached hereto is an affidavit of the Trustee as permitted by the Court, showing the revenue derived by Hoboken Manufacturers' Railroad Company over a period of ten years from Seatrain traffic and other traffic.

2. By its order in a proceeding entitled "Seatrain Lines, Inc. *against* Akron, Canton & Youngstown Railway, Docket No. 25727", in which the Hoboken was a defendant, the Interstate Commerce Commission ordered the railroads, including the Hoboken, to establish and maintain through routes for through transportation in connection with Seatrain and prescribed and ordered the maintenance of joint through rates for such transportation. This order of the Interstate Commerce Commission is in full force and effect without termination date.

3. In the interchange of freight in the performance of through transportation with Seatrain pursuant to the order of the Commission above referred to or otherwise, it is important that the Hoboken Manufacturers' Railroad Company be able to deliver the freight to the vessels of Seatrain in the cars in which such freight is received by it, including cars of the Pennsylvania Railroad and other Trunk Line railroad appellants. If the Hoboken Manufacturers' Railroad Company may not do this, it will be compelled to incur great expense, either in unloading the cars and delivering the freight loose, or in transferring the freight to cars of other railroads who have consented to interchange with Seatrain. In either of these events, not only will the Hoboken Manufacturers' Railroad Company be caused expense, but the through transportation service will be impaired.

4. With the requisitioning by the Government of the use of its vessels for war purposes, Seatrain on or about April 11, 1942 suspended its operations, but by Public

Notice filed with the Commission expressly stated that its service was merely "temporarily suspended." Joint through rates in connection with Seatrain, to which Hoboken is a party, have been maintained in effect and changed from time to time, and the Commission's order prescribing joint through rates and through routes is, as has been stated, still in effect without termination date.

5. On or about July 26, 1943, as the result, among other things, of reduction of its revenues due to the temporary suspension of Seatrain Service, the Hoboken Manufacturers' Railroad Company filed a petition to the United States District Court for the District of New Jersey for reorganization pursuant to Section 77 of the Bankruptcy Act. The petition was allowed and thereafter, on or about November 12, 1943, Forrest S. Smith qualified as Trustee of the property of the debtor and has been substituted in the place and stead of Hoboken Manufacturers' Railroad Company as an intervenor-defendant in this action, and as an appellant and appellee herein.

6. Under the provisions of Section 77 of the Bankruptcy Act, a plan of reorganization must be presented within such time as the court may permit. Whether such plan can be prepared at all and if so the nature of the plan, will depend upon whether, with the resumption of service by Seatrain, which is anticipated when its vessels are returned to it or other vessels become available, it will be possible for this appellant to deliver freight to and receive freight from Seatrain in railroad cars. Therefore the decision by this Court of the issues in this proceeding which directly concern this question, is essential for the preparation of a plan of reorganization.

7. Furthermore, when its vessels are returned to it, the order of the Commission prescribing through routes and joint rates in connection with Seatrain, which order is binding upon this appellant, will immediately become effective, and if this appellant may not perform such through transportation by interchanging freight in the railroad cars of the appellant Trunk Line railroads, it will suffer serious

financial distress. Indeed, without the revenues from Seatrain traffic, the Hoboken probably will not be able to operate at all.

8. Moreover, as more fully set forth in the affidavit of the Trustee annexed hereto, there are pending in the United States District Court for the Southern District of New York two suits brought by the Pennsylvania Railroad Company against the Hoboken Manufacturers' Railroad Company and Seatrain Lines, Inc. involving administrative questions on which it is believed that the determination of the Interstate Commerce Commission is necessary before submission to the Court. Since these administrative questions are involved in the present litigation, these two suits have, pursuant to orders of the District Court or on stipulation, been adjourned from time to time or held upon the suspense calendar of that court awaiting the determination of these issues by the Commission and thereafter awaiting the decision in the pending action with regard to the Commission's jurisdiction and the validity of its determination. If this court should decline to pass upon these questions on the ground that the present case has become moot, these pending suits would have to be further adjourned until the administrative questions could again be brought to the Commission in another proceeding and the Commission's determination therein passed on by the courts.

9. For these reasons we respectfully submit that the court should conclude that the issues involved have not become moot merely because Seatrain's service has been temporarily interrupted by the diversion of the vessels to war use.

Respectfully submitted,

JAMES D. CARPENTER, JR.,
Counsel for Forrest S. Smith, Trustee for Hoboken Manufacturers' Railroad Company,
75 Montgomery Street,
Jersey City 2, N. J.

Affidavit of Forrest S. Smith.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.:

FORREST S. SMITH, of full age, being duly sworn on his oath according to law, deposes and says:

I am the duly appointed and qualified Trustee in reorganization under Section 77 of the Bankruptcy Act of Hoboken Manufacturers' Railroad Company.

Annexed hereto and made a part hereof is an analysis made pursuant to my instructions by J. B. Cossolini, auditor of Hoboken Manufacturers' Railroad Company, of Seatrain Lines, Inc. tonnage on the one hand and all other tonnage passing over the lines of Hoboken Manufacturers' Railroad Company for the years 1932 to 1942 inclusive. The first Seatrain tonnage that Hoboken Manufacturers' Railroad Company enjoyed was in the year 1932. On or about April 11, 1942 Hoboken Manufacturers' Railroad Company lost further Seatrain traffic because the Government requisitioned the Seatrain vessels for war purposes and removed them from the Port of New York.

I verily believe from my study of the affairs of the Hoboken Manufacturers' Railroad Company that that Railroad cannot operate successfully as a railroad and cannot be reorganized if it permanently loses the traffic that for the last twelve years has passed over its lines to and from Seatrain vessels. Moreover, I believe it will be impossible to formulate a plan of reorganization until the right of Seatrain to operate as before is determined.

Furthermore this appellant is defendant in two suits pending in the United States District Court for the Southern District of New York—Civil 6-326 and 414 brought by the Pennsylvania Railroad Company, one of the appellants in 846, against Hoboken Manufacturers' Railroad Company and Seatrain Lines, Inc. to recover compensation for the use, or damages for the alleged conversion, of cars of the Pennsylvania Railroad delivered by this appellant to the

vessels of Seatrain. One of the issues in these suits is whether a so-called "Car Service Rule" involved in the present appeal, which rule purports to authorize the Pennsylvania Railroad to withhold its consent to the interchange of its cars with Seatrain as a water carrier in the performance of through transportation is a just, reasonable and lawful car service rule. Another issue is what will constitute a reasonable per diem charge to be paid by Seatrain and this appellant for the use of such cars when in their possession. Since these are administrative questions, as to which it is believed a determination of the Interstate Commerce Commission must first be had, these suits, pursuant to orders of the court or by stipulation, have been adjourned from time to time, or held on the suspense calendar of the court, pending a determination of these administrative questions by the Interstate Commerce Commission in the proceeding involved in this action, and thereafter pending final determination as to the validity of the Commission's order. If the present appeal is dismissed on the ground that the case has become moot, deponent is informed and believes that it will be necessary to present these administrative questions to the Commission in another proceeding, which will involve duplication of hearings and testimony and which may again invite judicial review of the Commission's determination before the New York District Court can proceed to a final decision in these two pending suits.

FORREST S. SMITH.

Sworn to and Subscribed before me
this 29th day of April, 1944.

WILLIAM L. ULYAT
Notary Public of New Jersey.
My Commission expires Dec. 21, 1947.

(SEAL)

Breakdown of Seatrain Lines, Inc., and Other Tonnage Handled From 1932 to 1942, Inclusive.

Year	1932	1933	1934	1935	1936
Seatrain	18,575	192,829	264,584	313,192	334,898
Other	115,157	93,023	86,463	94,182	105,008
Total	133,732	285,852	351,047	407,374	439,906

Year	1937	1938	1939	1940	1941	1942
Seatrain	329,481	344,777	343,286	467,705	549,454	37,521
Other	124,050	103,376	137,128	166,753	285,973	388,055
Total	453,531	448,153	480,414	634,458	835,427	425,576

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. [redacted] 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., *Appellants*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

No. [redacted] 48

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

BRIEF OF APPELLANTS IN NO. 846 (APPELLEES IN NO. 845) ON THE QUESTION WHETHER THE CAUSE IS MOOT, AND SUPPORTING AFFIDAVIT.

JOHN VANCE HEWITT,
JOHN A. HARTPENCE,
JOSEPH F. ESHELMAN,
R. AUBREY BOGLEY,
Counsel for Appellants in No. 846 (Appellees in No. 845).

J. R. BELL,
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CHARLES CLARK,
ELMER B. COLLINS,
FRANK W. GWATHMEY,
G. H. MUCKLEY,
CONRAD OLSON,
J. P. PLUNKETT,
EDWARD W. WHEELER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 845.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., *Appellants*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

No. 846.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

BRIEF OF APPELLANTS IN NO. 846 (APPELLEES IN NO. 845) ON THE QUESTION WHETHER THE CAUSE IS MOOT.

This brief is filed pursuant to the rule to show cause herein issued April 24, 1944.

OPINIONS BELOW.

The opinions of the specially-constituted District Court in *The Pennsylvania Railroad Company et al.*, v. *United States of America et al.*, are not officially reported but appear in the Jurisdictional Statement in No. 845 at pages 17 and 81.

The report of the Interstate Commerce Commission of October 13, 1941, in Nos. 25728 and 27878, *Hoboken Manufacturers R. Co.* v. *Abilene & S.R. Co.*, is reported in 248 I.C.C. 109.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, sections 47(a) and 345, for the taking of a direct appeal to this Court from the final decree of a United States District Court made pursuant to the provisions of U. S. Code, Title 28, sections 41 (28), 43-48, enjoining in whole or in part an order of the Interstate Commerce Commission. The final decree of the District Court was entered December 8, 1943, and appears in the Jurisdictional Statement No. 485, page 94.

STATEMENT.

A direct appeal has been taken from the final decree which set aside an order of the Interstate Commerce Commission in so far as said order directs petitioners to permit the interchange of their freight cars with or for the use of Seatrain Lines, Inc., for transportation beyond the United States and its territorial waters.

Fifteen railroad companies, appellees in No. 845 (appellants in No. 846), hereinafter referred to as petitioners, filed a petition under the Urgent Deficiencies Act (28 U.S.C. 41 (28), 43-48) in the District Court of the United States for the District of New Jersey, seeking to annul, as beyond its statutory authority and as confiscatory, the order of the Interstate Commerce Commission dated October 13, 1941, entered in its Docket Nos. 25728 and 25878 *Hoboken Mfrs. R. Co.* v. *Abilene & S.R. Co.*, 248 I.C.C. 109.

If this Court should adjudge that the said order, apparently enforceable on its face, has ceased to be effective and can no longer demand obedience, then the purpose of the suit has been accomplished. However, there are certain facts indicating that such is not the situation, which we feel should be called to the attention of the Court.

THE FACTS.

Hoboken Manufacturers Railroad Company, herein termed "the Hoboken", on December 30, 1932, commenced a proceeding before the Commission (Docket No. 25728) to compel the defendants therein, including petitioners herein, to cease and desist from the enforcement of Rule 4 of the Code of Car Service Rules (Finding 11, United States Jurisdictional Statement, p. 63) and to permit it to deliver their cars at Hoboken, N. J., to Seatrain Lines, Inc., hereinafter referred to as "Seatrain", a carrier by water which transports cargo in railroad cars between Hoboken, N. J., and Belle Chasse, La. Later the New Orleans and Lower Coast Railroad Company, herein termed the Lower Coast, filed with the Commission a similar complaint (Docket No. 25878) for the delivery of cars for Seatrain service at Belle Chasse, La. Contemporaneously with the filing of the Hoboken's complaint, Seatrain, which controls the Hoboken through stock ownership, commenced a proceeding before the Commission (Docket No. 25727) to compel the defendants, including The Pennsylvania Railroad Company and certain of the other petitioners, to join with it in establishing through routes and joint rates. Hearings were held jointly in Dockets 25728 and 25878, and the Commission rendered its report therein (206 I.C.C. 328, Amended Petition, p.49), holding that it had jurisdiction to compel the interchange of cars and to establish rules and regulations therefor only where through routes existed, and that the evidence in the proceeding did not show whether or to what extent such routes might exist. It thereupon dismissed No. 25728 and 25878. (Amended Petition, p.68).

Thereupon hearings were had in No. 25727, and the Commission, by its orders of January 28, 1938, and December 23, 1940, entered in connection with its reports of those respective dates (226 I.C.C. 7, 243 I.C.C. 199) required the defendants therein, including The Pennsylvania Railroad Company and certain of the petitioners herein,

to establish through routes and joint rates with Seatrain via Hoboken, N. J., and Belle Chasse, La. The pertinent portions of the order of January 28, 1938, are set forth as Exhibit 1 of the Eshelman affidavit.

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another."
> (Brandeis, J., in *St. Louis S.W. Ry. Co.* v. *United States*, 245 U. S. 136 at p. 139)

Thereupon The Pennsylvania Railroad Company and certain other petitioners herein, in obedience to said order joined with Seatrain in the arrangement for the through routes so prescribed. Appropriate tariffs were filed with the Commission establishing the prescribed joint rates over the said through routes. The said arrangement has never been cancelled or terminated, and The Pennsylvania Company and certain other of the petitioners have ever since been participating in the through routes as directed by the Commission.

Thereafter, upon motion of complainants in Nos. 25728 and 25878, the Commission reopened said dockets, and upon further hearings made its finding that certain of the defendants therein "according as they participate in through routes with complainants and Seatrain, have failed to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operations, in violation of section 1(4) of the Interstate Commerce Act, by refusing to agree to the interchange of freight cars owned by them with complainants for delivery to Seatrain for use, in interstate commerce between points in the United States", and the further finding "that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1 per day payable by Seatrain for such period as the cars are

in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain." (248 I. C. C. 119; Amended Petition, p. 87).

The violation of section 1 (4) found by the Commission was the refusal to enter into an agreement with complainants for interchange of cars with Seatrain. The record below shows that in the absence of such an agreement the ~~complainants~~ petitioners were in fact interchanging petitioners' cars with Seatrain. The Commission thereupon issued its order of October 13, 1941 in Nos. 25278 and 25878 (United States Jurisdictional Statement, pp. 18-19), making a part of said order the reports of the Commission in 206 I. C. C. 328 and 237 I. C. C. 297 (Amended Petition: Ex. C, p. 49; Ex. G, p. 71). Thereby the Commission ordered that the defendants therein "according as they participate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce." As The Pennsylvania and certain of the other petitioners had entered into the required arrangement with said complainants and Seatrain, and were participating in the said through routes, the order of October 13, 1941, was applicable to them. The Commission, having thus found that the petitioners violated section 1(4) of the act, has accordingly ordered them to cease and desist on or before February 2, 1942, subsequently extended to May 15, 1944, and thereafter to abstain from observing and enforcing their existing rules, regulations, and practices under which petitioners have refused to consent to the delivery of their cars to Seatrain. The order prohibits the continuance or maintenance of these rules, regulations, and practices.

By the said order of October 13, 1941, the Commission therein further directed that the said defendants be notified and required to establish on or before February 2, 1942, subsequently extended to May 15, 1944, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of their freight cars with complainants therein for transportation by Seatrain in interstate commerce. Further, the effectiveness of the order is not made to depend upon whether Seatrain has or has not ships available at the time. The railroads are required to establish the rules and observe the practice of delivering their cars to the Hoboken and the Lower Coast for Seatrain's use.

The situation is accordingly as follows: The petitioners have complied with the earlier orders by entering into the prescribed arrangement and establishing, maintaining, and participating in through routes and joint rates. The petitioners have not complied with the order complained of (October 13, 1941), and have not ceased, desisted, or abstained from observing and enforcing their rules, regulations, and practices which prohibit the interchange of their freight cars with Hoboken and Lower Coast for transportation by Seatrain. Further, the petitioners have not established, observed, or enforced rules, regulations, and practices with respect to the interchange of freight cars with the Hoboken and Lower Coast for transportation by Seatrain. They have not in any respect complied with the said order of October 13, 1941.

Pending an application for reconsideration and clarification of the said order, the Commission postponed the effective date from February 2, 1942 to April 1, 1942.

On March 26, 1942, the petitioners filed their petition in the United States District Court for the District of New Jersey seeking an interlocutory and permanent injunction annulling and setting aside the said order of October 13, 1941. As, by its terms, the said order was to "continue in effect until the further order of the Commission" (United

States Jurisdictional Statement, p. 19), Judge Fake requested the Commission to postpone the effective date until further order of the Commission. The Commission granted this request only to the extent of postponing the effective date until May 1, 1942.

During March, 1942, by the railway and steamship "Official Guide", Seatrain announced to the public that its coastwise service had been "temporarily suspended" (Eshelman affidavit).

In April, 1942, Seatrain and others filed Supplement No. 16 to the tariff naming the joint rates applicable over the said through routes. The portion of said supplement covering the discontinuance or suspension of steamship service is quoted in the Eshelman affidavit. Therein other steamship companies (Eastern Steamship Lines, Inc., and Ocean Steamship Company of Savannah) announced that their steamship service had been suspended, but the announcement of Seatrain and certain steamship companies was

> "coastwise service temporarily suspended",

except

> "that if and when ships and space are available, cargo will be accepted when covered by permit issued by the individual steamship lines.
>
> "Application for permits must specify the kind and quantity of cargo, point of origin and destination, and ports of loading and discharge."

The supplemental tariff carrying this announcement to shippers has not been cancelled but now remains in full force and effect (Eshelman affidavit). Accordingly, Seatrain is holding out to the public that the coastwise service is only temporarily suspended, and further that even so, cargoes will be accepted from time to time by special permit as ships may be available.

Thereafter, and on July 2, 1942, the Commission rendered a report in its Docket No. W-543 in which it stated

that the temporary suspension of Seatrain's service "should not prevent it from obtaining a certificate authorizing continuance of the operations in which it was engaged on January 1, 1940". On the said date the Commission issued its certificate and order "That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico," and "That this certificate and order shall take effect and be in force from and after August 10, 1942." The said certificate and order have not been annulled or modified and are now in full force and effect (Eshelman affidavit and Exhibit 4 thereto).

When the cause came on for hearing before the Court below on May 23, 1942, Judge Biggs requested counsel for the Commission to obtain a further postponement of the effective date of the said order until October 5, 1942, in order to avoid the necessity of passing upon petitioners' application for an interlocutory injunction, an otherwise immediate requirement. The Commission granted the said request by an order so postponing the effective date. Thereafter, pending final determination of this cause, by orders entered from time to time, the Commission has postponed the effective date of the order complained of until May 15, 1944.

THE CAUSE IS NOT MOOT

The Commission, reciting in its findings that petitioners had violated section 1(4) of the Interstate Commerce Act by refusing to agree to the interchange of their freight cars, issued an order requiring them to cease and desist by February 2, 1943 (subsequently extended to May 15, 1944), from observing their present rules, regulations, and prac-

tices. That is a continuing order. The Commission also directed petitioners to establish, before the said date, rules, regulations, and practices for the interchange of cars with Seatrain, and thereafter to observe and enforce them. It is also a continuing order in that respect. Proceedings may be taken for its enforcement if it is disobeyed. The petitioners, except as protected by the courts, could be subjected to a fine of not to exceed $5,000 per day under section 16(8) of the Act. The order prescribed the compensation for the use of petitioners' cars, which petitioners claim to be confiscatory. Under the statute, the petitioners are entitled to seek review of the order and to have it set aside if found to be invalid. The temporary suspension of Seatrain service does not relieve the petitioners from the requirement of the order to cease and desist from observing their present rules and practices, and does not relieve them of the duty to establish rules, regulations, and practices for the interchange of cars. Under the order, the rules and regulations are to be established by May 15, 1944, regardless of when the cars may be actually interchanged.

Such an order is a continuing order. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260.

The duty and rights of the Pennsylvania and other petitioners depend upon the validity of the order. The petitioners contend that the order was beyond the power of the Commission and without statutory authority. The Commission and others assert its validity.[2] The controversy was determined by the Court below upon the record.[3] It should be adjudicated here.

The cause is not moot.

Federal Trade Commission v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257;

United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290;

Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U. S. 433, 452;

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498, 514-516;

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261;

Leonard & Leonard v. *Earle*, 279 U. S. 392.

It is respectfully submitted that probable jurisdiction should be noted, and if the existence of a controversy is not now clear, it should be considered upon the record after argument.

Respectfully submitted,

JOHN VANCE HEWITT,
JOHN A. HARTPENCE,
JOSEPH F. ESHELMAN,
R. AUBREY BOGLEY,
Counsel for Appellants in No. 846 (Appellees in No. 845).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 845.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., *Appellants*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

No. 846.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

AFFIDAVIT IN SUPPORT OF BRIEF OF APPELLANTS IN NO. 846 (APPELLEES IN NO. 845) ON THE QUESTION WHETHER THE CAUSE IS MOOT.

DISTRICT OF COLUMBIA, *ss:*

JOSEPH F. ESHELMAN, being duly sworn, deposes and says: I reside at 326 Valley Road, Merion Station, Pennsylvania.

I am counsel for The Pennsylvania Railroad Company and the other railroad companies appellees in No. 845 and appellants in No. 846, hereinafter referred to as the petitioners, and I was counsel for certain of the said petitioners before the Interstate Commerce Commission in the proceedings hereinafter referred to.

Prior to the issuance of the order of the Interstate Commerce Commission complained of in this cause, but as a purported basis therefor, the Commission on January 28, 1938, entered an order in I. C. C. Docket No. 25727 directing the defendants therein, including The Pennsylvania Railroad Company and the other petitioners herein, according as they participated in through routes with other water lines as therein described, to establish through routes and joint rates with Seatrain Lines, Inc. (226 I. C. C. 7). The parts of the said order directing the establishment of such through routes and joint rates are set forth in Exhibit 1 which is annexed hereto and made a part hereof. Subsequently, on December 23, 1940, the Commission in the said Docket No. 25727 entered an amendatory order changing the amount of the rates prescribed (243 I. C. C. 199). As shown by the record in this cause (petition pp. 74-75) the Commission stated (237 I. C. C. pp. 100-101): "This issue is limited to cars containing a portion, but not all, of the traffic transported by Seatrain, and to the interchange of the cars of some, but not all, of the defendants * * *". The Pennsylvania Railroad Company and certain of the other petitioners were participating in the through routes and joint rates with other water carriers, and pursuant to the said orders established through routes and joint rates with Seatrain Lines, Inc., via Hoboken, N. J., and Belle Chasse, La.

On October 13, 1941, the Interstate Commerce Commission entered its order dated that date in I. C. C. Docket Nos. 25728 and 25878, which order is set forth at pages 18 and 19 of the Statement as to Jurisdiction in No. 845 herein but omitted by the Clerk from the jurisdictional statement in No. 846 as a duplication. By its terms the said order directed certain railroad companies, defendants therein, including the petitioners, to cease and desist as provided therein on or before February 2, 1942, and to establish on or before the said date "and thereafter to observe and enforce rules, regulations, and practices with

respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc." as prescribed therein. The complainants before the Interstate Commerce Commission and therein referred to were the Hoboken Manufacturers Railroad Company in Docket No. 25728 and New Orleans and Lower Coast Railroad Company in Docket No. 25878.

On December 26, 1941, the Interstate Commerce Commission entered an order postponing the effective date of its said order of October 13, 1941 until April 1, 1942. A true copy of the said order is annexed hereto as Exhibit 2 and made a part hereof.

The petitioners did not comply and have not complied with said order of October 13, 1941, but on March 26, 1942, and five days before the then effective date of the Commission's order, the petitioners filed in the United States District Court for the District of New Jersey their petition for an interlocutory and a permanent injunction enjoining, annulling, and setting aside the said order of the Commission.

The said petition as amended contained the following allegation:

"XV.

"In the No. 25727, referred to in Paragraph XII of this petition, the Commission made its report dated January 28, 1938, *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co.*, 226 I.C.C. 7, upon which it entered its order of January 28, 1938, directing defendants therein, including the petitioner The Pennsylvania Railroad Company and certain of the other petitioners herein, to establish through routes and joint rates for combined rail and Seatrain service between railroad stations in the eastern and southwestern portions of the United States reached via Hoboken, N. J., and Belle Chasse, La. The said defendants therein, including The Pennsylvania Railroad Company and certain of the other petitioners herein, established the through routes so prescribed and now participate therein as directed by

the said order, and the said through routes are now in full force and effect. The joint rail-Seatrain rates so prescribed, as modified by the order of the Commission therein dated December 23, 1940, *Seatrain Lines, Inc. v. Akron C. & Y. Ry. Co.*, 243 I.C.C. 199, were established by The Pennsylvania Railroad Company and certain of the other petitioners, and are in full force and effect. The said rates were and are on the same general basis as had been prescribed for rail-water service in connection with other water carriers serving North Atlantic and Gulf ports and were and are on a lower basis than the all-rail rates."

The answer of the United States of America, paragraph 7 thereof, is as follows:

"Admits the allegations of paragraphs IX through XVIII."

No intervening defendant denied the allegations of said paragraph XV of the complaint.

The finding of the court below thereon is No. 24, pages 71-72 of Statement as to Jurisdiction, No. 845 (the Clerk having omitted in the printing as a duplication the said finding annexed to the Statement as to Jurisdiction in No. 846).

With respect to the temporary suspension of the service of Seatrain Lines, Inc., between Belle Chasse, La., and Hoboken, N. J., the March 1942 issue of the "Official Guide of the Railways and Steam Navigation Lines of the United States, Porto Rico, Canada, Mexico and Cuba", published by National Railway Publication Company, 424 West 23rd Street, New York, contains on page 1258 the excerpt which is annexed hereto as Exhibit 3 and made a part hereof. The said "Official Guide" is the trade publication in which railway and steamship companies publish, for the use of the public, information as to their services, schedules, and other pertinent matter.

By Supplement 15 to Curlett Tariff I.C.C. No. A-732, which supplement was issued April 10, 1942, effective April 16, 1942, and by Supplement 16 thereto issued April 29,

1942, effective June 1, 1942, which tariff and supplements were duly filed with the Interstate Commerce Commission, notice was given by Seatrain Lines, Inc., of the temporary suspension of the coastwise service of Seatrain Lines, Inc. Supplement 16 is still in effect and contains on page 2 thereof the following:

"[13] SUSPENSION OF SERVICE OF EASTERN STEAMSHIP LINES, INC.

"The steamship service of the Eastern Steamship Lines, Inc., between all ports served by it, namely, Boston, Mass., Hopewell (City Point), Va., Newport News, Va., New York, N.Y., Norfolk, Va., Portland, Me., Portsmouth, Va., and Richmond, Va., is hereby suspended until further notice. (Departure from the terms of Rule 4(i), 8(f) and 9(a) of Tariff Circular No. 20 is authorized under permission of the Interstate Commerce Commission No. 7447 (Corrected) of February 20, 1942).

"[14] SUSPENSION OF SERVICE OF OCEAN STEAMSHIP COMPANY OF SAVANNAH

"The steamship service of Ocean Steamship Company of Savannah from and to all ports served by it, namely, Boston, Mass. and New York, N. Y., is hereby suspended until further notice. (Departure from the terms of Rules 4(i), 8(f) and 9(a) of Tariff Circular No. 20 is authorized under permission of the Interstate Commerce Commission No. 7966 of March 18, 1942).

"TEMPORARY SUSPENSION OF SERVICE OF ISSUING AND PARTICIPATING STEAMSHIP LINES

"Due to interruptions of service over which the carriers have had no control, steamship services formerly used in the transportation of freight within the scope of this tariff have been temporarily suspended to the extent indicated below:

"[15] The Bull Steamship Line—All coastwise service temporarily suspended.

"[15] Pan-Atlantic Steamship Corporation—All service within the scope of this tariff temporarily suspended.

"[15] Seatrain Lines, Inc.—All coastwise service temporarily suspended.

"10 Southern Steamship Company—All coastwise service temporarily suspended.

"Therefore, shipments will not be accepted until further notice, either direct or from connecting carriers, for transportation over the routes via which service has been temporarily suspended; except, that if and when ships and space are available, cargo will be accepted when covered by permit issued by the individual steamship lines.

"Application for permits must specify the kind and quantity of cargo, point of origin and destination, and ports of loading and discharge."

The said Curlett Tariff I. C. C. A-732 set forth the joint rates with Seatrain Lines, Inc., and others, prescribed by the Commission's order of December 23, 1940, in Docket No. 25727 (243 I. C. C. 199), over the through routes prescribed by the Commission's order of January 28, 1938, in said No. 25727 (226 I. C. C. 7), being the said orders referred to in paragraph 3 hereof. The said prescribed rates have remained continuously in effect from the time of their establishment pursuant to said orders and are now presently in effect.

In I. C. C. Docket No. W-543 "Seatrain Lines, Inc. Common Carrier Applications", the Commission (Division 4) rendered a report under date of July 2, 1942, in which it stated:

"In June and July 1941, two of applicant's vessels were requisitioned by the United States Maritime Commission, and the other three vessels were requisitioned by May 21, 1942, at which time all of applicant's operations between ports in the United States were discontinued. Such interruption of service was one over which

the applicant had no control and, therefore, should not prevent it from obtaining a certificate authorizing continuance of the operations in which it was engaged on January 1, 1940."

Upon the said date the Commission issued its Certificate and Order, a true copy of which is marked Exhibit 4 and annexed hereto.

Upon a request by Judge Fake that the effective date of the order of October 13, 1941 "be postponed until the further order of the Commission in order to permit the organization of the statutory court to hear the application for interlocutory injunction", the Commission granted the request only to the extent of postponing the effective date until May 1, 1942. Upon the hearing on May 23, 1942 before the three judge court below for an interlocutory and a permanent injunction, Judge Biggs requested the counsel for the Interstate Commerce Commission to obtain a postponement of the effective date of the order, and thereby render unnecessary the issuance by the court of an interlocutory injunction. Pursuant to said request, the Commission issued an order on May 25, 1942, postponing the effective date of the order until October 5, 1942. Thereafter, pending the determination of this cause, by orders of the Commission issued in said Docket Numbers 25728 and 25878 on October 2, 1942, December 26, 1942, February 25, 1943, May 14, 1943, July 9, 1943, July 29, 1943, September 10, 1943, October 27, 1943, November 9, 1943 and December 11, 1943, the effective date of the said order of October 13, 1941, has been postponed from time to time, and by an order of the Interstate Commerce Commission issued March 4, 1944, the effective date of the said order of October 13, 1941, has been further postponed to May 15, 1944. A copy of the last described order of the Commission is annexed hereto as Exhibit 5 and made a part hereof.

Upon the hearing in the court below on November 20, 1943, on the settlement of the final decree, the petitioners submitted a proposed decree setting aside the entire order

of the Commission dated October 13, 1941, but this was opposed by the Interstate Commerce Commission and the appellants in No. 845 (appellees in No. 846).

JOSEPH F. ESHELMAN.

Subscribed and sworn to before me this 1st day of May, 1944.

(Seal)

ELIZABETH MAYNARD,
Notary Public, D. C.

Exhibits to Affidavit.

Exhibit 1.

EXCERPTS FROM ORDER OF JANUARY 28, 1938, IN I. C. C. DOCKET NO. 25727.

"This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"*It is ordered*, That the above-named defendants, according as they participate in transportation of carload traffic over ocean-rail routes via the ports of New York and New Orleans between points in official territory covered by the findings in the twenty-third and twenty-fifth supplemental reports in *Consolidated Southwestern Cases* on the one hand, and points in southwestern territory covered by the findings in said twenty-third and twenty-fifth supplemental reports in *Consolidated Southwestern Cases* and points in that portion of southern territory on or south of the line of the Yazoo and Mississippi Valley Railroad extending from Vicksburg, Miss., to Meridian, Miss., and on the west of the lines of the New Orleans and Northeastern Railroad extending from Meridian to Hattiesburg, Miss., and the Gulf and Ship Island railroad from Hattiesburg to Gulfport, Miss., and points on the Louisville and Nashville Railroad extending east from Gulfport to the Alabama-Mississippi State line, on the other hand, be, and they are hereby, directed and required to join with Seatrain Lines, Inc., in establishing, on or before April 15, 1938, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed by section 6 of the Interstate Commerce Act, through routes between the same points on the same classes and commodities, in carloads, via Hoboken, N. J., and Belle Chasse, La.

"*It is further ordered*, That the above-named defendants, parties to the through routes prescribed in the next preceding paragraph hereof, be, and they are hereby, directed and required to join with said Seatrain Lines, Inc., in establishing, on or before April 15, 1938, upon notice to this Commission and to the general public by not less than

30 days' filing and posting in the manner prescribed by section 6 of the Interstate Commerce Act, joint rates applicable on carload traffic over said through routes which shall not exceed the following: (a) Between points in official and southwestern territories described in the next preceding paragraph hereof, first-class (column 100) rates made by adding 17 cents per 100 pounds to the first-class (column 100) rates from and to the same points prescribed in said twenty-fifth supplemental report in *Consolidated Southwestern Cases*, and other class rates and commodity rates that take percentages of first-class (column 100) rates made by applying to the first-class (column 100) rates prescribed herein the same bases as provided in Finding No. 11 of said twenty-third supplemental report in *Consolidated Southwestern Cases*, as modified by the said twenty-fifth supplemental report therein; and (b) between points in official territory and points in southern territory described in the next preceding paragraph hereof, first-class (column 100) rates made by adding 17 cents per 100 pounds to the present first-class (column 100) rates from and to the same points applicable in connection with break-bulk water lines via the ports of New York and New Orleans, and other class rates and commodity rates that take percentages of first-class (column 100) rates made by applying to the first-class (column 100) rates prescribed herein the same percentages as are now in effect in connection with break-bulk water lines via the ports of New York and New Orleans.

"*It is further ordered*, That the joint ocean-rail rates prescribed in the next preceding paragraph hereof shall be governed by the same classification and exceptions thereto as govern the joint ocean-rail rates now applicable between the same points in connection with break-bulk water lines operating between the ports of New York and New Orleans."

Exhibit 2.

ORDER.

INTERSTATE COMMERCE COMMISSION.

No. 25728.

HOBOKEN MANUFACTURERS RAILROAD COMPANY,

v.

ABILENE & SOUTHERN RAILWAY COMPANY, *et al.*

No. 25878.

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY,

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, *et al.*

PRESENT: JOSEPH B. EASTMAN, Chairman, to whom the above-entitled matter has been assigned for action thereon.

Good cause appearing therefor:

It is ordered, That the effective date of the order of October 13, 1941, in the above-entitled proceedings be, and it is hereby, postponed until April 1, 1942.

Dated at Washington, D. C., on the 26th day of December, 1941.

By the Commission, Chairman Eastman.

W. P. BARTEL,
Secretary.

(SEAL)

Exhibit 3.

SEATRAIN LINES, INC.

General Offices—39 Broadway,
New York, N. Y.

New Orleans Offices—1024 Whitney Bank Building.
Houston Offices—1504 Commerce Building.

Operating a regular freight service with railroad-car carrying steamers, offering a non-break-bulk route between New York and Cuba; between New Orleans and Cuba; between New York and New Orleans; and between New York and Texas City, Tex.

Connections with all railroads at New York, New Orleans, Texas City, Tex. and Cuba.

SERVICES.

SEATRAIN SERVICES ARE AS FOLLOWS:

CUBA

▲New York to Cuba
New Orleans to Cuba

▲Cuba to New York
Cuba to New Orleans

COASTWISE

▲New York to New Orleans
▲New York to Texas City, Tex.

▲New Orleans to New York
▲Texas City, Tex. to New York

▲Temporarily suspended

For further information please consult our offices.

GRAHAM M. BRUSH, President,
New York, N. Y.
JOSEPH HOBSON, First Vice President,
New York, N. Y.
E. K. MORSE, Vice President,
New York, N. Y.
G. S. AMORY, Vice President and Treasurer,
New York, N. Y.
W. J. MATHEY, Freight Traffic Manager,
New York, N. Y.
E. E. BYRD, Asst. to Vice President,
New York, N. Y.
H. H. BENEDICT, General Freight Agent,
New York, N. Y.
H. E. FRY, General Freight Agent,
New Orleans, La.
A. E. D'HERETTE, Asst. Gen. Freight Agent,
New Orleans, La.
R. G. BARNES, General Freight Agent,
Houston, Tex.

ANTONIO RODRIGUEZ, General Freight Agent for Cuba, Lonja del Comercio Building, Havana, Cuba.
DONALD W. SMITH, Claim Agent,
1419 Bloomfield Street, Hoboken, N. J.
G. W. GOLDSTEIN, General Western Agent,
Railway Exchange Building, St. Louis, Mo.
H. D. FRY, General Southwestern Freight Agent, 1921 Republic Bank Building, Dallas, Tex.
A. A. MUNRO, General Eastern Agent,
New York, N. Y.
CYRUS A. ANDERSON, 149 California Street,
San Francisco, Calif.
E. H. MUNRO & Co., Ltd.,
Royal Liver Bldg., Liverpool, Eng.
ATLANTIC FREIGHTING CORPORATION, Freight Agent for the Continent of Europe,
Pearl St., New York, N. Y.

Exhibit 4.

CERTIFICATE AND ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, division 4, held at its office in Washington, D. C., on the 2nd day of July, A.D. 1942.

No. W-543.

SEATRAIN LINES, INC. COMMON CARRIER APPLICATIONS.

Seatrain Lines, Inc. having filed applications under the provisions of Section 309(a) and (c) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing continuance of its operations as a common carrier by water, a full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the portion of the application seeking authority to transport passengers between New York and New Orleans be, and it is hereby, denied.

And it is further ordered, That this certificate and order shall take effect and be in force from and after August 10, 1942.

By the Commission, devision 4.

W. P. BARTEL,
Secretary.

(SEAL)

Exhibit 5.

ORDER.

INTERSTATE COMMERCE COMMISSION.

No. 25728.

HOBOKEN MANUFACTURERS RAILROAD COMPANY,

v.

ABILENE & SOUTHERN RAILWAY COMPANY, *et al.*

No. 25878.

NEW ORLEANS AND LOWER COAST RAILROAD COMPANY,

v.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, *et al.*

In the Matter of the Postponement of the effective date of the order in the above entitled proceedings.

PRESENT: CLAUDE R. PORTER, Commissioner, to whom the above entitled matter has been assigned for action thereon.

Upon consideration of the proceedings in court in these dockets, which proceedings require a postponement of the effective date of the order herein, and good cause appearing:

It is ordered, That the effective date of the order of October 13, 1941, in said proceedings be, and it is hereby, further postponed from March 15, 1944, to May 15, 1944.

Dated at Washington, D. C., on this 4th day of March, 1944.

By the Commission, Commissioner Porter.

W. P. BARTEL,
Secretary.

(SEAL.)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 47.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., *Appellants*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

No. 48.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Brief for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47, Plaintiffs in the District Court.

JOHN VANCE HEWITT,
JOHN A. HARTPENCE,
JOSEPH F. ESHELMAN,
R. AUBREY BOGLEY,
Counsel for Appellants in No. 48, Appellees in No. 47.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., et al.,

Appellants,

v.

THE PENNSYLVANIA RAILROAD COMPANY, et al.

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, et al.,

Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., et al.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Brief for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47, Plaintiffs in the District Court.

No. 47 is an appeal by the United States of America, the Interstate Commerce Commission, Seatrain Lines, Inc., Forrest S. Smith, Trustee of Hoboken Manufacturers Railroad Company, and The New Orleans & Lower Coast Railroad Company, defendants (R. 148-9), from a final decree of

a specially constituted district court of three judges for the District of New Jersey, entered December 8, 1943 setting aside, in part, an order of the Interstate Commerce Commission dated October 13, 1941 (R. 147-8).

No. 48 is an appeal by the plaintiffs in the District Court, The Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, The Boston and Maine Railroad, Merrel P. Callaway, Trustee of Central of Georgia Railway Company, Great Northern Railway Company, The Long Island Rail Road Company, Louisville and Nashville Railroad Company, Maine Central Railroad Company, Norfolk and Western Railway Company, Northern Pacific Railway Company, Legh R. Powell, Jr., and Henry W. Anderson, receivers of Seaboard Air Line Railway Company, Southern Railway Company, Southern Pacific Company, Texas and New Orleans Railroad Company, Union Pacific Railroad Company, from said decree in so far as it fails to set aside the Commission's order in its entirety (R. 154-6).

Opinions Below

The opinion of the District Court is reported in 55 Fed. Supp. at page 473, and appears in the Record at pages 109 and 141. The report of the Interstate Commerce Commission of October 13, 1941, in Nos. 25728 and 25878, *Hoboken Mfrs. R. Co. v. Abilene & S. R. Co.*, upon which the order of the Commission was made, is reported in 248 I.C.C. 109 (R. 60).

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Sections 47(a) and 345 of the United States Code, the appeals being from a final decree of the District Court in a case brought to enjoin set aside, annul or suspend an order of the Interstate Commerce Commission, other than

for the payment of money, under Sections 41(28) and 43-48.

Orders allowing the appeals were made on January 28, 1944 and January 31, 1944, respectively (R. 149, 155-6). An order noting probable jurisdiction was made on May 8, 1944 (R. 1378).

Statute Involved

The statute here involved is the Interstate Commerce Act as amended by the Act of September 28, 1940, 54 Stat. L. 899 (49 U.S.C. Sec. 1, et seq.). Sec. 1, paragraphs (1), (2), (3)(a), (4), (10), (11), (13) and (14)(a), and Sec. 302, paragraphs (i), (j), (k) & (l), the paragraphs specially involved, are set forth in the Appendix to this brief at pages i to ix thereof.

Statement of the Case

Proceedings before the Commission and the District Court

This case brings up for review the validity of an order made by the Interstate Commerce Commission in proceedings initiated by the complainants therein (intervener defendants in the District Court), Hoboken Manufacturers Railroad Company (Docket No. 25728), and New Orleans & Lower Coast Railroad Company (Docket No. 25878), and in which Seatrain Lines, Inc., intervened and joined in the prayer for relief (R. 34).

The said complainants sought to have the Commission require railroad companies (including petitioners herein), to permit the delivery of their freight cars by the complainants to, in interchange with, and for use by Seatrain (R. 20), a common carrier by water, on its ocean-going vessels. Seatrain controlled the Hoboken (R. 21, 36), owned no freight cars, and was found to be engaged in transportation by water, between Hoboken, N. J., and

Belle Chasse, La., via Havana, Cuba (R. 37). The Commission made a report (R. 60), finding that a number of railroad companies, including petitioners herein,* had violated Section 1(4) of the Interstate Commerce Act, by refusing to permit the delivery of freight cars owned by them to and for such use of Seatrain Lines, Inc. (R. 71).

After a lengthy and intricate series of reports and orders, see pp. 7-10, *infra*, in which the Commission had entered an order directing the establishment of through routes by certain petitioner railroad carriers with Seatrain (R. 136, District Court Finding 24), the Commission, on October 13, 1941, made the order complained of (R. 73), which is printed in the Appendix hereto (pp. ix-x), and which directs the railroad carriers to permit the interchange of their cars for use in such transportation by Seatrain.

Fifteen railroad companies petitioned the United States District Court for the District of New Jersey to set aside said orders, alleging that the railroads were under no duty to permit the use of their freight cars by Seatrain, or for use in ocean-going vessels, or upon the high seas, or through a foreign country or foreign waters, and that the Commission had no authority to compel them to do so, and also that the order in failing to require observance of its terms by Seatrain, and in fixing the compensation, was based upon a mistake of law and deprived the railroad carriers of their property without due process of law (R. 5-19).

The District Court, sitting as a three-judge Court, decided that the Commission acted within its statutory power in directing the railroad carriers to permit their cars to be used by Seatrain in so far as the routes of Seatrain were within the United States or its territorial waters, but that the order of the Commission was beyond

* For convenience, the said railroad companies will be referred to as petitioner railroad carriers.

the statutory power of the Commission, and based upon a mistake of law in so far as it required petitioners to permit the delivery of their cars to and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extra-territorial waters, or to a foreign port (R. 109-129), and entered a final judgment setting aside the order to that extent only, but refused to set aside the order in its entirety (R. 147). The District Court also rejected the claim of confiscation.

The Facts

The petitioner railroad carriers (appellees in No. 47; appellants in No. 48), common carriers of property by railroad subject to the Interstate Commerce Act, were respondents in the proceedings before the Interstate Commerce Commission in said Dockets Nos. 25728 and 25878, and are parties to the said orders entered by the Commission (R. 130, Finding No. 2). The intervener Seatrain Lines, Inc., is not a carrier by railroad (R. 36) but is a common carrier by water operating ships on the high seas (R. 130, Finding No. 6). The intervener Hoboken Manufacturers Railroad Company is a single-track terminal switching line connected with the piers at which Seatrain ships dock at Hoboken, N. J. (R. 130, Finding No 4). The New Orleans & Lower Coast Railroad Company is a common carrier by railroad, and makes physical connection with the piers at which Seatrain docks at Belle Chasse, La. (R. 130, Finding No. 5). The Hoboken Manufacturers Railroad Company is owned and controlled by Seatrain, and the New Orleans & Lower Coast is an affiliate of Seatrain (R. 130), in that it is financially controlled by the Missouri Pacific Railroad Company, (R. 40) a common carrier by railroad, which is also financially interested in Seatrain (R. 39).

Seatrain operates ships of ocean-going type with four decks, each deck in turn having four sets of standard-gauge railroad tracks.* By means of a special loading device, consisting of an overhead crane which lifts a cradle, loaded freight cars are placed on board Seatrain's ships.

From 1929 to 1932, Seatrain and its predecessor operated ships in foreign service between New Orleans, La., and Havana, Cuba, transporting freight generally in railroad cars, which were delivered to Cuban railroads at Havana (R. 131, Finding No. 8; 641, note, 607, Ex. 100).

On October 6, 1932, Seatrain began operating its service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, after certain of the petitioning railroad companies and others had notified the Hoboken and Seatrain, respectively, not to deliver or use their cars in such Seatrain service (R. 132, Finding No. 10). Such service would not be complementary to but would be in competition with the main line haul of railroad companies. Seatrain's transportation to or from Hoboken or Belle Chasse takes the cars and their contents into the port of Havana, Cuba (R. 130, Finding No. 6).

On November 15, 1932, the American Railway Association promulgated Car Service Rule 4 which had been adopted by its members,† by which cars owned by railroad carriers were not to be delivered to a steamship, ferry, or barge line for water transportation without the permission of the owner (R. 132, Finding No. 11).

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* The manner in which Seatrain operates is described in some detail in *Investigation of Seatrain Lines, Inc.*, 195 I.C.C. 215 (R. 423, et seq.), and in the opinion of this Court in *Interstate Commerce Commission, et al., v. Hoboken Manufacturers' Railroad Company*, 320 U. S. 368.

† All of the railroads involved were members of the American Railway Association and its successor, Association of American Railroads (R. 695-6), and subscribers to the agreement by which they agreed to abide by the Codes of Car Service and Per Diem Rules promulgated by the Association (R. 450).

The Hoboken, in 1932, filed with the Commission a complaint, Docket No. 25728 (R. 20; R. 132, Finding No. 12), entitled "Hoboken Manufacturers Railroad Company *v.* Abilene & Southern Railway Company, et al.", and the New Orleans & Lower Coast Railroad Company filed with the Commission a similar complaint, Docket No. 25878 (R. 132, Finding No. 12), naming as defendants the railroad carriers, including petitioner railroad carriers (R. 132, Finding No. 11). Both complaints alleged that Car Service Rule 4 was unlawful, was and would be in violation of paragraphs (4) and (11) of Sec. 1, and paragraphs (1) and (3) of Sec. 3 of the Interstate Commerce Act, and was also in violation of Sec. 7 of the said Act (R. 26). The complaints were consolidated, and Seatrain intervened with a petition adopting their allegations (R. 132, Finding No. 13; R. 33, 34).*

The defendants before the Commission moved to dismiss the complaints on the ground that the Commission was without authority to grant the relief sought, and was without jurisdiction of the matters complained of (R. 133, Finding No. 13). Testimony was taken, and the examiner issued his report (R. 133, Finding No. 13; R. 620, *et seq.*), in which he concluded that the Commission should find that it had no jurisdiction of the matter in controversy, and that even if the Interstate Commerce Act could be construed as conferring jurisdiction, the rules, regulations, and practices assailed were not unreasonable, prejudicial, or unlawful.

The Commission rejected the conclusions of its examiner and made its report dated February 5, 1935, 206 I.C.C. 328 (R. 35), in which it found that "Seatrain is not a common carrier by railroad or an extension of a line of railroads within the meaning of those terms as used in the act; * * * that it is a common carrier by water

* The complaints before the Commission and its reports are annexed as exhibits to the petition to set aside the order of the Commission (R. 20, 33-73).

• • •" (R. 35, 36); that Seatrain's vessels were designed primarily for the handling of railroad cars in non-break-bulk transportation; that Seatrain had been able to establish through routes between Hoboken and points in the Southwest via the lines of the Missouri Pacific, of which Lower Coast is a wholly-owned subsidiary (R. 40), and its subsidiary Texas & Pacific and some of their short line connections (R. 50), and that both of those railroad companies had a direct and active interest in the operation of Seatrain; that Seatrain's transportation was competitive with that of those railroad companies (R. 40-42). The Commission also stated that it had jurisdiction to require the establishment of through routes between rail and water carriers and, where such through routes* are established, to require the rail carriers to interchange cars with the water carrier (R. 51). The Commission stated, however, that it could not determine on the record what through routes existed, and that said issue was pending undetermined in Docket No. 25727 (R. 50). Accordingly, the Commission, on February 5, 1935, dismissed the complaints without prejudice to the filing of a petition for further consideration after it had decided whether through routes existed and, if not, whether they should be established (R. 53).

On January 28, 1938, the Commission made an order in No. 25727 directing the petitioner railroad carriers to establish through routes and joint rates for combined rail and water service between railroad stations in eastern, southern, and south-western portions of the United States reached via Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba. 226 I.C.C. 7 (Petition, Par. XV, R. 11); 237 I.C.C. 97, 99 (R. 57).

Through routes were established as prescribed, and

* A through route is a route by which a shipment may be sent from a point on one line to a destination on another line without any intervention by the shipper. *Memphis Freight Bureau v. Ft. Smith & Western R. R. Co.*, 13 I.C.C. 1, 8.

certain of petitioner railroad carriers were compelled to participate therein.*

Seatrain and the complainants in Nos. 25728 and 25878, in July, 1938, moved before the Commission for an order requiring the defendants therein, including the petitioner railroad carriers, to permit their cars to be interchanged with and used by Seatrain in its said service (R. 136, 137, Finding No. 25).

On November 21, 1938, the Commission reopened these dockets "for further hearing to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc." (R. 137, Finding No. 26). The Commission made two reports on these further hearings, the first on January 8, 1940, 237 I.C.C. 97 (R. 137, Finding No. 26; R. 55), and the second on October 13, 1941, 248 I.C.C. 109 (R. 137, Finding No. 27; R. 60), and on the latter date entered the final order complained of (R. 73).

By its said order of October 13, 1941 (R. 73; Appendix, p. ix), the Commission directed, in effect, that the railroad carriers permit the delivery of their freight cars to the Hoboken and the Lower Coast, for interchange with and use by Seatrain in its ocean-going vessels between Hoboken, N. J., and Belle Chasse, La., which route was via Havana, Cuba, and that the railroad defendants therein observe and enforce rules, regulations, and practices with respect to such interchange of freight cars, corresponding to the current Code of Per Diem Rules as observed by the railroads among themselves, including the rate of $1.00 per car per day, provided, however, that such per diem should be payable by Seatrain, not from the time the cars are made available as is required of the railroads *inter sese*, but only for such periods as the cars should be in its actual

* Through routes exist between various railroad carriers and certain break-bulk water lines. *Seatrain Lines, Inc.* v. *Akron, Canton & Y. R. Co.*, 226 I.C.C. 7, 12.

possession. The order made no direction that Seatrain observe the rules and regulations, or the terms of the order, or return the cars directed to be turned over to it, or that it should become responsible for the payment of the compensation, and petitions (R. 1340, 1355, 1358) to reconsider and modify the order and compel it to do so were denied by the Commission (R. 74).

In view of this appeal, the effective date of the order has been postponed to March 15, 1945 (R. 1380).

The Commission based its order on the finding that petitioner railroad carriers had violated "Section 1(4) of the Interstate Commerce Act by refusing to agree to the interchange of freight cars owned by them with complainants, for delivery to Seatrain for use in interstate commerce between points in the United States" (Commission Finding No. 4, R. 71). The Commission refused to find that other sections had been violated (R. 50, 70, 71).

It is to be noted at the very outset, that since 1920, Section 1(4) has contained no reference to interchange of cars, Appendix p. iii. On this issue Commissioner Caskie, in 237 I.C.C. 97, 102* (R. 60) had, with the concurrence of Commissioner Alldredge, dissented and had referred to his prior dissent in 226 I.C.C. 7,† in which he said at p. 40:

> "The provisions of the Car Service Act, approved May 20, 1917, and amended February 20, 1920, by its terms are specifically confined to carriers by railroad. It is this act which gives us authority to require the interchange of cars between railroads and to fix the compensation to be paid for their use. Although this act was passed about five years after the enactment of section 6(13)†† no such authority was given us as to rail and water carriers. * * * We cannot compel the carriers to furnish cars to the Seatrain in the absence of an agreement without providing compensation

* *Hoboken Mfrs. R. Co.* v. *Abilene & S. R. Co.*

† *Seatrain Lines, Inc.* v. *Akron, Canton & Y. R. Co.*

†† Panama Canal Act, see p. 23, *infra*.

for their use. The act does not specifically give us such authority. If we have it, it is because it necessarily flows from the power to require the interchange of cars, which in turn must necessarily flow from the jurisdiction to prescribe through routes, or expressed otherwise, it is a power implied from another implied power.

"In my opinion if the Congress had intended to confer such broad and important powers on us, it would not have clothed its intention in obscurity and left it to be evolved by doubtful implications and disclosed by construction, but would have explicitly declared it."

Specification of Assigned Errors To Be Urged*

The District Court erred:

(1) In not setting aside, annulling and enjoining, in its entirety, the Commission's Order of October 13, 1941, involved in this case.

(2) In not setting aside, annulling and enjoining the Commission's said Order in so far as the said Order required the railroad petitioners to permit the use of their cars by Seatrain Lines, Inc. (hereinafter referred to as "Seatrain"), a carrier by water.

(4) In concluding and holding as a matter of law that the Commission acted within its statutory power in requiring the railroads petitioners to permit the use of their cars by Seatrain in so far as such transportation is within the United States or its territorial waters.

(5) In concluding and holding as a matter of law that the Commission did not base its decision upon a mistake of law to the extent that it held that the railroads petitioners were under a duty to permit their cars to be used by Seatrain on any through routes existing or pre-

* (R. 156-162).

scribed by the Commission in so far as such through routes are within the United States or its territorial waters.

(6) In concluding and holding as a matter of law that the Commission, in requiring the railroads petitioners to permit the use of their cars by Seatrain, a carrier by water, did not exceed the authority conferred upon it by statute.

(9) In not setting aside, annulling, and enjoining the Commission's said order to the extent that it requires the railroads petitioners to cease, desist and abstain from observing and enforcing their rules, regulations, and practices which prohibit the interchange of their freight cars for transportation by Seatrain.

(10) In not setting aside, annulling, and enjoining the Commission's said order to the extent that it requires the railroads petitioners to establish, observe, and enforce rules, regulations and practices with respect to the interchange of their freight cars for transportation by Seatrain.

(24) In failing to conclude and hold that the findings of the Commission in respect to the compensation to be paid by Seatrain for the use of petitioners' cars was without adequate evidence to support it, and in holding and concluding to the contrary.

(25) In failing to hold and conclude that the Commission's conclusion of law in respect to the compensation to be paid by Seatrain for the use of petitioners' cars was without adequate evidence to support it and in holding and concluding to the contrary.

(26) In failing to hold and conclude that the rate of compensation to be paid by Seatrain for the use of petitioners' freight cars at $1.00 per day for such period only

as the cars were in Seatrain's actual possession was confiscatory.

(28) In failing to conclude and hold that the Commission's said order in finding that the compensation to which petitioners are entitled for the use of their freight cars by Seatrain is only $1.00 per car per day payable only for the time that the cars are in Seatrain's actual possession, denies to each of the petitioners the just compensation to which each is entitled and deprives each of them of the use of its property without due process of law and in violation of the Fifth Amendment to the Constitution of the United States.

(30) In failing to hold and conclude that the Commission's said order is arbitrary, capricious, and unwarranted in law in that it does not run against or impose any obligation upon Seatrain with respect to its use of the cars of petitioners herein, and the said order fails to direct Seatrain to make any payment therefor.

(34) In failing to conclude and hold that the railroads petitioners were entitled to just compensation for the use of their cars to be determined and paid or adequately secured by Seatrain before or at the time they were required to interchange their cars with Seatrain.

We also rely upon Assignments Nos. 3, 7 and 8, which are supplemental to Nos. 1, 2, 4, 5 and 6, and on Nos. 11 to 23, inclusive (R. 157-161), 27 29, 31, 32, (R. 161-162) and 33, which relate to the unreasonableness and confiscatory effect of the order, are supplemental to Assignment 24, et seq., quoted above, and are voluminous because of the form and nature of the Commission's "findings". For the convenience of the Court, they are further referred to in connection with the appropriate points of the argument.

Summary of Argument

The District Court properly held that the order of the Interstate Commerce Commission is erroneous and beyond the lawful authority of the Commission in so far as it directs railroad carriers to permit the interchange of their freight cars with or for the use of Seatrain Lines, Inc., for transportation beyond the United States and its territorial waters, in extra-territorial waters, or to a foreign port, but the judgment of the District Court in failing to set aside the order in its entirety was erroneous, for the following reasons:

1. The Interstate Commerce Act creates no duty on the part of carriers by railroad to furnish their cars for transportation on the ships of a carrier by water such as Seatrain, and confers no authority upon the Interstate Commerce Commission to compel railroad carriers to perform any such alleged duty. That Congress did not intend to, and did not, create such duty or confer such power is shown by the phraseology of the provisions of the Interstate Commerce Act, by the lack of express provision for such duty or power, by the detail in which Congress enumerated the duties imposed upon the carriers and the powers granted to the Commission, and by the history of the Act.

2. Independently of the foregoing, the provisions of the Interstate Commerce Act, requiring carriers by railroad to furnish or to interchange cars, are expressly limited to transportation which takes place within the United States, and, therefore, do not require railroad carriers to furnish cars for transportation by Seatrain on ships which go outside of the United States. As transportation by Seatrain invariably goes beyond the United States, the petitioner railroad carriers should not be compelled to establish

observe and enforce rules, regulations or practices for transportation by Seatrain upon non-existent routes, on the hypothesis, which has no basis in the record, that Seatrain may at some future time operate occasionally within territorial waters.

3. The order by requiring railroad carriers to permit the delivery of their freight cars to Seatrain, without providing adequate protection for their return and compensation for their use by an enforceable order directed against Seatrain, deprives the railroad carriers of their property without due process of law within the meaning of the Fifth Amendment. Moreover, the Commission adopted the railroad Code of Per Diem Rules, including the rate of $1 per car per day, as providing the reasonable rental for the use of the cars compelled to be delivered to Seatrain, and then denied to the railroad carriers the right to charge Seatrain for a substantial part thereof. Finally, even if the said carriers were permitted to charge the full amount so determined, the rate as fixed by the Commission as the maximum that may be charged by said railroad carriers for the use of their cars by Seatrain, is less than the cost of car ownership. Thereby, the Commission has failed to require the reasonable compensation prescribed by the Interstate Commerce Act and the property of the petitioner railroad carriers is taken without just compensation in violation of the Fifth Amendment to the Constitution.

ARGUMENT

I. The railroad carriers are under no duty to deliver their freight cars for the use of, or to interchange their cars with, Seatrain Lines, Inc., a water carrier, for use in ocean going vessels on the high seas, and the Commission has no authority to direct the railroad carriers to perform any such alleged duty.

The phraseology of the car service provisions of the Act, the detail with which Congress has enumerated the duties of railroad carriers and the authority of the Commission to enforce such duties, the history of the Act, and the express limitations contained therein, all show an utter lack of intent on the part of Congress to impose a duty upon railroad carriers to interchange freight cars with or furnish freight cars for use by water carriers in ocean-going ships upon the high seas and the Commission was without statutory authority to enforce such alleged duty.

A. The Interstate Commerce Act does not impose a duty upon railroad carriers to interchange their freight cars for use in ocean-going ships upon the high seas by a water carrier, and does not confer authority upon the Commission to compel such an interchange.

The Commission was unable to support its finding that such a duty exists by any express provision of the Act; it relied upon an implication from the provision, first introduced by the Hepburn Amendment of 1906, and now in Sec. 1 (4), which required railroad carriers to establish through routes with other carriers, including certain water

carriers (R. 61-2). The Commission reasoned that this statutory duty carries with it the duty to interchange cars; that, as through routes may be established with water lines, as well as with other rail lines, the railroads are under an implied duty to interchange cars with both railroad carriers and water carriers as an incident to the establishment of through routes; and further, that such implied duty of the railroad carrier implies in turn, power in the Commission to compel such interchange. *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328, 341-342, (R. 35, 48, 49).*

The Commission recognized that, although Congress had made specific provisions with respect to "car service", no support for its findings could be obtained therefrom as those provisions are expressly confined to carriers by railroad; so neither the asserted duty of the railroad carriers nor the claimed power was found by the Commission to be in the car service provisions. Sec. 1(10), (11) and (14)(a), Appendix pp. v-vii.†

The District Court seems to have followed the Commission in basing the asserted duty of railroad carriers to supply cars for the use of water carriers upon the duty

* This is the first time that the Commission has found it a duty for railroad carriers to interchange cars for transportation by a water carrier. No question of interchange of cars was involved in the cases mentioned in the Commission's report (R. 48). *Pennsylvania Co. Operation of Transportation Co.*, 34 I.C.C. 47; *Grand Trunk Ry. Co. of Canada Operation of Car Ferry Co.*, 34 I.C.C. 49; *Buffalo R. & P. Ry. Co. Operation of Car Ferry Co.*, 34 I.C.C. 52; and *Grand Trunk W. Ry. Co. Operation of Car Ferry Co.*, 34 I.C.C. 54.

† The Commission said (R. 47, 49):

"• • • These car service provisions, by their terms, apply only to 'carriers by railroad subject to the Act.'"

"• • • the Act of February 28, 1920 also amended the car service act so as to provide that the provisions thereof should apply only to railroads • • •"

to establish through routes imposed by Sec. 1(4). (R. 119, 120).*

Unlike the Commission, however, the District Court was apparently of the opinion that the Commission's power was dependent on the car service provisions. So, in finding authority in the Commission, the District Court said (R. 120):

> "* * * Subsection (11) provides that it shall be the duty of 'every carrier by railroad' subject to part I to furnish car service. The subsection is notably silent in that it does not state to what carriers (subject to part I) the rail carriers shall supply car service * * *."

The silence referred to would in itself be significant in establishing that Congress did not intend to include carriers by water. Indeed, the Court in the quoted language indicates a realization that the subsection cited relates only to such carriers by water as are subject to Part I of the Act. When paragraph (11) is read in connection with the definition of car service in paragraph (10), it appears that Congress was not silent.

1. *The Phraseology of the Car Service Provisions.*

These car service provisions, with paragraphs (13) and (14)(a), exclusively prescribe the duty of the carriers and the power of the Commission with respect to the interchange of freight cars. By paragraph (10), "car service" is defined as "the use, control, supply, movement, distribution, exchange, interchange, and return

* The Commission and the District Court in finding that Sec. 1(4) now imposes a duty to interchange cars, failed to note the distinction between car service—the interchange of cars by railroads under Sec. 1(10) and (11)—and transportation service under Sec. 1(4), pointed out by Mr. Justice Brandeis in *Peoria Railway Company* v. *United States*, 263 U. S. 528, where, speaking for this Court, he said (at p. 533): "But 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them."

of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part". Cars are thus placed in the category of "vehicles", a word defined by statute, as including all means of land transportation.* Irrespective of the foregoing statutory definition, this Court, by Mr. Justice Holmes, said with respect to the meaning of the word "vehicle":

> "* * * in every day speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle* v. *U. S.*, 283 U. S. 25, 26.

In the use to which the Commission has endeavored to compel the petitioner railroad carriers to devote their cars, i. e., one of repose on ocean-going ships, the car is obviously not "moving" and certainly not "on land".

Moreover, the definition of "car service" shows that Congress was legislating with respect to transportation on land or transportation incidental thereto. It includes, and is limited, paragraph (19), to:

> (a) The "use * * * of locomotives, cars, and other vehicles * * *, by any carrier by railroad subject to this part". By limiting the "use" to "any carrier by railroad", as well as by placing "cars" in the category of a conveyance for "transportation on land", the use of such vehicles by water carriers for ocean transportation is definitely excluded.

* Rules of Construction, 1 U. S. C. Sec. 4: "'*Vehicle*' *as including all means of land transportation.* The word 'vehicle' includes every description of carriage or other artificial contrivance used or capable of being used, as a means of transportation on land". Compare with 1 U. S. C. Sec. 3: "'*Vessel*' *as including all means of water transportation.* The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

(b) The "exchange" and "interchange" of such locomotives, cars and other vehicles, etc., "by any carrier by railroad subject to this part". Here carriers by water are excluded for the same reasons as in the preceding paragraph. Furthermore, mutual duties and obligations are imposed. When the Act provides for "exchange" and "interchange" by carriers by railroad, it is obvious that both parties thereto are to be carriers by railroad.

(c) The "return" of cars "by any carrier by railroad". The fact that Congress thus limited the Commission's jurisdiction over the return of cars to the return "by any carrier by railroad", shows clearly that Congress never intended a compulsory interchange of cars with water carriers for ocean transportation. There is no provision in the Act empowering the Commission to compel a water carrier to return cars. It is inconceivable that Congress authorized the Commission to direct the railroads to hand their cars over to water carriers, and at the same time withheld from the Commission power to compel the return thereof by such water carriers while conferring authority with respect to the return by railroad carriers. Yet Sec. 1(10) specifically limits "return" to the act of a carrier by railroad.

(d) The "control, supply, movement, distribution" of "locomotives, cars, and other vehicles * * *" and "the supply of trains, by any carrier by railroad". Clearly, this does not apply to transactions with carriers by water.

Furthermore, by Sec. 1, par. (14)(a), the authority conferred upon the Commission over car service is limited to authority over railroad carriers, and par. (11) imposes the duty only on railroad carriers.

In accordance with the usual rules of statutory construction, the express provisions prescribing the duty of the railroads and defining the power of the Commis-

sion, (14)(a), with respect to the "use", "exchange", "interchange" and "return" of cars and other vehicles, preclude the implication of any duty or power beyond the Congressional grant.*

This Court has refused to impose duties on carriers or to permit the Commission to exercise powers based upon implication where specific provisions with respect to related matters are contained in the statute. When it was urged that emergency "power to require switching should be held to be granted by implication", Mr. Justice Brandeis in *Peoria Ry. Co.* v. *I. C. C.* (1924) 263 U. S. 528, writing for a unanimous court, analyzed the car service provisions which contained the Commission's emergency powers, Sec. 1 (15) and (16), and said at p. 532:

> "* * * The specific grant, in paragraph 16 of emergency power to 'make such just and reasonable directions with respect to the handling, routing and movement of the traffic of such carrier and its distribution over other lines of roads', and the omission of any reference to switching, tend to rebut an intention to grant the power here asserted."

He said, further, pp. 534, 535:

> "Transportation Act 1920 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power to that end; and the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication."

This Court has held that there were no general or implied powers in the Commission to order a railroad company to provide special cars. In *United States* v. *Pennsylvania Railroad Co.*, (1916) 242 U. S. 208,* it

* See also *Palmer* v. *Massachusetts* (1939) 308 U. S. 79 at pp. 83-84; *Joseph Goldberg Realty Co.* v. *N. Y. C. & St. L. R. Co.* (1938) 229 I.C.C. 497.

refused to find authority implied in the statute for the Commission to direct a railroad carrier to furnish tank cars, described by the Court as a combination of "package and car", p. 229. The Court reviewed the history of the statute, considered the amendments thereto, which it emphasized had been drawn and recommended by the Commission, and used the following language which *mutatis mutandis* is equally pertinent to the case at bar, p. 231:

> "Of course, if there is a duty upon a carrier to furnish tank or other special cars upon request, its enforcement cannot be arrested by the burden it imposes; but here again the thought obtrudes, which we have already expressed — it may be to tiresome extent — that if Congress had intended such consequence with all that it implies of expense, directly and indirectly, it would not have left its intention to be evolved from obscure language but would have put it in explicit declaration and with notice and time for accommodation to it."

Sections 12 and 15 of the Act, upon which Congress had relied in the above case for its asserted power, remain, so far as material, unchanged. When Congress subsequently intended to require railroad carriers to acquire special types of equipment, it did so by specific enactment, Sec. 1(10) and (21). Had Congress intended to impose an obligation and confer authority for the enforcement thereof, such as the Commission has asserted in the instant case, so important a purpose would not have been left to inference.

2. *The Enumeration by Congress of Specific Duties and Powers.*

With respect to the acquisition of equipment and its use by others, Congress has recognized the need enunciated by this Court of employing specific and not general terms, and has formed its legislation accordingly. For example, by Sec. 1(9), Congress expressly imposed the

duty upon railroad carriers to construct and maintain switches, connections with lateral branch lines, or side tracks and to furnish cars for the movement of traffic thereon, and conferred power on the Commission to compel compliance. By the Panama Canal Act, Sec. 6(13) of I.C.A. as amended 1920, now Sec. 6(11), I.C.A., Congress extended benefits to certain water carriers to the limited extent of authorizing the Commission to require a railroad carrier to make connections between its line and the docks. By Sec. 1(13) and (14)(a), Congress conferred upon the Commission power to compel railroad carriers to furnish car service as defined in Sec. 1(10); by Sec. 1(12), Congress imposed the duty on railroad carriers to make reasonable distribution of cars for the transportation of coal from the various mines; by Sec. 1(15), Congress conferred emergency power on the Commission with respect to car service; by Sec. 1(19), Congress conferred power on the Commission over the abandonment of tracks or portions thereof; by Sec. 1(21), Congress authorized the Commission to direct railroad carriers to acquire cars; by Sec. 3(5), Congress authorized the Commission to compel carriers by railroad to use the same terminals upon the stated terms and conditions; by Sec. 25, Congress conferred authority upon the Commission to compel railroads to install block systems, automatic devices, etc. Other examples show the practice of Congress to be specific in conferring authority. Thus, by Sec. 1(16), Congress authorized the Commission to reroute traffic in emergencies; by Sec. 15(5), Congress conferred upon the Commission power to prescribe rules for loading and unloading livestock at the stockyards; by Sec. 15(10), Congress authorized the Commission to direct the routing of traffic under certain conditions.

The enumeration by Congress of these specific powers of the Commission, rebuts any intention to extend by a grant of general powers the specific and limited authority to compel railroad companies to interchange cars. Clearly,

Congress has not permitted such duties or powers to rest in implication. There is, accordingly, neither duty imposed upon railroad carriers to interchange cars with water carriers nor authority conferred on the Commission to compel them to do so.

The District Court in the instant case referred to the duty to furnish "facilities", and to the fact that freight cars have sometimes been referred to as facilities of carriage (R. 120). But freight cars have never been considered facilities of carriage on ocean going ships, and the definition of facilities for water carriers, Sec. 302(g), does not include freight cars or other vehicles.

This Court, as previously noted, (pp. 21-2, *supra*), described a tank car as a combination of "package and car". As proposed to be used by Seatrain, the cars are not even such a combination. They become mere packages or shipping cases.* Seatrain is asking that the railroad carriers furnish the package in which the commodity of the shipper is to be transported on ocean-going vessels.

In somewhat analogous cases, the Commission has recognized that there was no duty to furnish cars for such purposes, even where a water carrier is not concerned. Thus, it was determined that a railroad carrier had no duty to furnish cars for storage or warehouse purposes, *Pittsburgh & Ohio Mining Co.* v. *Baltimore & O. R. Co.*, 40 I.C.C. 408; *Wilson Produce Co.* v. *Pennsylvania R. Co.*, 16 I.C.C. 116; *F. M. Turnbull Co.* v. *Erie R. Co.*, 17 I.C.C. 123; *Andrews Bros. Co., Inc.* v. *Pennsylvania R. Co.*, 123 I.C.C. 733; or for use as a place for peddling to the public. See *The Car Peddling Case*, 45 I.C.C. 494. *A fortiori* it is no part of the carrier's duty to furnish freight cars to rest passively as shipping cases in the hold or upon the deck of a water carrier. The petitioning rail-

* They were so characterized in the dissent of Commissioners Mahaffie and McManamy, 226 I.C.C. at p. 39, and also by Seatrain (R. 522).

road companies have never held themselves out to perform such services, or to furnish cars as part of the cargo of ocean-going vessels.

Moreover, the history of the Act demonstrates conclusively that Congress never intended that railroad carriers should be compelled to interchange cars with carriers by water for use on ocean-going ships, and that no such duty can be implied either from the obligation to establish through routes or from the requirement "to provide reasonable facilities for operating such routes."

3. The History of the Act.

Discussion of the evolution of the requirement for the interchange of cars may appropriately be introduced by a condensed statement of the various successive steps, as follows:

(1) At common law a carrier was not required to permit its cars to go beyond its own lines.

(2) The original Interstate Commerce Act of 1887 imposed no such obligation.

(3) The Hepburn Amendment of 1906 required all carriers subject to the Act to furnish transportation, including cars and other facilities, and to establish through routes and reasonable rates applicable thereto, I.C.A. Sec. 1(4),* and it also gave the Commission power to establish through routes and maximum joint rates provided that no satisfactory through route existed and the provision of the section was also to apply "when one of the connecting carriers is a water line" subject to the Act, *id.* Sec. 15(3). It contained no provision with respect to interchange of cars.

* The section numbers mentioned in the history of the Act were not in the amendments prior to 1920, but refer to the appropriate sections of the Interstate Commerce Act as amended by the Transportation Act of 1920. See Appendix for pertinent parts of the statutes.

(4) The Mann-Elkins amendment of 1910 required carriers to furnish transportation and to establish through routes and reasonable rates and also (a) to provide reasonable facilities for operating such through routes, and (b) *to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein.* I.C.A. Sec. 1(4). The power of the Commission with respect thereto, Sec. 15(3), remained substantially unchanged.

(5) The Esch Car Service Act of 1917 required car service, including "the movement, distribution, exchange, interchange and return of cars", to be provided "by any carrier subject to the provisions of this Act."

(6) The amendment of 1920 omitted from Sec. 1(4) the provision requiring the making of "rules and regulations with respect to the exchange, interchange and return of cars used therein" and amended the Car Service provisions so as to add to the definition of "car service" the italicized words and to omit the bracketed words, viz: "* * * *the use, control, supply,* movement, distribution, exchange, interchange and return of *locomotives,* cars, *and other vehicles* used in the transportation of property, *including special types of equipment, and the supply of trains,* by any carrier *by railroad* subject to [the provisions of] this Act." I.C.A. Sec. 1(10). The authority of the Commission over car service was likewise limited to railroad carriers. *id.* Sec. 1(14).

(7) The Act of 1940 made no substantial changes in the car service provisions, which were expressly made applicable only to a "carrier by railroad subject to" Part I of the Act. I.C.A. Sec. 1(10), *et seq.*

It is thus seen that the interchange of cars was dealt with as an obligation separate and apart from the duty to furnish facilities; that the provision with respect to the interchange of cars, Sec. 1(4), inserted by the Mann-

Elkins Act of 1910, was subsequently omitted from that section, where the provisions for through routes and reasonable facilities remained, and that the interchange of cars was dealt with solely in the car service provisions which were limited to railroad carriers.

The foregoing, we submit, demonstrates that Congress has at all times considered the obligation to furnish car service as separate from and not included in either the duty to establish through routes or the duty to provide reasonable facilities for operating through routes; that car service is to be furnished only to the extent required by the car service provisions, Sec. 1(10), *et seq.*; and that these provisions apply only to transactions by and between carriers by railroad subject to Part I of the Act.

It is appropriate that we consider at greater length the statutory developments outlined above.

At common law, a carrier was not bound to permit its cars to go beyond its own line or to interchange cars with another carrier. See *Atchison Topeka & Santa Fe R.R. Co.* v. *Denver & New Orleans R.R. Co.*, 110 U.S. 667, 680-3 (1884); *Southern Pacific* v. *Interstate Com. Com.*, 200 U.S. 536, 553-4 (1906); *Atlantic Coast Line* v. *Riverside Mills*, 219 U.S. 186, 197 (1911).

The Interstate Commerce Act, as originally enacted in 1887, 24 Stat. L. 379, did not impose any obligation upon the railroads either to establish through routes or to exchange or interchange cars. There may be applied to this situation, by the substitution of obvious equivalents, the language of Mr. Justice Field, when, as a Circuit Justice, he passed upon the question whether an interchange of cars was required by the act of Congress granting a charter to the Northern Pacific Company. He there said:

> "Whenever an intention has been manifested, in the creation of railway charters, that a connecting company shall have the power to run its cars over

> the lines of another, or to require one company to haul over its line the cars of another, such intention has been expressed in unequivocal terms, such as is found in the constitutions or statutes of several of the states respecting railway companies, which is substantially in these terms: 'And they shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.'" *Oregon Short Line* v. *Northern Pacific R. Co.*, (1892) 51 Fed. 465, 475.*

In the face of this prior decision of Mr. Justice Field that duties, such as the Commission in the instant case held were imposed by implication (R. 48, 49), are created only by unequivocal and specific language, Congress in 1906 adopted the Hepburn Amendment with no provisions as to such duties or as to power to enforce them if they existed.

By the Hepburn Act, 34 Stat. L. 584, 1906, there was added a provision, later incorporated in Sec. 1 (3) and (4), imposing a duty upon carriers to provide transportation, defined as follows (Sec. 1 of Hepburn Act):

> "* * * the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership * * *".

It is clear that "facilities" as there used, was not intended to include "cars and other vehicles" which were separately particularized. The amendment imposed the further duty on carriers subject to the provisions of the Act

> "to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

* Compare *Central Stockyards Company* v. *Louisville & Nashville Ry. Co.*, (1904) 192 U. S. 568, with *Michigan Central Railroad Co* v. *Michigan Railroad Comm.*, (1915) 236 U. S. 615.

By the same amendment, the Commission was given power, 34 Stat. L. 590 Sec. 4, see Sec. 15(3) of present I.C.A., "to establish through routes" and to prescribe "the terms and conditions under which such through routes should be operated", provided that no reasonable or satisfactory through route existed; and this provision was to apply "when one of the connecting carriers is a water line".

Although it is upon the Hepburn amendment that the Commission now bases both the duty and the authority (R. 48, 49), the Commission at that time recognized that these provisions did not require any interchange of cars with railroads. Interchange of cars with water carriers was, as far as appears, not even imagined. This recognition, involving an obvious construction of the then existing law, is important in that although the Hepburn Act required railroads to furnish "facilities" and to provide through routes, this was not then considered to require an interchange of cars.

Shortly after the passage of the Hepburn Act, the Commission stated, both in its 1906 Annual Report to Congress and in a report, *Matter of Car Shortage*, 12 I.C.C. 561, that the Commission did not have the power to compel carriers to make reasonable rules and regulations with respect to the interchange or return of cars. The Commission was concerned perhaps more with its lack of power to compel the return to the owners of cars voluntarily exchanged, than with its want of authority to require the interchange. The Commission pointed out that certain carriers had been in the habit of reloading for use on their own lines, cars received from other roads. The result was that, instead of bringing about an uninterrupted flow of traffic, the free interchange of cars had resulted in their withdrawal from through transportation for local use on the foreign line.*

* By foreign line is meant a line other than that of the owner.

In its 1906 Annual Report, the Commission reviewed the facts with respect to the then existing car shortage and the retention of cars owned by other railroads, and said (p. 17):

> "It is scarcely necessary to point out that the Commission is without authority under any existing law to deal effectively with this condition. Broadly speaking, the regulating power of the Congress has not been exercised to control the physical operations of interstate railroads—aside from the safety appliance requirements—either as respects the movement of trains or the supply of equipment. It is true that the recent amendments [Hepburn Act] include a very broad definition of 'transportation' and impose in general the obligation to provide all needful facilities, but this is perhaps not much more than a statement of common law obligations which already existed. * * *"

Later, in 1907, the Commission said in *Matter of Car Shortage*, 12 I.C.C. 561, 578, that it should

> "be empowered to make rules under which free interchange of cars shall be effected or to require railroads engaging in interstate commerce to make such rules for their own protection and provide for their enforcement."

Further, at p. 579, the Commission said:

> "Such legislation without providing also for the compulsory interchange of cars would tend to compel carriers to keep all their cars on their own tracks in order to avoid demurrage penalties, and thus break up the advantages now enjoyed by shippers of through transportation."

It appears from the foregoing that the Commission was then asserting its lack of power to compel the interchange of cars, although the existing statute, Hepburn Act, 34 Stat. L. 584, Sec. 1, made it the duty of carriers to

establish through routes and empowered the Commission to establish such routes. The ensuing amendments (see pp. 35-7, *infra*) which gave the Commission power to compel the interchange of cars by some carriers, those by railroad, furnish a construction by Congress itself that the prior existing provisions did not embrace such power. See *Peo. ex rel. Westchester F. I. Co.* v. *Davenport*, 91 N. Y. 574, 591. The present insistence of the Commission that it has "power to enforce rules relating to the interchange of cars (which) necessarily flows from the carriers' duty to establish through routes" (R. 48) is diametrically opposed to its previous construction, acquiesced in by Congress.

As a result of the recommendations of the Commission, the Mann-Elkins Act, 36 Stat. L. 545 (1910), amended the Hepburn Act, see Sec. 1(4) of present I.C.A., so as to read as follows, the italicized portions being added by the Mann-Elkins Act, Sec. 7:

> "* * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; *and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.*" (Emphasis supplied).

It should be noted that although the Mann-Elkins Act for the first time imposed a statutory duty on carriers to make rules and regulations with respect to the exchange, interchange, and return of cars used in through routes, it did not in express terms direct carriers to interchange cars.* In form, at least, it only required the railroads to

* There may be through routes without interchange of equipment. *Seatrain Lines Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I.C.C. 7, 12; *Through Routes and Joint Rates*, 153 I.C.C. 129, 135.

make reasonable rules and regulations with respect thereto. It is also to be noted that the providing of "facilities" and the making of rules for the "exchange, interchange, and return of cars" were dealt with as separate and distinct obligations. The latter was not included in the former. This will be further demonstrated when we consider the 1920 amendment, wherein the duty to establish through routes and to furnish facilities for operating them remained in Sec. 1(4), while the provision respecting interchange of cars was enlarged upon and placed in Sec. 1(10) to (14).

The important fact is that the Hepburn Act of 1906, imposed a duty to provide facilities and to establish through routes, but, as the Commission, contrary to its present claim, then recognized, did not impose a duty to, or confer authority on the Commission to compel, interchange of cars. It was only after the 1910 amendment, enacted at the Commission's request, added the above provision for rules and regulations for the interchange and return of cars, that the Commission said in *Missouri & Illinois Coal Co. v. Illinois Central R. R. Co.*, (1911) 22 I.C.C. 39, at p. 49, that the "carriers must make reasonable rules and regulations with respect to the exchange, interchange and return of cars used upon their through routes and for the operation of such through routes (Section 1) * * *". The Commission in that case relied (p. 45) largely upon the provisions of the amendment, requiring rules for interchange of cars, in reaching its decision that the carriers should not establish an embargo. Even then the Commission did not attempt to enforce its opinion by an order which could be reviewed. On the contrary, it expressly left the matter to the railroad carriers "to make such regulations for car inter-

change and for the maintenance of through routes involved as may be needed" (p. 49).

The 1910 amendment still did not, in the opinion of the Commission, clearly impose a duty to interchange cars nor grant sufficient power to compel such interchange. When the recurrent problem of the return of cars to their owners arose again at the outbreak of the First World War, the Commission recommended to Congress that it be given definite and specific authority to prescribe car interchange rules, particularly governing the return of interchanged cars. In its 1916 Annual Report, dated December 1, 1916, the Commission referred to the above amendment and to its power to prescribe through routes and joint rates and said (pp. 73-4):

> "* * * We recommend that the Commission be given definite and specific authority to prescribe for the carriers by rail subject to the Act, rules and regulations governing interchange of cars to the owning road, the conditions and circumstances under which such cars may be loaded on foreign roads and the compensation which carriers shall pay to each other for the use of each other's cars."

This recommendation shows that the Commission did not consider that it had the authority to compel the interchange and return of cars. In *Car Supply Investigation*, 42 I.C.C. 657, (1917) the Commission recognized the limitation of its authority, but held, three of seven commissioners dissenting, that it had authority to modify car service rules theretofore promulgated by the American Railway Association so as to effect a more prompt return of cars to their owners. The question of compulsory interchange was not involved. The Commission again recommended that it be given definite and specific authority to

prescribe rules and regulations governing the interchange of cars."

* At the hearings before the Subcommittee on Interstate Commerce, United States Senate, 65th Congress, First Session (May 3, 1917) on S. 626, preliminary to the enactment of the Esch Car Service Act of 1917 (Senate Library Vol. 120 No. 5), Hon. Frank H. Funk, Commissioner of State Public Utilities Commission of Illinois and Chairman of the Committee on Car Service and Demurrage, National Association of Railway Commissioners of the various state commissions, referring to *Car Supply Investigation*, 42 I.C.C. 657, which had as its principal purpose to relieve "the carriers who are wrongfully deprived of the use of their cars" (id. p. 674) made the following statement (p. 18):

> "Commissioner McChord I believe, will admit that the order [requiring the establishment and observance of car service rules found reasonable by the Commission] that he issued in the coal car investigation in Louisville last November was issued without any warrant of law but he got by with it; he arbitrarily did it. He told me that—I do not know that I am authorized to quote him, but it is a fact—he told me that complaint was made. He was criticized that he had nothing back of him on which to issue the order, and he said 'Gentlemen, I have the public opinion of 100,000,000 people who will support this order.'"

At similar hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives (February 1, 9 and 13, 1917) on H.R. 19546, H.R. 20256, H.R. 20352, preliminary to the enactment of the Esch Car Service Act, Commissioner Henry Clay Hall of the Interstate Commerce Commission explained the request of the Commission as follows (p. 24):

> "* * * *We do not here ask any power to require the furnishing or supplying of cars, however proper* and *appropriate* that might or might not be. We are talking of exchange interchange, and return; we say that there should be *rules which mean something*, that they should not be changed except as tariffs are changed and that they should be subject to the determination of the Commission as to whether they are just and reasonable. And then to meet the cases of emergency which will arise we propose this amendment to which I was about to call your attention." (Emphasis supplied).

To the same effect see the comments of Commissioner Aitchison in Interstate Commerce Acts Annotated, Vol. 1, p. 83; 1 *Sharfman*, "The Interstate Commerce Commission", Part I, pp. 145-146, particularly Note 17.

These hearings and the debates hereinafter referred to are presented to show the evil aimed at, and the environment at the time of the enactment. They may properly be consulted for that purpose. The *Tap Line Cases*, 234 U. S. 1, 27; *Seven Cases* v. *U. S.*, 239 U. S. 510, 515; *Helvering* v. *Griffiths*, 318 U. S. 371.

The recommendations of the Commission were incorporated in the Esch Car Service Act, 40 Stat. L. 101 (1917), hurriedly drawn for World War I and enacted substantially in the form recommended. 1917 Annual Report, p. 65. This statute added the first definite car service provisions to the Act. The term "car service" was defined to include "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act." A duty was imposed upon the carriers subject to the Act to "establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service", and the Commission was given authority to establish such rules.

Preparatory to the return of the railroads to their private owners, the Transportation Act of 1920, 41 Stat. L. 474, made various changes in the car service and through routes provisions. For the first time, Congress in express terms imposed a duty on railroad carriers to "furnish" car service,* that duty being expressed as follows: "It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service." Sec. 1 (11). At the same time "car service" was by definition, extended to include "use, control and supply" as well as "movement, distribution, exchange, interchange and return" and the activities, which so far as previously specified had related only to "cars", were made to include "locomotives, cars, and other vehicles used in the transportation of property, including special types of equip-

* This distinction between the Transportation Act of 1920 imposing a duty upon railroads to "furnish" car service including interchange of cars with each other, and the provision in the Mann-Elkins Act of 1910 carried through the Esch Car Service Act to make reasonable rules and regulations where cars were being interchanged, was pointed out by Hon. C. B. Aitchison, a member of the Commission, in 5 George Washington Law Review (1937) 289, pp. 368-9.

ment, and the supply of trains". The phrase "by any carrier subject to the provisions of this Act" was amended to read "by any carrier by railroad subject to this Act". Sec. 1(10); see page 26, *supra*. It was thus made clear that the duty of the railroads and the powers of the Commission with respect not only to the "exchange, interchange and return", but also to the "use" of cars and other vehicles was subject to the limitation that such use, exchange, interchange or return was by a carrier by railroad. This limitation had been carefully considered in drafting the statute.

When the act, H.R. 4378, 66th Congress, 1st Session, MacVeagh, Transportation Act of 1920, pp. 517, 518, was first introduced on June 2, 1919, the definition of "car service", Sec. 1(10), provided for the use, exchange, interchange return, etc. "by any carrier subject to this act", while Sec. 1(11) imposed the duty to furnish car service upon "every carrier by railroad subject to this act".

This bill, providing for the "use" and the "return" of cars by any carrier subject to the Act, was reintroduced and finally enacted after substituting in paragraph 10 "any carrier by railroad subject to this Act" for "any carrier subject to this Act", so that the said sections, as finally enacted, read as follows:

> "(10) The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act."
>
> "(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

At the same time the power of the Commission with respect to car service—that is, the use, interchange and return of cars—was limited in the grant by Congress to authority over railroad carriers by paragraphs (13) and (14). (See Appendix, pp. vi, vii).

At the same time the provision of the Mann-Elkins Amendment of 1910 imposing the duty upon any carrier subject to the Act "to make reasonable rules and regulations with respect to the exchange, interchange and return of cars", was dropped from Sec. 1(4) leaving both the duty of interchange and the authority over the same, wholly in the car service provisions of the Act, Sec. 1(10)-(14).

Nevertheless, in the instant case, the Commission and the District Court have held that this clause relating to "exchange, interchange and return" of cars which had been so withdrawn from Sec. 1(4) should still be read into that section by implication and, as so read in, should be free of the limitations to carriers by railroad only. After referring to the elimination of the said provision from Sec. 1(4), the Commission said: "While the Act of February 28, 1920 also amended the car service act so as to provide that the provisions thereof should apply only to railroads, such amendment did not lessen the duty of the railroads with respect to car service which had been imposed upon them prior to such amendment." 206 I.C.C. 342, (R. 49).

It would be strange, indeed, after the Commission had, since 1906, repeatedly requested authority to compel the return of cars to their owners, if, in 1920, Congress had conferred authority on the Commission, which it had not requested, to compel railroad carriers to hand their cars over to a water carrier for ocean transportation, and had at the same time denied to the Commission authority to compel the return of the cars by the water carrier. In other words, upon the Commission's interpretation,

Congress granted authority, which had not been sought, and refused to confer the power which had been requested. That was exactly what was accomplished, if the present views of the Commission and the District Court prevail, as paragraphs (13) and (14)(a) of Sec. 1 expressly limit the authority of the Commission with respect to car service to authority over carriers by railroad, and as paragraphs (10) and (11) likewise limit the duty to return cars. Furthermore no other section of the Act confers authority upon the Commission to compel any carrier to return cars.

In recognition of its lack of power the Commission has directed the railroads to deliver their cars to Seatrain but has not directed Seatrain to return the cars.

This leads to a further reason for not attributing to Congress the intent to require railroad carriers to provide cars for ocean going vessels. Had it so required, without, at the same time, providing for compulsory return thereof to the owners, and it cannot be denied that no such provision was made in the act, the Federal constitution would have been violated. See *Louisville & Nashville R. R. Co. v. Central Stock Yards Co.* (1909), 212 U. S. 132; *Grand Trunk Ry. Co. v. Michigan R. R. Com.* (1913), 231 U. S. 457, at p. 470.

Additional facts evidence the lack of Congressional intent to compel railroads to permit their cars to be loaded aboard ocean going vessels. In adopting the 1920 amendment, Congress was not unmindful that extra hazards were involved in transportation by water. Sec. 20(11), providing that the initial carrier should be responsible for any damages to the freight by a connecting carrier, expressly limited the liability with respect to cargo damaged by a water carrier to that which could be recovered from the water carrier, thereby giving full consideration to the limitation of liabiltiy under the admiralty law. However, Congress made no provision for

protection of a railroad carrier for loss of or damage to its freight cars by a water carrier. Surely, Congress did not intend to compel a railroad, against its will, to subject its property to such incidents of maritime transportation as limitation of liability, or contribution to special or general average, or to salvage claims. These matters would certainly have been provided for if Congress had intended that the railroad carriers could be compelled to provide the freight cars to be interchanged with and used as containers for the benefit of the water carriers.

The Transportation Act of 1940, 54 Stat. L. 898, recast, amended and added to the Act. The provisions with respect to railroads were placed in Part I, those with respect to motor carriers in Part II and those with respect to water carriers, newly enacted, in Part III. The duties of and authority over railroads must now be found in Part I exclusively. The car service provisions, Sec. 1(10), (11), (13) and (14)(a)*, were not changed in any pertinent respect although their exclusive application to railroads was emphasized by being made applicable only to a "carrier by railroad subject to this part", instead of to a "carrier by railroad subject to this Act". There was added to Sec. 1(4) the duty of railroads to establish through routes with water carriers subject to Part III of the Act, and a reciprocal duty on water lines was imposed by Part III, Sec. 305 of the Act, but no provision was made for the exchange and interchange of cars by railroad carriers and water carriers. By Sec. 305(a) common carriers by water were required to furnish "transportation" which, so far as material, means by definition, Sec. 302(g)(h), "any vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrumentality or equipment of any kind used in or in connection with transportation by water subject to this part"; Sec. 15(3) was amended so as to give the Commission also the power to establish either maximum or minimum rates where one of the participants

* "(14)" in the 1920 Act.

in the through routes was a common carrier by water subject to Part III.

It is to be noted that when Congress intended Part I, as amended in 1940, to apply to carriers by water it specifically so provided not only by so stating in the particular section of Part I, see, for example, Sec. 3(4) and Sec. 4, but also when appropriate, by inserting a provision for correlative duty or power in Part III, see, for example, Sec. 1(4) and 305(b); Sec. 3(4) and 305(i); Sec. 1(1) and (2) and Sec. 302(i) (2) and (3).

Nowhere, prior to the adoption of any of the amendments or Acts heretofore considered, had it been suggested either by the Commission or in the Committee reports or in the Congressional debates, that railroad carriers should provide freight cars for use on ocean-going vessels of carriers by water.

By the terminology of the car service provisions, by the history of the Act, by the enumeration of the Commission's powers, and the classification of cars as contrivances for transportation on land, it is clearly shown that in providing for the "use, exchange, interchange, and return of locomotives, cars and other vehicles", by railroad carriers, Congress was providing for transportation on land and not for transportation on the high seas.

B. Seatrain Lines, Inc., is a Carrier by Water Whose Ocean-Going Vessels are Engaged in Transportation on the High Seas.

The Commission found "that Seatrain is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act; that it is a common carrier by water." (R. 36. See also District Court Finding No. 6, 130.)

The definition of a railroad includes "all bridges, car floats, lighters and ferries used by or operated in connection with any railroad, * * *." Sec. 1(3)(a).

Seatrain's ships "are oceangoing vessels" which ply the high seas, 195 I.C.C. 215-221. This is not in dispute. As the District Court stated (R. 121), the testimony of Graham M. Brush, president of Seatrain, made the character and scope of Seatrain's operations very plain.*

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* Mr. Graham M. Brush, president of Seatrain, testified as follows (R. 210):

"You must realize that Seatrain ships are seagoing vessels. They can operate around the world, they can operate through any kind of weather. * * * Comparing our ships with the ordinary type of car ferry, those vessels were not designed to go on ocean voyages. * * * * it would just be impossible to compare a car ferry in the usual trade route with a Seatrain vessel; the car ferry, in our opinion, would only run a short time before it would be lost, the same as a car float."

Mr. Brush further testified (R. 583):

"Q. Your ships are now operating in what service or in what services, Mr. Brush?

"A. Our present operation is from New York to Havana, thence to New Orleans, returning from New Orleans to Havana to New York; the ships leaving New York and clearing for the foreign ports, entering Havana and again clearing from Havana for a foreign port.

"Q. What is the length of the voyage from New York to Havana?

"A. In time the voyage is three and a half days under the present operating schedule from New York to Havana, a distance of approximately 1200 nautical miles.

"Q. And from Havana to New Orleans?

"A. From Havana to New Orleans the running time is approximately two days, a distance of 600 nautical miles.

"Q. In those voyages do your ships go out to sea?

"A. Yes, sir. * * *"

For the distinction between a ferry and an ocean-going ship, see also *Puget Sound Nav. Co. v. U. S.*, 107 F. (2d) 73; cert. den. 309 U. S. 668; *Canadian Pac. Ry. Co. v. U. S.*, 73 F. (2d) 831, 835.

C. Since Congress did not impose a duty upon carriers by railroad to interchange cars for use upon the high seas by carriers by water, nor confer authority upon the Commission to enforce any such alleged duty, and since Seatrain Lines, Inc., is a carrier by water engaged in such transportation and not a carrier by railroad, the order directing the railroad carriers to interchange cars with Seatrain should be set aside in its entirety.

The Commission erroneously held that petitioner railroad carriers had violated Sec. 1(4) of the Act in refusing to grant permission for the interchange of cars for Seatrain's use. The District Court erred in its conclusions of law Nos. 2 and 3, whereby it sustained the power of the Commission to require railroads to permit the use of their cars by Seatrain insofar as such transportation is within the United States or its territorial waters, and held that the Commission did not base its decision upon a mistake of law in holding that the rail carriers were under such a duty (R. 140). The order should have been set aside in its entirety.

II. The District Court correctly held that the order of the Commission is based upon a mistake of law in that in making it the Commission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extra-territorial waters, or to a foreign port, and that the order is beyond the statutory power of the Commission in so far as it requires an interchange of cars for such use, but the District Court erred in failing to set aside the order in its entirety.

It appears without dispute that Seatrain carries the cars on ships plying from or to Hoboken, N. J., to or from Belle Chasse, La., operating by way of Havana, Cuba. (R. 130, 131; see also p. 41, note, *supra*), and invariably going out to sea in the course of their voyages. (R. 129, note; 141, note 1.)

The Commission has sought to compel the railroads to interchange their cars for use in such transportation. Ever since the enactment of the Transportation Act of 1920, 41 Stat. L. 474, paragraph (1) of Sec. 1 has expressly made the Act (or after the Amendment of 1940, part I thereof) applicable to carriers by railroad engaged in transportation between states or territories from one place in the United States through a foreign country to another place in the United States, or between the United States and a foreign country, "but only in so far as such transportation takes place within the United States."* Paragraph (2) of Sec. 1 similarly limits the application of the Act to "such transportation" as takes place within the United States. Not only the terminology of paragraph (1)

* This precise limitation was first expressed in the Transportation Act of 1920, and was coincidental with, if not a result of, the careful revision of Sec. 1, pars. (10) and (11), directing railroad carriers to furnish car service.

but the restriction in paragraph (2) shows clearly that the limitation applies to all such carriers by railroad and to all such transportation. Speaking of the limitation, this Court has said: "The Act extends to transportation only in so far as it takes place in this country." *St. Louis, etc., Ry. Co.* v. *Brownsville District*, (1938) 304 U. S. 295 at p. 300. Accordingly the provisions of the Act as it was prior to 1940 applied to the carriers, Sec. 1(1), and to the transportation, Sec. 1(2), only in so far as the transportation takes place within the United States. These provisions were continued in the Transportation Act of 1940 which added Part III, with similar limitations with respect to transportation partly by water and partly by railroad. By Section 302 (i)(2) and (3), Part III applies to such transportation partly by rail and partly by water "from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, * * * [it] shall include transportation by railroad or motor vehicle only in so far as it takes place within the United States * * *". It applies to transportation "from or to a place in the United States to or from a place outside the United States, * * * only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, * * *", and (B) to movements to a foreign place only in so far as the water transportation takes place prior to the transshipment at a place within the United States for movement to a place outside thereof, with a similar limitation in the case of incoming foreign movements to the domestic portions thereof. By subdivision (j) the term "United States" means "the States of the United States and the District of Columbia". By subdivision (l) "The term 'common carrier by railroad' means common carrier by railroad subject to the provisions of part I".

The limiting provisions of the Act of 1920, thus carried into and emphasized by the Act of 1940, make it plain that Congress did not intend to empower the Commission to compel railroad carriers to provide cars for transportation by water carriers in extra-territorial waters. By Sec. 1 (14), 1920 amendment, authority was conferred upon the Commission to make rules with respect to the use, exchange, interchange and return of cars by railroads subject to the Act, constituting "car service" as defined in paragraph (10) of said section, including compensation for the use of cars. These provisions were continued by the 1940 amendment, the words "this part" being substituted for "this Act". The conclusion of the District Court was therefore, necessarily, that there was no duty or authority with respect to furnishing cars for transportation outside of the United States, or in extraterritorial waters, foreign waters or to a foreign port.

The Commission had sought to justify the asserted power to compel interchange of cars by the proposition that it "necessarily flows from the carriers' duty to establish through routes", 206 I.C.C. 328, (R. 48), as provided by Sec. 1(4) of the Act. Subsequently recognizing the limitations imposed upon that paragraph by the provisions of paragraphs (1) and (2) of Sec. 1, the Commission, 226 I.C.C. 7, 13-16, was compelled to seize upon the provisions relating to the establishment of through routes contained in the Panama Canal Act, then Sec. 6(13) of the Act,* which provided in part that

> "when property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, * * * the Interstate

* This provision of the Panama Canal Act, 37 Stat. L. 560, enacted August 24, 1912, became Sec. 6(13) (a), (b), (c), and (d), of the Transportation Act of 1920, but the Transportation Act of 1940, repealed subparagraph (b), upon which the Commission relied, and the other provisions became Sec. 6(11) of the Act. 54 Stat. L. 898.

> Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act * * *:
>
> "(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

By laying hold of such general language, the Commission sought to free itself from the jurisdictional restraints.

If these provisions can be given any effect in sustaining the Commission's self-asserted power, which we deny, it can only be on the assumption that the Commission had authority to determine the terms and conditions under which through routes with Seatrain should be operated by virtue of said subparagraph (b), *supra*, and that such power was "in addition to the jurisdiction given by the Act," and that by reason thereof the limitations of paragraphs (1) and (2) of Sec. 1 did not apply.

But when in 1941 the report was made directing the interchange of cars with Seatrain, said subparagraph (b) had been repealed by the Act of 1940, 54 Stat. L. 898, and the only duty with respect to the establishment of through routes was to be found in Sec. 1(4) and by no pretense involved any jurisdiction over railroad carriers in addition to that given by Part I. Nevertheless, when the foregoing was urged upon the Commission, it chose to regard the 1940 Act, and its repeal of subparagraph (b) of Sec. 6(13) "as confirming our jurisdiction in the present premises, as Congress reenacted Sec. 1(4) with no material change in wording, presumably with full knowledge of the interpretation of that section followed in our first report in these proceedings" (R. 62).

It was in this manner that the Commission sought to justify the exercise of an extraordinary power, and to bring about by indirection a result which Congress had refused and, it is submitted, intentionally refused to accomplish by specific enactment.

As stated above, the Commission, in 1938, had cited the Panama Canal Act as its authority to compel the interchange of cars with Seatrain for use without the United States, 226 I.C.C. 14. Thereafter, in 1939, in the first session of the 76th Congress a bill to amend the Interstate Commerce Act generally was introduced in the Senate, S. 2009,* which, if enacted, would have legitimized the proposed action of the Commission, as far as territorial jurisdiction was concerned. By this bill the territorial limitation both as to railroad carriers and water carriers was to apply to foreign commerce only, Sec. 2(1)(a) and (b), defined as commerce from a point in the United States to a point in a foreign country, Sec. 3(30) thereof, but no territorial limitation was imposed upon transportation in interstate commerce, Sec. 2(1)(a) thereof, which was defined as follows in paragraph (29) of Section 3 thereof:

> "The term 'interstate commerce' means transportation of passengers or property by a carrier or carriers, from a place in one State, Territory, or possession to a place in another State, Territory, or possession of the United States (*another such transportation be wholly within the United States or through a foreign country or by way of a foreign port or waters or the high seas*), or between places in the same State by a route or routes passing beyond the borders of said State, or between places in the same Territory, and includes the use of any and all instrumentalties and facilities embraced in paragraphs (23) and (26) of this Section." (Emphasis supplied.)

* S. 2009 was introduced in the Senate by Senator Wheeler, chairman of the Committee on Interstate Commerce, on March 30, 1939. A similar bill, H. R. 4862, was introduced in the House by Mr. Lea, chairman of the Committee on Interstate and Foreign Commerce, on March 8, 1939.

The proposed bill would have extended the application of the Act and the power of the Commission over railroad carriers and railroad transportation beyond the territorial limits of the United States, over the high seas, through foreign waters, and by way of a foreign port. It is to be noted in this connection that the authority was not only to be thus expanded, but also extended to cover transportation to and from insular possessions of the United States, not comprehended in the Transportation Act of 1920.

Congress rejected the bill, and thereafter adopted the Transportation Act of 1940, continuing the existing territorial limitations, Sec. 1(1)(2), and adding other similar provisions, Sec. 302(i)(2) and (3), heretofore considered (p. 44, *supra*). It also repealed subparagraph (b) of paragraph (13) of Sec. 6, thereby relegating all requirements for the establishment of through routes to Sec. 1(4).

With regard to the Commission's claim of obtaining the asserted power by the reenactment of Sec. 1(4) it is to be remembered that since 1920 that section had contained no reference to the interchange of cars, such provision by and after the 1920 amendment being solely in the "car service" sections applicable only to carriers by railroad, Sec. 1(10)-(14). The "reenactment" in 1940 made no change in this respect. It is to be noted further that, to this stage of the proceeding, the Commission had never relied upon Sec. 1(4) as the source of any jurisdiction over railroad transportation upon the high seas or beyond the territory of the United States. The assertion of such reliance was in the report of October 13, 1941 (R. 62, 71).

Even had the Commission, prior to the reenactment of Sec. 1(4) by the Act of 1940, construed Sec. 1(4) as implicitly giving it the extraterritorial jurisdiction it claimed, such construction would have been clearly erroneous. This Court has held that the reenactment without alteration of a section of the Interstate Commerce Act was not an adoption of an erroneous construction of such section

by the Commission even in a long line of decisions, *U. S.* v. *Mo. Pac. R. Co.*, 278 U. S. 269 (1929), and *a fortiori* "one decision construing an act does not approach the dignity of a well settled interpretation." *White* v. *Winchester Country Club*, 315 U.S. 32.

It has been authoritatively determined that railroad carriers are not required to interchange cars for transportation beyond the United States.

In *St. Louis etc. Ry. Co.* v. *Brownsville District*, (1938) 304 U. S. 295, the Court held that the District Court had properly refused to compel a railroad carrier to furnish cars for transportation of freight between the Port of Brownsville, Texas, and Matamoras, Mexico, and held (at p. 300) that the railroad carrier was not bound to deliver cars in the United States to another railroad carrier for transportation into Mexico.*

The Commission itself has repeatedly held that it does not have jurisdiction to establish through routes and prescribe joint rates between carriers with respect to transportation from a point in the United States through a foreign country to another point in the United States. *San Diego Chamber of Commerce* v. *A. & V. Ry. Co.*, 102 I.C.C. 27, 28, 29 (1925); *Cyanamid & Cyanide from Niagara Falls*, 155 I.C.C. 488, 490 (1929); *J. R. Clogg & Co.* v. *Railway Express Agency*, 215 I.C.C. 15, 17 (1936); *Great Northern Railway Co. Abandonment*, 202 I.C.C. 703, 707 (1935); *Lake & Rail Class & Commodity Rates*, 205 I.C.C. 101, 177, 178 (1935); *Hy Grade Food Products Corp.* v. *Wabash Ry. Co.*, 227 I.C.C. 306 (1938).

By its order (R. 73) the Commission has directed the railroad carriers to deliver their cars for transportation,

* The fact stated in the opinion, 304 U. S. at p. 298, was that any delivery of cars by the Missouri Pacific Railroad Co. to the Port Isabel Ry. Co. would be made in the United States, for the reason that the Port Isabel Railway Company's line extended from Port Isabel, Texas, to the tracks of the Missouri Pacific in Brownsville, Texas.

not only upon the high seas and beyond the territorial limits of the United States, but upon a route through foreign waters and on ships that dock at a foreign port. Moreover, as the Commission states, Seatrain moves "a very substantial number of empty cars, routing them preferably via Havana, in the hope that there they may pick up loads" (R. 65). Such cars will thereby enter Cuban commerce. The vessels and their contents are thereby made subject to attachment or libel, and to seizure, not only by process of the United States Courts, but also by a foreign sovereignty, in which event the rights of the American owners can be asserted only through foreign courts or through the diplomatic department of our government. See *Ricaud* v. *American Motor Company*, (1918) 246 U. S. 304, 310.

The effect of the Commission's decision is that it has the power to compel a railroad carrier to deliver its freight cars to and for the profit of and use by a water carrier on a route, let us say for illustration, from New York over the Atlantic Ocean, through the Mediterranean, the Suez Canal, the Red Sea, the Indian Ocean, across the Pacific Ocean to San Francisco, stopping at various points en route. See R. 210, where Seatrain's president testified that its vessels can operate around the world.

Yet the Commission admits "that we have no power to make a finding which directly or indirectly would require defendants to turn over their cars to complainants for use by Seatrain in its Cuban traffic" (R. 59, 70, 71). In the face of the statutory provisions limiting its territorial jurisdiction the Commission by its order has arrived at this astonishing result: Although it cannot compel a railroad to send its cars out of the country, and cannot compel a water carrier to send its ships to a foreign port, yet when

a water carrier voluntarily sends its ships through foreign waters docking at a foreign port, the Commission can compel the railroads to allow their cars to be placed on the ships which are engaged in such transportation. The statement of this result affords a refutation of the grounds upon which it rests.

It is evident that the order entered by the Commission is calculated, if sustained, to accomplish a result which Congress has steadily refused to accomplish by direct legislation. The District Court correctly reached the conclusion that Congress did not intend to confer such power on the Commission (R. 140), but in setting aside the order only in part, has left the petitioner railroad carriers under compulsion to establish, observe and enforce some kind of rules, regulations and practices with respect to the interchange of cars with Seatrain to meet the contingency that Seatrain may at some time establish a route which would be within the Commission's territorial jurisdiction—a contingency contrary to existing facts and improbable of eventuation.*

Upon the decision of the District Court (R. 140) the order should have been set aside in its entirety.

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* The court in its main opinion said it "* * * can see no practical way in which Seatrain can operate its ships between Hoboken and Belle Chasse without going outside of the territorial waters of the United States." (R. 129, note.)

On argument with respect to the form of final decree, Seatrain suggested that it "might be able to maintain routes from Hoboken to Belle Chasse entirely within the United States and its territorial waters." The court said "That there is no evidence in the record from which an opinion in respect to this question can be formed. Navigation maps and similar documents of which we may take judicial notice seem to indicate that such routes would be impractical." (R. 141, note.)

III. The order of the Commission requiring the railroad carriers to deliver their freight cars to Seatrain makes no provision directing Seatrain to return the cars or to pay for their use or to provide other adequate compensation. The compensation to which the railroads are confined is inadequate. The order therefore fails to comply with the Congressional mandate, is arbitrary, unjust and unreasonable in its consequences, and deprives the railroad carriers of their property without due process of law and without just compensation, in violation of the Fifth Amendment.

A. The provisions in the order requiring railroad carriers to permit the delivery of their freight cars to Seatrain, without providing adequate protection for their return or compensation for their use, amounts to a taking of property without due process of law within the meaning of the Fifth Amendment.

Assignments of Error Nos. 14, 30 (R. 158-9, 162)

The order does not contain any direction against Seatrain (R. 73-74). It directs the railroad carriers to permit delivery of their cars to Seatrain and to establish, observe and enforce rules, regulations and practices with respect to the interchange of cars corresponding to the Code of Per Diem Rules, but makes no requirement that Seatrain observe the rules, including that requiring return of cars, or make the payment, and is not conditioned upon any performance by Seatrain. Compulsion is imposed upon the railroads only. Seatrain retains full freedom of action.

and may refuse any performance without violating the order.*

The railroads' petitions for modification of the order so as to make it run against Seatrain as well as against the railroads (R. 1340-71) were denied (R. 74-75). The Commission even refused to make a finding as to the manner in which settlement should be made, saying that this would "be left to the intervener, Association of American Railroads" (R. 71). The Commission's order is futile in attempting to transfer to a voluntary organization the burden of prescribing and enforcing the manner of settlement. This is not the performance of the function required of an administrative body. See *U. S. v. Chicago, Milwaukee, St. P. & P. R. Co.*, 294 U. S. 499, 510 (1935).

The Commission, in its answer filed in the District Court, sought to justify its failure to direct Seatrain to pay any amount found to be reasonable (Pet. Par. XXX, R. 17) by claiming as follows: (a) The order "is a cease and desist order"; (b) it requires defendants to permit the delivery of their cars to Seatrain "only upon the condition that defendants are paid [the] reasonable compensation" of $1 per day; and (c) Seatrain cannot be compelled by the Commission to pay directly to the railroads as, by the Car Service and Per Diem Rules and Agreement, the railroads will accept payment only from a railroad which is a party to the agreement (Answer, Par. XVIII, R. 94-95).

* The Commission made its order and refused to make any direction against Seatrain, although it knew that not one of the connecting railroads at Hoboken had succeeded in obtaining a settlement of the per diem from Seatrain or the Hoboken from 1933 to at least April, 1941, and that at the time of the order, no settlement had been made with the Pennsylvania. (R. 799, 1334, 68; see p. 66, note, *infra*).

The attempted excuse indicated in (a) is purely rhetorical. It does not follow that even if it had limited its order to a direction to "cease and desist" the Commission could have escaped its obligation to afford the railroads the protection required by the Constitution. Moreover, the order directs affirmative action by the railroads, viz.: the establishment of rules, etc. (R. 73-4). There is no reason why, by reason of the nature of the order, reciprocal action should not have been required of Seatrain.

As to the matter urged in (b) in vindication of its order, the Commission expressed no such "condition", and denied an application for modification or clarification of the order so as to make it ran against Seatrain as well as against the railroads (R. 74-75; 1340-60, *l. c.*, 1356, 1360, 1371). Furthermore, the Per Diem Rules do not require prepayment, but under Rule 11 (R. 471), which by the order is to be applied by the railroads in dealing with Seatrain, the per diem reports are not required to be made by the owning railroad carrier until 40 days after the end of the calendar month with regard to the cars used during that month. The "condition", if it exists, does not furnish the assurance of compensation that is required when property is taken *in invitum*.

The reason indicated in (c) for the lack of power, is equally untenable. It is true that the Commission has no power to regulate the use of cars by a water carrier, or the compensation to be paid for such use, as such power is limited to use by carriers by railroad, Sec. 1(10)(13). Lack of the Commission's power rests upon this and not upon any provision of the Per Diem rules. The Commission has assumed power to require departure from the rules by directing the railroad carriers, in the case of transactions with Seatrain (R. 73-4), to abstain from enforcing Car Service Rule 4 (R. 453), and by relieving Seatrain from payment in accordance with Per Diem Rule 15 (R. 479). Conditioning the requirement of performance by the rail-

road carriers is made even more important by the Commission's self-asserted lack of power to "require Seatrain to pay per diem to them" (the owners)*.

Irrespective of why the Commission lacks power to compel Seatrain to compensate the railroads, such lack of power would not justify taking the railroads' property without insuring proper compensation. On the contrary, its effect is to destroy completely the Commission's jurisdiction to make the order under review. It requires no argument that the provisions of the Fifth Amendment to the Constitution are not met when property is taken by the act of a governmental agency which lacks the power to require compensation to be made.

Not only does the order fail to direct Seatrain to pay for the use of the cars, but it also fails to make provision for their return by Seatrain. This objection to the order (Pet. Par. XXX, R. 17) was met by the Commission by the plea we have already discussed with relation to the failure to require payment, that the order "is a cease and desist order * * *." (Ans. Par. XVIII, R. 94-5). Whatever the nature of the order, and irrespective of whether Seatrain may be willing to "move in the home direction cars which it has moved in the opposite direction under load" (R. 65), the fact remains that Seatrain is placed under no compulsion to return cars to their owners. This fatal defect in the order is inherent in the fact that the return of cars can be enforced only as against railroad carriers. Sec. 1(10), (14). Its only result, however, is to deprive the railroads of the protection required by the Constitution when their property is taken, and, therefore, to render the order void.

* The Commission's premise that, under the Car Service and Per Diem Rules, railroads "will accept payment only from a railroad which they permit to become a party to said agreement" (R. 95) is contrary to the fact. The provision that the railroads will accept settlements from subscribers only is Per Diem Rule 6 (R. 46) which, by its prefatory note "applies only to cars interchanged within Canada, Cuba, or Mexico."

The order in imposing unilateral obligations on the railroad carriers to permit Seatrain to use their property without imposing any correlative duty on Seatrain, is an arbitrary exercise of power and deprives them of their property without due process of law in violation of the Fifth Amendment.

In *Louisville & N. R. R. Co.* v. *Central Stock Yards Co.*, (1909) 212 U. S. 132, 144, Mr. Justice Holmes, speaking for this Court, in holding that a state constitution violated the Fourteenth Amendment, said that a law requiring interchange of cars with another for through traffic "could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use."

In *Brewster* v. *Rogers Co.* (1901), 169 N. Y. 73, the Court of Appeals of the State of New York held (pp. 80-81):

> "It was settled early in the history of this state that when private property is taken for public use, compensation need not necessarily precede the appropriation; but it was also settled that where payment does not precede appropriation, it must be secure and certain. (*Bloodgood* v. *Mohawk & Hudson R. R. Co.*, 18 Wend. 9). The responsibility of the state or of one of its municipal corporations or political division is deemed sufficient, but a fund to be raised solely from a local assessment district of limited area 'is not a sure and adequate provision, dependent upon no hazard, casualty or contingency whatever, such as law and justice require to meet the constitutional requirement' (*Sage* v. *City of Brooklyn*, 89 N. Y. 189). It is clear, therefore, that the property owner cannot be relegated to the doubtful responsibility or solvency of a private corporation or of an individual. (*Bloodgood* v. *Mohawk & Hudson R. R. Co.*, supra.) * * *"

See also *Cherokee Nation* v. *Kansas Railway Co.* (1890) 135 U. S. 641, 658, 659, *Grand Trunk Ry.* v. *Michigan Ry. Com.* (1913) 231 U. S. 457, 470-471.

B. The Commission adopted the Railroad Code of Per Diem Rules, including the $1.00 per diem, as providing the reasonable rental for the use of freight cars, and then relieved Seatrain from paying a substantial but undetermined part thereof, without other essential basic findings.

Assignments of Error 12, 13, 16, 19, 21, 27-29, 32 (R. 157-162).

By its order the Commission has required the railroad carriers to establish, observe and enforce "rules, regulations and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current Code of Per Diem Rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day"; but, unlike the requirement for railroad carriers among themselves, has provided "that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession." (R. 73, 74)*

*The decision was the subject of a sharp dissent by 5 of the 11 Commissioners. See dissenting opinion of Commissioner Lee, and of Commissioner Patterson in which dissent Commissioners Mahaffie, Rogers and Alldredge joined (R. 72):

"Whether Seatrain is a railroad or, as the majority found, a water carrier, it cannot successfully operate except by transporting freight in railroad cars. It owns no cars, and we are here requiring defendants, against their will, to interchange their cars with it. We should not require defendants to make such interchange on less favorable terms and conditions than those on which they interchange cars with each other. Seatrain, as the majority has found, should pay the same daily rate of rental as the railroads pay each other. A railroad that is unable to accept a car from its rail connections pays the car rental which accrues because of its inability to accept such car. Seatrain should do likewise. In other words, so far as responsibility for car rental is concerned, Seatrain should be treated exactly the same as the line-haul rail carrier, receiving all of the privileges and assuming all of the responsibilities that the railroads receive or assume in their relation with each other."

See to the same effect the examiners' reports (R. 1035, 1298).

It is manifest that if the reasonable amount to be paid for the use of property is to be fixed on a per diem basis, two factors must be correctly established, viz: the reasonable value per day, and the number of days of use.

The Commission found that the reasonable compensation for the use of a freight car was the amount prescribed by the Code of Per Diem Rules governing the interchange of freight cars between rail carriers (R. 143-146, Dist. Court Findings 1, 2, 3, 4 and 8). The Commission stated the purpose of the complaint before it was "to permit" Seatrain "to use railroad cars owned by others upon terms comparable with those available to railroad carriers generally" (R. 68), and said:

> "We have found that it is entitled to the privilege of such use, and, on the theory stated above, it should also be willing to assume the obligations incident thereto." (R. 68-69, 145-146)

The obligations of railroad carriers generally, which Seatrain should have been "willing to assume," were those prescribed by the Code of Per Diem Rules, (R. 141) which provided for the payment of a per diem rate of $1 per car per day (Rule 1, R. 463) from the time the cars are made available (Rule 15, R. 479).

The Commission then made the statements, or findings, whichever they may be, that the tariffs of the Lower Coast provided that it would receive cars for movement over Seatrain only upon the latter's written order, and not before the day prior to the sailing date, and that "the detention being one attributable to Seatrain's mode of operation, on this view of the matter defendants should not be compelled to assume the cost of this detention" (R. 69).

The opposing view there alluded to, and thereafter expounded (R. 69), does not affect the determination appearing in the foregoing, that the reasonable value of the use of the cars by Seatrain must include compensation for the number of days of detention. It merely sets forth a

apparent analogy between "the burden which they [the owning railroads] would bear on traffic interchanged with Seatrain if the latter should pay per diem only when the cars are in its actual possession," and the "burden through car detention," which they bear "on traffic interchanged with break-bulk lines." The analogy is non-existent, for a break-bulk carrier, as the Commission said (R. 68), "does not have occasion to use railroad cars and accordingly is not required to pay per diem rental." However that may be, the Commission concludes on the strength of the supposed analogy, that as the detention of cars in connection with transportation by a break-bulk water carrier "is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic," the compensation of the railroads for the use of their cars during the period of detention "is a matter for consideration in connection with these rates and divisions, rather than in determining the per diem rates which Seatrain should pay" (R. 69). The Commission left such adjustment for the future.

The effect of this, as stated by the District Court (R. 141) is as follows:

> "The Commission thus has relieved Seatrain of the obligation to compensate the petitioners for the period of time during which a car may be held by Seatrain's connecting railroad carriers because there is no ship immediately available to receive the car at Hoboken or at Belle Chasse. The nature of this exception in Seatrain's favor is made plain by an examination of Rule 15 of the Car Service and Per Diem Agreement of the trunk line carriers."

The pertinent provision of Rule 15, as quoted by the District Court (R. 141), is:

> "(a) A road failing to receive promptly from a connection cars on which it has laid no embargo,

> shall be responsible to the connection for the per diem of the cars so held for delivery, including the home cars of such connection."

Thus, the Commission has found that payment of $1 per day only for such period as the cars are in Seatrain's actual possession does not afford full compensation to the railroads for Seatrain's use of their cars, but has nevertheless ordered the railroads to surrender their cars to Seatrain limiting the trunk line connecting carriers to such admittedly inadequate compensation.

The vice of this situation is not met by relegating the railroads to a possible adjustment in some future proceeding.

The petitioners may not, under the Constitution, be deprived of the use of their cars today in the hope that adequate compensation in the form of divisions may be accorded to them at a more convenient time hereafter.*

> "This was not a full discharge by the Commissio of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come." Mr. Justice Cardozo, speaking for the Court in *U. S. v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, at p. 510.

The rule as to compensation for compulsory taking of property has been stated by this Court as follows:

> "* * * the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 659.

To the same effect, with respect to the taking of prope

* The divisions case, *Seatrain Lines, Inc. v. Akron, Canton & Youngstown Ry. Co.*, is now pending, unheard and undecided before the Commission, Docket No. 28668.

erty for temporary use, this Court has said that the owners

> "* * * are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking." *Phelps* v. *United States*, 274 U. S. 341, 344.

See also, *Brewster* v. *Rogers Co.*, 169 N. Y. 73 (p. 56, *supra*).

The order of the Commission in the instant case violates the rule recognized and enunciated in the foregoing decisions, and thereby deprives the connecting railroad carriers of a constitutional right.

The order cannot be justified, as the District Court attempted, by saying "that the determination of the per diem rate and of its method of application rested with the Commission in the exercise of its expert administrative judgment" (R. 142). When the Commission, by its order, directed the railroads to turn over their cars for Seatrain's use at the daily rate found reasonable, but limited the compensation to only a portion of the time employed in such use, it deprived the railroads of their property without just compensation.

The impact of the order upon certain of the petitioner railroad carriers may now be examined.

Petitioners Texas & New Orleans Railroad Company (a Southern Pacific System line), Louisville & Nashville Railroad Company and Southern Railway Company operate trunk line railroads connecting with the Lower Coast at New Orleans (R. 805-6, 130). The Lower Coast, an affiliate of Seatrain (R. 130, Dist. Court Finding 5), will not, under its tariff, receive cars from connecting railroads for movement over Seatrain, except upon written orders from Seatrain, and then only the day before the sailing date (R. 145, Add'l Finding 5). Accordingly, if one of the said railroad carriers owns the freight cars it suffers the loss of the value of their use during the period of time after

they are made available and before Seatrain sees fit to accept them. If, on the other hand, the cars so detained on its line belong to another, it must pay out of its own pocket to the owner the $1 per diem for the said detention, not for its own purposes, but for the sole use and benefit of Seatrain (R. 65-67).

During a test period such detention on the connecting lines at Belle Chasse averaged 3.3 days per car for each trip (R. 145, Dist. Court Add'l Finding 6; R. 67, 68, 812). The voyage requires on the average 6 days (R. 121). The car, therefore, is used approximately 9.3 days solely for the benefit and profit of Seatrain. By the Commission's order (R. 73-74) Seatrain can not be charged more than $6 for such use and escapes the payment of $3.30, which in turn must be paid to the owner by the railroad carrier on whose line the car is required to be detained, or if said railroad carrier happens to be the owner, it must suffer the loss of the rental during that period. On this basis, Seatrain pays only approximately two thirds of the amount paid by a railroad, yet Seatrain is given the benefit of the $1 per diem solely because that is the prescribed compensation for settlement by the railroads among themselves. Moreover, the free use obtained by Seatrain of the cars detained at the port, the cost of which must be absorbed or paid by the said railroad carriers, is not limited by the order to the 3.3 days found to be the average in the period tested.

There is absolutely no limit except Seatrain's unrestrained discretion with respect to the amount of free time it may take (R. 73, 74). Thus Seatrain is relieved of the results of any failure or inability to carry the cars promptly, the indefinite or uncertain burden of which is wholly imposed upon said petitioner railroad carriers.

The Commission has made no finding that such detention is any part of the railroads' duty to the shipper. On

the contrary, it expressly recognized that the delay is inherent in Seatrain's service (R. 67, 69). It stated "Seatrain contends that its inability to receive cars promptly must be regarded as inherent in the nature of all water lines, which ordinarily have a limited number of sailings and are therefore unable to provide as frequent service as a railroad" (R. 67).

The order offers no protection to the connecting carriers in any respect. There is no rational basis in the findings of the Commission or in the record for relieving Seatrain from paying for the cars during the time of their detention at the port.*

In *Chicago R. I. & P. Ry. Co. v. U. S.*, (1931) 284 U. S. 80, this Court held that an order of the Commission, compelling line haul railroad carriers to allow two days free time in the per diem to be paid by their short line connecting carriers, was arbitrary, unreasonable and in violation of the railroad carriers' constitutional rights. The dissenting opinion pointed out that in that case the short line carrier was engaged in origin or destination terminal services which were an aid to the main carrier; that the stated per diem was found by the Commission to be unfair to the short line carriers without the two days' free time in view of the service they rendered to the trunk lines, and that the Commission's finding was supported by evidence and demonstrated that the short lines were being compelled to bear a disproportionate part of car hire costs. There is no such showing here. Seatrain is engaged in the line haul, and the unlimited free days of detention were extended to Seatrain for reasons having no relation to car hire.

In extending to Seatrain free rental for an indefinite period of time, because break bulk lines also cause car

* We are not here concerned with the question whether the Commission's findings could be construed as allowing a deduction of 10c per day while the cars are on Seatrain's ships. Such a deduction would not compensate for 1 day's detention much less the average of 3.3 days or the unlimited number made possible by the order.

detention, the Commission failed to adopt the rational basis required of administrative bodies whose determination Congress has made subject to judicial review. *Rochester Tel. Corp. v. United States*, (1939) 307 U. S. 125, 145, 146; *Interstate Commerce Comm. v. Jersey City*, (1944) 322 U. S. 503, 513.

The only reasons advanced by the Commission for relieving Seatrain from the obligation of paying for the use of the cars to the same extent as railroads pay generally and found by it to be reasonable, are the attempted analogy to break-bulk carriers (R. 69) referred to above (pp. 58-9, *supra*) and the assertion that some of Seatrain's line haul connections "have agreed to this method" (R. 69-70, 145).* The treatment accorded by railroads to shippers or break-bulk carriers has no relevancy in determining the reasonable value of the use of a freight car.

Seatrain owns no cars (R. 64). Since it owns no cars it must hire them from some one. If it takes them from the railroads it must pay rental for their use. If it rented them from a manufacturer it would have to pay the full rental. If it bought them from the manufacturer it would have to pay the full purchase price. In neither event would it be relieved from paying a portion thereof, because of its competition with a break-bulk carrier, for the reason that its relationship with the break-bulk competitor has no more bearing on the value of the use of a freight car than of the use of a taxicab. Seatrain has been relieved from paying the reasonable value of the use of the freight cars because of extraneous matters which have no probative force as to car hire.

Not only is there no interchange of cars with break-bulk carriers nor any car rental involved, but, there is no compulsory detention of the cars containing freight to be shipped by break-bulk shippers. The railroad carriers may unload their cars at any time they desire (R. 67-68, 1120, 1125-26). There is accordingly no basis for compar-

* See Dist. Court's Add'l Findings 9 and 10 (R. 146).

ing the right of the railroads to unload their cars at any time in their dealings with the break-bulk carriers, who never rent them, and the rental to be paid by Seatrain wherein the cars may not be unloaded by the railroad carriers, but must be held for Seatrain without time limitation.

Moreover, by granting an unknown and unlimited number of days during which the cars may be detained by Seatrain at the port without cost to it, the Commission's order has made it impossible to make a division of rates in the future so as to provide fair compensation for this unknown and unlimited number of days. Even the past can be no guide for the future because the rule tending to discourage unnecessary days of detention has been suspended for the benefit of Seatrain. It was generally understood that, in order to prevent unnecessary detention, car hire costs would never be considered in fixing divisions. *Chicago R. I. & P. Ry. Co. v. U. S.*, 284 U. S. 80, 108-109. This was in accordance "with the unvaried practice of the trunk lines, whose traffic and transportation departments have customarily kept divisions and car hire rigidly divorced." (*Ibid.*, p. 124).*

Compelling the said petitioner trunk lines to absorb or pay for the unlimited detention caused by Seatrain has no warrant in the record. The Commission's extension to Seatrain of all of the benefits of a railroad carrier while relieving it of the burdens adjunctive thereto has no basis in fact or law.

Equally without merit is the other consideration which

* In Ex Parte No. 96, 174 I.C.C. 477, 478, Commissioner Eastman, speaking for the Commission, said:

"* * * but the barge line urges that per diem at ports of interchange is part of the through traffic arrangement and must be taken into consideration in fixing equitable divisions. We regard the subject of car-hire settlement as distinct from that of divisions of joint rates, and this distinction is reflected in the interstate commerce act. Section 1 (14) of that act in connection with our jurisdiction over car service gives us power, after hearing, to prescribe the compensation to be paid for car hire. Our power to fix divisions of rates is derived from section 6."

seems to have impelled the Commission to direct railroads to turn over their cars to Seatrain without compensation for the days of detention by Seatrain. No alleged agreement with other carriers can have any materiality. If they have chosen to waive payment of the amounts which, under the Commission's report, would be necessary to afford full compensation, that does not warrant the Commission in denying such compensation to the petitioners who are compelled to surrender their cars to Seatrain at New Orleans.

> "Just as an owner may sell his property for less than the amount he would be entitled to have upon expropriation, so may carriers, conditions warranting it, render service for less than, by exertion of sovereign power, they could be compelled to accept."
>
> *B. & O. Railroad* v. *U. S.*, 298 U. S. 349, 358.

Moreover there is no evidence to sustain the statement of the Commission (R. 69-70) that "Seatrain's line-haul connections at Hoboken have agreed to this method," that is, to charge Seatrain per diem only for the period that the cars are in the actual possession of Seatrain with the privilege of unlimited free time at the port. The alleged agreement was not placed in evidence and the full terms and conditions thereof were not stated. Indeed, it was admitted that perhaps the agreement was only in the process of negotiation (R. 1330 ff). The chief basis of the negotiation, to wit, the consideration to be received, was not disclosed. However, if the connecting railroad carriers at Hoboken preferred less than just compensation to no compensation at all* that is no reason why the connecting carriers at

* Witness Randall, testifying on March 1, 1939, stated (R. 799): "* * * No per diem or reclaim settlements have been made as between Hoboken on the one hand, and Central of New Jersey, D. L. & W., Erie, Lehigh Valley, New York Central, or Pennsylvania on the other, since 1932 or 1933."

That no settlement of per diem had been made with any of the rail connections at Hoboken prior to April 1941 is shown by Ex. 87 (R. 1334, 1330).

New Orleans should be required to accept less than reasonable compensation. But it is more important that it did appear, affirmatively, from the correspondence that the free time allowed by such carriers was to be limited (R. 1333, 1336), in contrast with the unlimited free time afforded Seatrain by the Commission's order.

Having determined that the reasonable compensation for the use of a freight car was $1 per day, and that the full amount ought to be payable by Seatrain (R. 68, 69, 145-146) and not be assumed by the railroad carriers (R. 69), the Commission has required the railroad carriers to devote their cars to Seatrain's use without providing for compensation for the actual use. The vice in the Commission's order, in this respect, is not in the failure to adopt an appropriate standard to measure reasonable compensation, but in refusing to permit the railroads to charge Seatrain the compensation, for the use of a freight car, determined to be reasonable.

If, as we submit, the Commission has found that the compensation provided by the Code of Per Diem Rules for the interchange of cars by railroad carriers with each other is just compensation, then the order should be set aside for the reason that Seatrain has been relieved from paying a substantial part thereof and the order fails to provide the just compensation required by Congress, Sec. 1(14)(a) of the I.C.A., and guaranteed by the Fifth Amendment.

If, on the other hand, the Commission has not adopted the Code of Per Diem Rules as reasonable compensation, it has not made the basic findings essential to support its conclusory statement of the amount Seatrain should pay. The ultimate finding or conclusion of the Commission (R. 71), does not suffice in the absence of basic findings upon which the conclusion is based. *U. S. v. Carolina*

Freight Carriers Corporation, (1942) 315 U. S. 475, 488, 489; *Florida* v. *U. S.*, (1931) 282 U. S. 194, 215; *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, (1935) 294 U. S. 499, 504, 506, 510, 511; *Baltimore & Ohio R. Co.* v. *U. S.*, (1937) 22 Fed. Supp. 533; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, (1942) 315 U. S. 575, 586.

In short, there is no justification in law or fact for the provision in the order that the said connecting railroad carriers shall require payment of the per diem "only for such period as the cars are in its [Seatrain's] actual possession," and as this is an essential, inseparable part, the order should be set aside in its entirety.

C. The basic per diem rate of $1 for a freight car compulsorily supplied to Seatrain has no support in the record, is less than the cost of car ownership, and is confiscatory.

Assignments of Error 20, 24, 25, 28, 29 (R. 160-2)

For the purpose of the prior argument we have assumed that there was warrant in the record for fixing the per diem value of a car at $1 per day for Seatrain's use, and, upon that assumption, submitted that the order was confiscatory because it did not apply that rate to the full number of days during which the owners were deprived of their property. The inadequacy of the per diem figure, and the resulting confiscatory nature of the order will now be shown.

The statements in the Commission's report which may be considered as findings of the basic per diem value are few, and may be repeated here.

The Commission stated that defendants

> "* * * show that a car in general railroad use spends an average of only 1 day in 'active and productive service' out of a period ranging, in accord

ance with the definition of such service, from 3.82 to 19 days." (R. 64).

It then states the conditions to which the varying figures apply. It suffices to quote their statement concerning the shortest period, viz.:

> "If [such service] * * * includes the time which elapses between placement of the car for the consignor and release of the car by the consignee, 1 out of 3.82 days is so spent." (R. 64).

In other words the car is in productive service only for some 95 and a half days in the year.

The Commission then said:

> "As heretofore stated, we found in Rules for Car Hire Settlement, supra, that in 1925 the full cost of ownership and maintenance was, on the average, approximately $1 each per day for the periods in which the cars were actually in service, not including the time they were idle because of lack of demand or unserviceable condition. The record indicates that the present cost does not exceed that amount." (R. 64).

The prior finding referred to, and quoted in the report (R. 62) was as follows:

> "The per diem rate is supposed to reflect the average cost, to the owner, of freight car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 percent interest on the investment. From the evidence of record, it is estimated that the cost of car ownership and maintenance averaged 83.812 cents per car day and $305.91 per car unit in the calendar year 1925, and approximately $1 per car day in that year for the periods cars were actually in service. Cars were idle a portion of the year, due in part to unserviceable condition, and in

(part to the fact that the supply of cars exceeded the demand.'"

After further discussion of the contentions of the parties the Commission said:

> "In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the $1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars is decreased approximately 10 cents per day while they are in its possession" (R. 66).

Nowhere else in the record is there any language which may be construed as a finding of the basic value to the owner of a car during its use by Seatrain; other findings, previously referred to, relate to whether the basic rate should be paid during Seatrain's detention of the car.

The defendants in the District Court there denied that some or all of the language quoted above constituted findings. In either event, the result is the same.

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* To comprehend the difference between the 83.812¢ average cost of ownership and the $1 for periods of actual use, see the closely similar figures for 1939 and 1940 (R. 1261). Thus, using interest on depreciated reproduction value, the cost for 1939, taking no account of bad order and surplus cars, was 79.441¢ per day, while taking those cars into account it was 99.458¢ per day.

The items break down as follows:

Repairs	Taxes	Interest on Depreciated Value	Depreciation and Retirements	Miscellaneous charges	Total Cents
27.290	5.966	19.993	16.893	9.299	79.441

If interest be calculated on the investment, the figures were substantially higher (R. 1261).

The cost of maintenance and repair items alone of the Lower Coast were shown to be 27 1/2¢ per car per day (R. 931) as against the 27.290¢ in the estimate of the Association of American Railroads.

The cost of car ownership by the petitioner Southern Railway Company was separately shown to be 82¢ per car per day without taking into account the return of empties, which would bring the figure above $1. (R. 723-730).

If they be deemed findings, the compensation fixed is shown thereby to be less than the cost of car ownership and confiscatory. If, on the other hand, they are not findings, then there are no adequate basic findings to support the order with respect to compensation. If in the absence of appropriate findings by the Commission and the District Court this court should examine the evidence, the order will be found to be confiscatory and to deprive the railroads of their property without due process of law. In any of said events the order should be set aside.

1. *Nature of the railroad per diem rate.*

Assignment of Error 20 (R. 160-161).

It appears from the report, as quoted above, that the $1 per day was based on a finding that the cost of car ownership and maintenance was $305.91 a year, or 83.812c (1/365th thereof) for every day in the year. Allowing for idle time due to unserviceable condition and excess of the supply over the demand during a year, the cost in 1925 was fixed at $1. per car per day (R. 64) No consideration was given to the other unproductive days of a car in serviceable condition, particularly to the number of days for which the owning railroad receives no compensation, and their proportion to the days which are productive of revenues.

The application of the $1. per diem to Seatrain would be an appropriate method of determining compensation only if Seatrain were renting the cars on an annual basis, or if railroad cars were earning income substantially every day year in and year out, or, possibly if Seatrain were a contributing participant in the cooperative pool in which it was bearing all of the other burdens of car ownership and rendering the reciprocal service required of the members.

But Seatrain is not renting cars on an annual basis; cars cannot earn income every day in each calendar year

(even when not withdrawn from service because of unserviceable condition or excess of supply over demand during the year), and Seatrain is not directed to bear the burdens of car ownership (R. 73).

2. *Active use of the car during the calendar year.*

Assignments of Error 17, 18 (R. 159).

We have previously quoted the statement of the Commission to the effect that a car in general railroad use spends an average of only 1 day in "active and productive service" out of a period ranging in accordance with the definition of such service, from 3.82 to 19 days. (pp. 68-9, *supra.*)

As previously stated, it is of little moment whether that is a finding. The difficulty in recognizing and distinguishing findings from argument in the Commission's report is admitted. It has labeled as findings only its ultimate conclusions (R. 71), and not the basic findings, if any there be, necessary to sustain its order. See *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499.* However, it seems clear that the Commission was careful in its report to distinguish contentions of the

* The Commission's report falls within the condemnation of this Court, speaking through Mr. Justice Cardozo in that case, where he said, at p. 510:

> "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. * * * The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86; *Florida* v. *United States*, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

parties from facts which are established, as it referred to arguments as "defendants contend", "they urge", "defendants argue" (R. 63-64). But in the paragraphs above quoted the Commission states that the defendants "show". If this was not a finding, it should have been, for it is material and fully supported by uncontradicted evidence received without objection (R. 790, 808-818).*

The unproductive days, in addition to those due to lack of demand or unserviceable condition which alone were considered in fixing the $1 rate, include those when the cars "are hauled empty, when they are being conditioned and placed for loading". (R. 63-4).

It is thus seen that the $1 rate applicable to railroads is predicated upon the assumption that each of the line-haul railroads, parties to the agreement to abide by the Car Service and Per Diem Rules promulgated by the Association (R. 973), will bear an equitable proportion of the expense of owning and maintaining the country's

* Randall, an officer of the American Association of Railroads, testified in part as follows (R. 815):

"Q. Have you any figures that indicate the proportion of the total time of a car that it spends under load, using the term, 'under load' with a particular significance—and it may be used with a different significance. I mean now—take the time between the placement of the car for the consignee to load it and the release of that car, and we will call that inaccurately for this purpose 'loaded time.' What part of that time—what part of the total car time is that time which I have called 'loaded time'?

"A. It is less than one-third of the time.

"Q. In other words, how many total car days are there in railroad operation to one car day of the kind that I have described, and called loaded time, meaning now the time between the placement for the consignee and the release?

"A. Approximately 3.82.

"Q. 3.82 total days for one such day?

"A. That's right.

"Mr. McCollester. Just let me be sure I understand. Is it 3.82—is that the total days, including the one day?

"The Witness. Yes, sir.

"Mr. McCollester. In other words—oh, I see, all right. That's right."

See also R. 816-818.

car supply. All railroads performing line-haul service may not own cars in precise proportion to their use in any one month; but a general equitable distribution of the cost of providing cars is accomplished through the payment by railroads of per diem on cars not owned by them. It has long been recognized by the railroad carriers, the Commission and the courts, that the $1 per day from the date the car is held for delivery, "admittedly but a rule of thumb" and not full and "accurate compensation", has been a convenient figure in settling accounts among railroads, and that with a proper balance of car ownership, debits and credits for car hire would equalize themselves.* Yet the Commission has found that Seatrain may participate, on the receiving end, in the car pool and obtain all of the benefits therefrom without even paying its share of the resulting expense, or without making a capital investment with respect thereto, and as we have seen, without even paying the per diem for all of the time the car is held for its use.

If the Commission did not intend the statement with respect to the days that freight cars are in productive service (pp. 68-9, *supra*) as a finding, it has failed to make any finding of the proportion of such days in the year when a car is productive and the proportion of days that it is unproductive. Yet such a finding is essential to determine the cost of the car to the owner and the reasonable rental to be paid by a company such as Seatrain which owns no cars and which uses them only on the most productive days.

The Commission, implicitly at least, admits that the $1 per day does not compensate the owner for the time consumed in placing the cars for loading and unloading.

* *Chicago R. I. & P. Ry. Co. v. United States*, 284 U. S. at p. 108, footnote 9, 111, 112; *Burton Stock Car Co. v. Chicago, Burlington & Quincy R. Co.*, 1 I.C.C. 132, 140; *Virginia Blue Ridge Ry. v. Southern Ry. Co.*, 96 I.C.C. 591, 593; *Lake Erie & Ft. Wayne Railroad Company*, 78 I.C.C. 475, 489; *Marcellus & Otisco Co. v. N. Y. Central R. R. Co.*, 104 I.C.C. 389, 392.

etc., and that as between the railroads this burden is distributed by the general ownership of cars (R. 64).

3. *Seatrain is not required to and does not contribute to the car supply of the country.*

Assignments of Error 15, 19 (R. 159).

The Commission stated (R. 64): "As aforesaid, Seatrain owns no cars." However, recognizing the weakness of its position, it also says (R. 65): "it appears also that Seatrain rents a substantial number of privately owned cars." In so far as this may be deemed an intimation or finding that Seatrain has rented cars for interchange and thereby contributes to the car supply for that purpose, it is without evidence to support it. Seatrain's evidence is to the contrary.*

---

* Ballantine, a witness called by Seatrain, testified as follows (R. 240-1):

"A. Seatrain Lines, Inc. not yet having provided any cars for use in through service, has to assume the per diem on all its traffic, whereas on business interchanged between two rail carriers involves the expense of cross-hauling empty cars previously referred to. Therefore, when roads deliver a car to Seatrain they are going to be paid per diem and Seatrain is not going to load any of its cars to them, necessitating special effort on their part to avoid payment for their use.

"Q. In other words, there is no reciprocal feature attached to it.

"A. No, there is no reciprocal feature."

* * * * *

"A. Yes; as between railroads there is a reciprocal feature in per diem payments; as a whole the payments equal the receipts. Seatrain only pays per diem as it has no cars to rent."

A Hoboken official (MacGowan) on direct examination testified that 60 cars belonging to other railroads, were held on the Hoboken at $1 per day (R. 905). But after considerable cross-examination and after inquiry from the Examiner whether 60 was the exact number, the witness admitted that 60 was an abnormal number and the customary number was 20, and that these cars were held purely for the local business on the Hoboken line for Seatrain and not interchanged with the trunk lines on the through routes or otherwise (R. 925-7). It thus appears that these cars are not contributed by Seatrain to the car supply for general interchange.

There is apparently no contention that Seatrain either owns or rents any general freight cars which can be deemed a contribution to the car supply available for interchange purposes and any findings by the Commission to the effect that Seatrain rents or otherwise supplies line cars for interchange with railroad carriers is without evidence to support it.

The urging by Seatrain (R. 15; 101, 102, 1074-1078) that the supply during 1933-1934 was excessive, does not affect the situation, whether that were the fact or not. Such argument ignores the fact that the requirement of freight cars is not constant, either as to kind or as to seasons or as to years. So long as the quantity of the various kinds of traffic is not constant from season to season, nor from year to year, there will be peak movements both as to seasons and as to years, and cars must be maintained throughout the 365 days at the peak, and likewise through the lean years. But this should give no special benefit to Seatrain since neither its requirements nor the directions of the order are limited to seasons or periods when there is a surplus.

Likewise, an alleged offer by Seatrain to acquire cars when that "is desirable from the standpoint of the car supply of the country" (R. 65, 144), cannot be substituted for the duty to pay to the owners a reasonable share of the actual cost of the cars which Seatrain uses, and does not afford to the owners the just compensation to which they are constitutionally entitled for the use of the cars taken without their consent.*

Equally futile as justification for its order is the Commission's statement that "as between railroads there is no such balancing of burdens * * *," as the car ownership is not equal (R. 65). Assuming that the trunk line rail-

* In the present state of the Commission's order if Seatrain were to furnish cars for exchange, Seatrain would receive from the railroads per diem from the time the cars are made available, while paying for cars it receives only while in its actual possession.

roads voluntarily, and not by direction of the Commission, subsidize the short lines which serve them as feeders, or receive less than full compensation from other lines, this would be no reason why the railroads should be compelled to act as feeders for Seatrain and pay for the privilege or be compelled to receive less than the full value of their cars. Moreover, the $1 per diem, even as "a rule of thumb," approximates compensation only when paid also during the time when cars are being returned empty. The Car Service and Per Diem Rules, which the Commission can enforce against railroad carriers, ensure such compensation to the railroads as between themselves, but as the Commission cannot, and has not attempted to compel compliance by Seatrain, this important element of just compensation is missing.

Likewise it makes no difference that some of the trunk-line railroads may have found Seatrain's operation of the service from New Orleans to Cuba, where the cars must be returned, a sufficient feeder to justify their voluntarily rendering car service in that respect at less than cost (R. 65-6). Voluntary conduct is no basis for compulsion, *Baltimore & Ohio R. R. Co.* v. *United States*, 298 U. S. 349, at page 358.

Seatrain's use of cars closely corresponds with the unit of rolling time in loaded line-haul movement, which would seem to warrant the use of the highest ratio in determining an appropriate rate therefor (see pp. 68-9, *supra*). However, since it is not the function of this court to fix an appropriate rate, but only to determine whether the Commission has followed the Congressional mandate to fix "reasonable compensation", Sec. 1(14)(a), and the constitutional requirement of just compensation, it is only necessary to point out that, given the ratio most favorable to Seatrain, there would still be only one day of active service

for which Seatrain pays to 2.82 days of unproductive time to which Seatrain makes no contribution. Since the car is earning only one day out of 3.82 days, the cost of ownership for each of such productive days is more than treble the 83.8¢ average for each day in the calendar year, or the 82¢ actual cost of petitioner Southern Railway Company (p. 70, *supra*). The cost of ownership would be $3.20 for each such usable day, or $3.10 after the deduction of ten cents a day alleged to be saved by the fact that the cars are not moving on Seatrain's ships (R. 144-5).* Even if the interest on value (p. 70, *supra*) were eliminated the compensation fixed would still be less than the actual cost to the said railroads.

The plight of the railroads may be illustrated by that of the Southern Railway Company. With a minimum cost per use day of $3.20 (or $3.10 after deducting the ten cents) it loses that amount of car rental for each day that it holds the car for Seatrain's benefit, receiving no compensation from Seatrain either in reciprocal service or otherwise, and suffers the loss of the difference between $3.20 and $1. per day for the days its cars are in Seatrain's actual possession.

If the statements, with respect to the actual cost per calendar day and the number of days of productive use of the car during the year, are findings, it is readily seen that Seatrain has been permitted to deprive the railroad carriers of their freight cars without their consent and at a compensation less than the actual cost of car ownership of the said railroad carriers respectively. This is shown both by the Commission's said findings and by the evidence.

* It should be noted that the 10¢ is not to be deducted before applying the unit factor of 3.82, since the alleged saving is only for each day cars are on Seatrain's vessels and not for each of the days the car is idle or in unproductive service.

If, on the other hand, the statements of the Commission with respect to the actual cost of car ownership during the calendar year and the days of actual productive use during the year are not findings, then there are no basic findings to support the order. In either event, the order is purely arbitrary and has no rational basis in the record. See *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 145.

CONCLUSION

The order of the Interstate Commerce Commission of October 13, 1941, in Docket Nos. 25728 and 25878, as amended, is erroneous and beyond the lawful authority of the Interstate Commerce Commission and is void, for the reasons hereinbefore set forth, to wit:

1. The carriers by railroad are under no duty to furnish their cars, by interchange or otherwise, for the use of a carrier by water, such as Seatrain, and the Commission is without power to enforce any such alleged duty.

2. Independently of the foregoing, the provisions of the Interstate Commerce Act, requiring carriers by railroad to furnish and to interchange cars, are expressly limited to transportation which takes place within the United States, and, as the transportation by Seatrain invariably goes beyond the United States and its territorial waters, the petitioner railroad carriers should not be compelled to establish, observe, or enforce any rules, regulations, or practices with respect to interchange of cars for transportation by Seatrain.

3. The order deprives the railroad carriers of the use of their property without due process of law and without

the compensation prescribed by the Interstate Commerce Act and guaranteed by the Fifth Amendment, in that (a) Seatrain is under no direction to return the cars delivered under compulsion for its use, or to make any compensation therefor, and (b) the amount of compensation which the railroad carriers are permitted to charge for the use of their cars is less than the cost of car ownership, and is unreasonable and confiscatory.

For these reasons it is submitted that the order of the Commission should be set aside in its entirety and the judgment of the District Court modified to that extent.

Respectfully submitted,

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APPENDIX

Relevant Portions of Interstate Commerce Act.

NOTE: *The original Interstate Commerce Act and the various amendments thereto which are quoted hereafter are as follows:*

Original Act,	Feb.	4, 1887,	24	Stat. L.	387
Hepburn Act,	June	29, 1906,	34	" "	585
Mann-Elkins Act,	June	18, 1910,	36	" "	545
Esch Car Service Act,	May	29, 1917,	40	" "	101
Transportation Act of 1920,	Feb.	28, 1920,	41	" "	474
Transportation Act of 1940,	Sept.	18, 1940,	54	" "	898

Section 1, Paragraph (1)

SEC. 1(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment: * * *

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(As amended, 1940; unchanged from 1920 Amendment, except by substitution of "this part" for "this Act", and omission of application to "transmission of intelligence.")

Appendix

Section 1, Paragraph (2)

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States. * * *.

(As amended, 1940; unchanged from 1920 Amendment, except by substitution of "this part" for "this Act", and omission of application to "transmission of intelligence".)

Section 1, Paragraph (3)(a)

* * * The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported * * *.

(As amended 1940; unchanged from 1920 Amendment, except by substitution of "this part" for "this Act". The corresponding matter, as contained in previous acts, follows:)

Appendix

Original Act of 1887.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

Hepburn Act of 1906; this matter was unchanged by Mann-Elkins Act of 1910.

* * * The term "railroad", as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported * * *.

Section 1, Paragraph (4)

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reason-

able through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(As amended, 1940. The corresponding matter, as contained in previous acts, follows:)

Hepburn Act of 1906.

* * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

Mann-Elkins Act of 1910.

* * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the opera-

tion of such through routes, and providing for reasonable compensation to those entitled thereto.

(NOTE: *The matter in the last clause, "and to make reasonable rules, with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto" was omitted from 1920 and 1940 acts; "car service" was, by the Esch Car Service Act, and the 1920 and 1940 Amendments, provided for in what are now Section 1, paragraphs (10), (11), (13) and (14)*, q. v.)

1920 Amendment.

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Section 1, Paragraphs (10) and (11)

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other

vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(As amended, 1940; unchanged from 1920 Amendment except by substitution of "this part" for "this Act". The corresponding matter, as contained in previous acts, follows:)

Esch Car Service Act of 1917.

The term "car service" as used in this Act shall include the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.

It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation and practice, with respect to car service is prohibited and declared to be unlawful.

Section 1, Paragraph (13)

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct

that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

(As amended, 1940; unchanged from 1920 Amendment except by substitution of "part" for "Act". The 1920 Amendment, in turn, was substantially unchanged from the Esch Car Service Act in this respect, except that the 1920 Amendment substituted "all carriers by railroad" for "all carriers".)

Section 1, Paragraph (14)

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

(As amended, 1940. The corresponding matter, as contained in earlier acts, follows:)

Esch Car Service Act of 1917.

(Gave Commission power to establish rules, etc., with respect to car service; not necessary to quote.)

1920 Amendment.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint,

establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicles not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

Section 302, Paragraphs (i), (j), (k) and (l)

(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce', as used in this part, means transportation of persons or property—

(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States;

(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a

movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof.

(j) The term 'United States' means the States of the United States and the District of Columbia.

(k) The term 'State' means a State of the United States or the District of Columbia.

(l) The term 'common carrier by railroad' means a common carrier by railroad subject to the provisions of part I.

(Added 1940, as a portion of Part III.)

Order of Interstate Commerce Commission of October 13, 1941, in Nos. 25728 and 25878.

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report together with the prior reports, 206 I.C.C. 328 and 237 I.C.C. 297, are hereby referred to and made a part hereof:

It is ordered, That the defendants listed in the appendix to said report on further hearing, according as they participate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which

prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.

It is further ordered, That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day; *provided, however*, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

And it is further ordered, That this order shall continue in effect until the further order of the Commission.

By the Commission.

W. P. Bartel,
Secretary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.,

Appellants,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Reply Brief for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47.

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IN THE

Supreme Court of the United States

October Term, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.,

Appellants,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Reply Brief for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47.

This brief is submitted in reply to the brief of the United States and the Interstate Commerce Commission which was served on December 19, 1944, and which will be

referred to herein as the Commission's brief; and in reply to the brief of Seatrain Lines, Inc., Forrest S. Smith, Trustee of Hoboken Manufacturers Railroad Company, its subsidiary, and New Orleans & Lower Coast Railroad Company, its affiliate, which was served on December 29, 1944, and which will be referred to herein as Seatrain's brief.

Answering "I" in Commission's Brief and "Point I" in Seatrain's Brief.

In our Main Brief we urged that exchange of cars between carriers could be enforced only under the car service provisions, Sec. 1(10) to (14); that as those sections are limited to carriers by railroad, railroads could not be compelled to deliver their cars for use by Seatrain. It must be noted that whenever Congress intended to apply existing sections to carriers subject to the newly-enacted Part III that was done by specific and appropriate words, as in Secs. 1(4) and 15(3), such as the authority in the latter provision to establish through routes "by carriers by railroad subject to this Part and common carriers by water subject to Part III, * * *." No such addition was made to the car service provisions.

The Commission makes no contention that the car service provisions afford the power which it has sought to exercise, and attempts to find jurisdiction by implication from other portions of the Act.* Seatrain, while it also relies largely upon such implications, in addition contends (pp. 41-2) that, despite the limitation of the car service provisions to carriers by railroad, these provisions are applicable

* In view of the express provisions, no duty or power to enforce such duty can rest on implication. See our Main Brief, pp. 20-22.

to interchange with water carriers. It says that "The 'interchange' referred to therein is, of course, defined as interchange *by* a 'carrier by railroad', but the statute does not say that this means only interchange *with* another carrier by railroad". This violates the definition of interchange, viz.:

> "Interchange * * * 1. To put each in the place of the other; to give and take *mutually*; to exchange; *reciprocate* * * *." (italics supplied). (Webster's New International Dictionary, Second Edition).
>
> "Interchange * * * 1. To put each of two things in the place of the other; receive and return reciprocally." (Practical Standard Dictionary).
>
> "Interchange. To exchange; to give and take mutually; to put each in the place of the other; to reciprocate." (33 C. J. 171)

Although it is thus made clear that Congress had no intention to compel a railroad to turn over its cars to any but another railroad, Seatrain urges (p. 41) that the duty to turn over a railroad's car to a carrier by water is created by the inclusion of the terms "use", "supply", and "distribution" in the definition of "car service". The words "use" and "supply" were added to the Act by the 1920 amendment. As stated by a member of the Commission, at a hearing on the bill before the Committee on Interstate and Foreign Commerce of the House of Representatives, the purpose was to empower the Commission "to require a carrier to provide itself with locomotives, cars, and other vehicles used in the transportation of property * * *". The other new provision then inserted was "the extension of the jurisdiction to the supply, movement, and operation of

trains. That * * * will come into play in times of emergency, car shortage, etc., and in connection with the common use of tracks or terminals when the public interest demands such use". See *Wisconsin R.R. Commission* v. *Chicago & Northwestern Ry. Co.*, 87 I.C.C. 195, 197. Therefore, these words, upon which Seatrain relies manifestly apply to matters other than the compulsory surrender of its cars by a railroad. That duty, so far as it exists, is embraced in the provision for "exchange, interchange, and return".

"Use * * * by any carrier by railroad" certainly does not contemplate, as Seatrain urges (pp. 41-2), delivery of a "car loaded with freight to a connecting carrier, whether by rail or by water, in order to complete a through transportation undertaking which the railroad has contracted to carry out." In this argument, which effectively epitomizes the discussion at pages 36-8 of its brief, Seatrain has inverted the consequent and the antecedent. The railroad has not "contracted to carry out" a through transportation without breaking bulk if it has no duty to interchange cars with Seatrain. It is still necessary to find where that duty arises. See *United States* v. *Pennsylvania R.R. Co.*, 242 U. S. 208, 236.

Seatrain seems to infer further (p. 42), that as the words "supply" and "distribution", also found in the car service provisions, "do not mean supply and distribution only to other railroads", so likewise "exchange, interchange and return" may cover transactions with carriers other than those by railroad. But this again ignores the difference between such words as "use", "supply" and "distribution" which connote no mutuality of action, and "exchange" and "interchange", which involve only reciprocal action.

It is attempted in the briefs under answer and reply to find implied duty and power with respect to the interchange of cars, first, as an incident to through routes, and, if that does not suffice, in unrelated words contained in the Act.

The Commission urges (p. 14) that "If Seatrain were a railroad" the petitioner railroad carriers could be compelled to interchange cars with it. That may be conceded to the extent that the transportation involved is within the United States. The duty to interchange cars with other railroads rests, however, on specific statutory requirements, to-wit: the car service provisions, Sec. 1(10) to (14). No such provisions exist with relation to carriers by water. The Commission in its brief does not now contend that such duty with respect to railroads existed prior to 1910 when, by the Mann-Elkins amendment, carriers subject to the Act were for the first time specifically required "to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used" in through routes. Indeed, the Commission contemporaneously recognized that the earlier acts which contained no such specific provision for interchange of cars, imposed no such duty. See our Main Brief, pages 28-31. It is true that the Commission cites authorities (pp. 17-8) in support of the proposition that "In view of the statutory obligation of carriers to maintain through routes and facilities for operating through routes" the Commission may require interchange of cars between rail carriers which are parties to a through route, but examination of those cases, particularly *Missouri & I. Coal Co.* v. *Illinois Central R. Co.*, 22 I.C.C. 39, where alone the question was discussed, shows that the power was assumed to stem from the above-quoted portion of the Mann-Elkins Act. In a later discus-

sion of this case, *Car Supply Investigation*, 42 I.C.C. 657, at page 671, the Commission referred to the above language of the Mann-Elkins Act as the basis of the *Missouri & I. Coal Co.* decision. When this Court, in *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 284 U. S. 80, cited the *Missouri & I. Coal Co.* case (Commission's brief, p. 23, Seatrain's brief, p. 25) the controlling factor was the provision added by the Mann-Elkins Act. The dissenting opinion by the present Chief Justice makes it manifest that no duty to interchange equipment existed prior to that act, for he there said (p. 102):

> "* * * in 1911 * * * the Interstate Commerce Commission, under the amended Interstate Commerce Act, decided that carriers could not refuse to permit their freight cars to pass onto rails of connecting carriers."

In support of the same proposition Seatrain likewise cites (pp. 22-4) the *Missouri & I. Coal Co.* case, and by ingenious paraphrase, enclosed in inner quotation marks, in the course of quotation from the opinion seeks to evade the basis, stated above, for that opinion, viz.: the exchange, interchange and return provision of the Mann-Elkins Act. At the top of page 23 of its brief, Seatrain quotes the statement of the Commission that railroads which have established through routes are required to serve the same without respect to the fact that this may carry their equipment beyond their own lines. The quotation concludes with the Commission's phrase, "In the opening section of the Act, is to be found this mandate:", and for the language of the statute which followed in the opinion is substituted an inaccurate and misleading paraphrase, viz.:

" '(here the Commission cited those provisions of the Act requiring the establishment of through routes and furnishing of facilities for their operation, which provisions will now be found in Sec. 1(4).' "

Literally, this approximates the truth. With some changes the provisions requiring the establishment of through routes and furnishing facilities for their operation which were then cited by the Commission, are now in Sec. 1(4). But the provision for interchange of cars which was contained in the same citation is no longer in Sec. 1(4). It is now to be found only in the car service provisions, expressly limited to carriers by railroad. See our Main Brief, pages 26-7.*

Seatrain, in further support of its submission in this respect, cites authorities which, it says (p. 22), held that Sec. 3(2), now Sec. 3(4) required a railroad to interchange cars.* *Toledo, A.A. & N.M. R. Co.* v. *Pennslyvania Co.*, 54 Fed. 730 and 54 Fed. 746, involved injunctions to prevent a secondary boycott against non-union plaintiffs resulting in discrimination.. Of Sec. 3(2) the Court there said that it required "one common carrier * * * to freely interchange freight with another when their lines connect". 54 Fed. at page 736. The question of compulsory interchange of cars was not there considered. *Chicago, Burlington, etc. R. Co.* v. *Burlington C.R. & N. Ry. Co.*, 34 Fed. 481, also dealt with a secondary boycott. The duty to receive and move cars tendered by complainant was admitted by the defendants

* The purpose of that section, which remains substantially as originally enacted in 1887, was to prevent undue prejudice or preference. *Maloney Tank Mfg. Co.* v. *Atchison T. & S. F. R. Co.*, 153 I.C.C. 741, 749.

and was based, in part at least, on a state statute specifically requiring railroads to receive and transport cars furnished by any connecting road.* These cases, Seatrain says (p. 22) "were cited with approval in *Peoria Ry.* v. *United States*, 263 U. S. 528, 535". They were, but upon the proposition, wholly immaterial in this case, that courts may enforce certain duties imposed by the Act by mandatory injunction.

We are unable to find in *St. Louis, S.W. Ry.* v. *Arkansas*, 217 U. S. 136, the "approval" with which Seatrain says (p. 24) that this Court quoted the language of the lower court. Apart from that, however, it is to be noted that it is not there said that any Federal legislation required an interchange of cars, an issue not there presented. Indeed, the railroad company there sought to excuse failure to furnish sufficient shipping facilities, as required by a state statute, by the need for their cars to interchange in interstate commerce pursuant to the American Railway Association Rules. This Court held that the determination of the sufficiency of those rules was exclusively within Federal control, and beyond the power of a state court.

The Commission asserts (pp. 22-3) that the car service provisions "did not lessen the Commission's jurisdiction but materially increased it". That may be true, but it is necessary, if the Commission's contention is to prevail, to find that there was jurisdiction in the Commission to compel interchange of cars in the absence of statutory provision such as is contained in the car service sections. The

* In a later decision the Circuit Court of Appeals for the same (8th) circuit held that there was no duty to interchange cars. *Little Rock & M. R. Co.* v. *St. Louis S. W. Ry. Co.*, 63 Fed. 775, 778-9. See also, *Oregon Short Line & U. N. Ry. Co.* v. *Northern Pac. R. Co.*, 61 Fed. 158.

Commission's jurisdiction with respect to the interchange of cars first came into being under the Mann-Elkins Act, as stated above, and was thereafter made more definite and specific by the Esch Car Service Act of 1917, and later by the 1920 Act, Sec. 1(10) to (14).

It is necessary to scrutinize, even at the risk of repetition, the basis upon which the Commission asserts that independently of the car service provisions the duty of the railroad and the Commission's authority "as to car service and interchange are the same where a water carrier is concerned, as in the case of an interchange between rail carriers" (pp. 14-5).

The Commission refers (pp. 16, 19) to the provisions of Sec. 1(4) which require common carriers subject to Part I to "provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers * * *", including carriers by water subject to Part III, and "reasonable rates, fares, charges, and classifications applicable thereto" and upon "establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation."

Manifestly, this provision creates no greater duty with respect to carriers by water than did the essentially similar language in the Hepburn Amendment,* with respect to the

* "* * * the term 'transportation' shall include cars * * * and all instrumentalities and facilities of shipment or carriage, irrespective of ownership * * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto." (See our Main Brief, App. pp. iii-iv.)

carriers then subject to the Act. As has been seen, the Commission conceded and represented, at the time of its enactment, that the Hepburn Act gave rise to no such power or duty. Our Main Brief, pages 29-32.

From this provision, coupled with Sec. 3(4), the Commission urges (p. 21) that the duty of railroads to interchange cars with water carriers arises.

Its reliance on Sec. 3(4) in this respect is seemingly inconsistent with the position taken by the Commission in entering the order which is now under attack, for there, although the complaint had alleged a violation of Sec. 3(3), now Sec. 3(4), the Commission made no finding to support a conclusion of such violation, and found only a violation of Sec. 1(4).

While we shall consider Sec. 3(4) more in detail hereinafter, it suffices at the present place to say that the requirement of that section that carriers shall afford facilities for the interchange of traffic, is as old as the Act itself, 24 Stat. L. 379, Sec. 3.* We have previously noted the recognition of the fact that no provisions which existed in the Act prior to 1910 established the duty to interchange cars or gave the Commission power to compel such interchange. With respect to Sec. 3(4) the Commission definitely held that the section did not confer upon it the power to require a carrier to furnish cars, saying: "The term 'facilities' as here used, does not embrace car equipment for the origination of and transporting of freight along the line of the

* "Every common carrier subject to the provisions of this Act shall * * * afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith * * *."

carrier in the sense in which it is here contended for by the petitioners." *Scofield* v. *Lake Shore & Mich. So. Ry. Co.*, 2 I.C.C. 90, 116, cited and followed in *United States ex rel. Morris et al.* v. *Delaware, L. & W. R. Co.*, 40 Fed. 101, 103. See also, *Railroad Comm'n* v. *Louisville & N. R. Co.*, 10 I.C.C. 173, 188.

Having thus indicated its views as to the source of the duty to interchange cars with water carriers, the Commission in its brief bases its power to enforce such duty upon Sec. 15(3) which gives the Commission power to "establish through routes * * * and the terms and conditions under which such through routes shall be operated." Under the Hepburn Act, Sec. 4 thereof, the Commission was given by similar language like power with regard to carriers by railroad.*

It appears from the foregoing that the power of the Commission to compel interchange of cars between a railroad and a carrier by water is no greater than was the power to compel the interchange between railroad carriers prior to the adoption of the Mann-Elkins Act. It appears further that, although the duty to interchange cars between a railroad and a carrier by water is no greater than was the duty to interchange cars between railroad carriers prior to the adoption of the Mann-Elkins Act, a duty which as we have seen does not exist, Seatrain claims that there is such a duty by reason of the provision of Sec. 1(4) requiring "every such common carrier establishing through routes to provide reasonable facilities for operating such

* "The Commission may * * * establish through routes * * * and the terms and conditions under which such through routes shall be operated."

routes." But it has also been seen that the general obligation to furnish "facilities of shipment or carriage" was also in the Hepburn Act.

This difference in locution is necessarily the shibboleth by which the Commission and Seatrain seek to distinguish the Hepburn Act, which created no duty to exchange cars, from the present Act; with respect to the power to enforce such alleged duty, not even such a ground for differentiation exists, because the power is conferred in no different language than it was prior to 1910.

The contention based on the word "facilities" will not withstand analysis. It is, in effect, that under Sec. 1(4) the carriers are required to furnish "reasonable facilities for operating such routes". Then, ignoring the limiting words "for operating such routes", it is urged that cars are such facilities because in Sec. 1(3) "transportation" is defined as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage." It is also contended, in support of the alleged duty to interchange cars, that there have been various decisions in which cars have been referred to as "facilities".

To avoid being misled by the equivocation which is the basis of the argument founded on the word "facilities", the varying senses in which "facilities" is used in the Act must be noted. Thus, in Sec. 1(3) "transportation" is defined as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and *facilities of shipment or carriage*". In Sec. 1(4) the "facilities" referred to are those "*for operating such* [through] *routes*". In Sec. 3(4)

the "facilities" are those "*for the interchange of traffic between their respective lines and connecting lines*".

We have shown in our Main Brief (pp. 28, 32) that "facilities" as used in Sec. 1(3) does not include any interchange of cars. Indeed, the definition of transportation quoted above, which has been substantially the same since 1906, viz.: "cars and other vehicles and all instrumentalities and facilities of shipment or carriage", has been said by this Court to be "not much less general than the words of the Act of 1887", to-wit: "all instrumentalities of shipment or carriage", and concerning the effect of the added words the Court said: "There is no advance made by them or enlargement of meaning. There was simply a useless tautology". *United States* v. *Pennsylvania R.R. Co.*, 242 U. S. 208, 226.

Returning to the phrase employed in Sec. 1(4), "facilities for operating such through routes", it would suffice to refer to the submission in our Main Brief, pages 28, *et seq.*, to establish that this does not refer to interchange of cars—a subject exclusively covered by the car service provisions. Apart from that, however, what was meant by that phrase? Clearly it is not synonymous with "facilities of shipment or carriage" as contained in the definition of "transportation", Sec. 1(3), which was first formulated in the Hepburn Act. In *Tank Car Corp.* v. *Terminal Company*, 308 U. S. 422 (Seatrain's Brief, p. 26) this Court was considering the right to an allowance by a shipper which furnished its own cars instead of having its goods transported in cars provided by the railroad. The Court nowhere states that the word "facilities" connotes an interchange of cars.

In this connection Seatrain again refers to the *Missouri & Illinois Coal Co.* case, *supra*, p. 5, this time saying (p. 26) that the Commission "in reaching its conclusion as to the duty to interchange cars, cited Sec. 3(2) [now Sec. 3(4)], and referred to the duty imposed thereby to 'furnish the necessary *facilities* for transportation, * * *.'" The Commission did not there say, however, that "facilities" included compulsory interchange of cars, and, as previously noted, rested its decision on the exchange provision of the Mann-Elkins Act. The same misconception of the reason underlying the foregoing report is again found at pages 38-9 of Seatrain's brief.

In *Hastings Commercial Club* v. *C.M. & St. P. Ry. Co.*, 69 I.C.C. 489, 494 (Seatrain's Br., p. 26) the Commission merely held that a switch engine used only and entirely for handling freight at a terminal is a terminal facility. This is no authority for holding that a railroad car to be placed on an ocean-going vessel, is one of the "facilities for operating" a through route.

The incompleteness of the quotation furnished by Seatrain (p. 26) from *City of Nashville* v. *Louisville & N.R.R. Co.*, 33 I.C.C. 76, 85, makes it misleading. The Commission in fact there said:

> "Section 1 of the act requires carriers by railroad to establish through routes and to interchange cars with connecting carriers.* Through routes and the interchange of cars are thus expressly included among the facilities for the interchange of traffic which the second paragraph of section 3 in turn requires carriers to afford to all connecting carriers

* This refers to the specific provision for interchange contained in the Mann-Elkins Act, see p. 5, *supra*.

equally and without discrimination in rates and charges."

The Commission was there dealing with the question of discrimination, and it is clear that it did not rest any duty to interchange cars upon the requirement "to provide reasonable facilities for operating such through routes". On the contrary, it relied on the express provision requiring interchange, and to the extent that such provision was effective, said that interchange of cars was to be considered a facility for the interchange of traffic.

In no event, however, can opinions such as that last cited, or *Assigned Cars for Bituminous Coal Mines*, 93 I.C.C. 701 (Seatrain's Br., p. 26), dealing with discrimination in affording "equal facilities for the interchange of traffic" under Sec. 3(4), formerly Sec. 3(3) and prior to that Sec. 3(2), throw any light on the meaning of "facilities for operating such [through] routes" in Sec. 1(4).

It is clear that in *Assigned Car Cases*, 274 U. S. 564 (Seatrain's Br., p. 27) this Court was employing "facilities" in a general sense, without definite relation to, or attempt to interpret, that word as used in any part of the Act.

Seatrain pursues this subject at a later place in its brief (p. 29), where it asserts that the provisions requiring establishment of through routes and reasonable facilities for operating them "have been consistently construed as imposing equal obligations in connection with transportation by rail and water". The asserted consistent construction is based upon three reports of the Commission, *Flour City S.S. Co. v. Lehigh Valley R.R. Co.*, 24 I.C.C. 179; *Chattanooga Packet Co. v. I.C. RR. Co.*, 33 I.C.C. 384; and *Pacific*

Navigation Co. v. *Southern Pacific Co.*, 31 I.C.C. 472. In none of these is any consideration given to the matter of interchange of cars.

Assuming, however, that cars are "facilities of shipment or carriage" within the meaning of Sec. 1(3), it does not follow that they are "facilities for operating" through routes, under Sec. 1(4). As previously noted, the definition of "transportation", including cars and "all instrumentalities and facilities of shipment or carriage" has existed ever since the Hepburn Act, but the duty then created to furnish such transportation and establish through routes did not suffice to require the interchange of cars. There is no more reason to include interchange of cars in "facilities for operating" through routes than there would be so to include "facilities for the interchange of traffic". The special provisions with respect to the latter, Secs. 3(4) and 305(d), demonstrate that the former phrase has a constricted meaning, not extending to "facilities" generally.

Even were the phrase "facilities for operating" through routes ordinarily susceptible of including interchange of cars, such interpretation must give away, in view of the specific coverage of such interchange by the car service provisions. "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment". *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. "* * * specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Baltimore N. t'l Bank* v. *Tax Comm'n*, 297 U. S. 209, 215.

Both the Commission and Seatrain offer, as an alternative solution of their problem, the power of the Commission to "establish * * * the terms and conditions" under which through routes shall be operated, the Commission citing Sec. 15(3), (pp. 17, 20, 21, 23), and Seatrain citing not only that paragraph (pp. 3, 33, 72), but also Sec. 6(13), (pp. 29-31). "Terms and conditions" cannot be extended and distorted to the extent of authorizing compulsory exchange of cars, any more than it could be deemed to require establishment of physical connections,—a subject specifically dealt with by the statute, Sec. 6(13)(a). Independent of that, however, as early as the Hepburn Act of 1906, the powers enumerated in Sec. 15(3) were granted to the Commission, to "establish through routes,* * * and the terms and conditions under which such through routes shall be operated". It was made clear by the Commission itself that the Commission could not, under that provision, compel railroads to interchange cars; by the same token, similar powers with regard to through routes between carriers subject to Part I and Part III, respectively, do not authorize compulsory interchange of cars between them. We have seen that the Commission in its report held that its authority to make the order complained of flowed from the duty of railroad carriers to interchange cars, which in turn was implied from the duty to establish through routes imposed by the Hepburn Act in 1906, which also conferred the authority upon the Commission to establish such routes (R. 47, 48, 49). The District Court was unable to accept this basis for the Commission's authority and sought to find the power in Sec. 1(14)(a) (R. 120). Counsel for the Commission and for the United States do not attempt on this appeal to sustain the District Court's theory that the power can be found in Sec. 1(14)(a). On the contrary,

they seek to find the source of the power in Sec. 15(3). However, in this respect Sec. 15(3) is in substantially the same language as that originally in the provisions of the Hepburn Act (see Appendix p. i). We have heretofore seen that the Commission represented to Congress that the Hepburn Act did not confer any such authority and repeatedly requested of Congress a specific grant of such power.

In short, the duty to interchange cars, and the power to compel performance thereof, rest exclusively on the car service provisions, applicable only to carriers by railroad, Sec. 1(10), *et seq.*

The Commission's *argumentum ad hominem* (pp. 20-1) that "For a long period railroads and water carriers have interchanged cars", and that the petitioner railroad carriers have "consented to the delivery of their cars to every water carrier except Seatrain", might well be passed over.

It is, however, appropriate to say that voluntary action in one case is no warrant for compulsion in another; and also that Seatrain is unique (R. 608).

Seatrain pursues this thought to a greater extent. It insists (pp. 28, 35-8), with complete irrelevancy, that petitioners have not contested their obligation, pursuant to the Commission's order in Docket No. 25727, 226 I.C.C. 7, to establish and maintain through routes for through transportation via their lines and Seatrain, and quotes (pp. 35-6) certain findings there made, to which "petitioners have taken no exception".

As no order for interchange of cars was made in that case, it was not possible there to raise, by exception or

otherwise, the issue of the duty to interchange cars with Seatrain. Furthermore, the proceeding now under review, Docket No. 25728, brought by Seatrain's subsidiary, Hoboken Manufacturers Railroad Company, being separate and distinct from Docket No. 25727, brought by Seatrain itself, no exceptions could be taken in the present proceedings to findings made in No. 25727.

Finally, on this subject, the Commission repeats (pp. 22-3) its assertion that "the car service provisions do not diminish but rather facilitate the Commission's ability to enforce appellee's statutory obligation to interchange cars", and Seatrain echoes the thought (pp. 30-40). This assumes that at some time prior to the enactment of the car service provisions there was an obligation that railroads exchange cars with carriers by water such as Seatrain. As previously noted, no duty to interchange cars with *any* other carrier existed prior to the Mann-Elkins Act of 1910. That act clearly was not intended to require interchange with a water carrier such as Seatrain, for none such was then known, nor had any come into existence when the car service provisions were first adopted in 1917, or when the provisions for rules with regard to interchange of cars were, in 1920, taken out of Sec. 1(4). Seatrain's predecessor, in 1929, provided "the first car-carrying vessel capable of being operated independently of a railroad" (R. 608).*

* Manifestly, transportation of freight in cars by railroad-operated car ferries, which by definition of Sec. 1(3) are included in the term "railroad", such as those concerned in *Pennsylvania Co., Operation of Transportation Co.*, 34 I.C.C. 47, and the cognate cases cited by Seatrain (p. 31), has no analogy to the situation which arose upon the birth of the Seatrain-type vessels.

Repeated at various stages in Seatrain's brief, is the cry of public interest and policy (pp. 18, 32, 35). The obvious answer is that when Congress adopted the Transportation Act of 1940, it maintained and continued the limitation of the car service provisions to carriers by railroad, carefully designating such carriers as "subject to this part".

Answering "II" in Commission's Brief and "Point II" in Seatrain's Brief.

As previously noted in our Main Brief (pp. 45-8) the Commission sought to justify its asserted power to compel interchange of cars by the railroads with Seatrain on the ground that it necessarily flowed from the carriers' duty to establish through routes as provided in Sec. 1(4) of the Act (R. 48). The District Court while finding the duty under the provisions of Sec. 1(4) held that the Commission's power to compel the interchange was dependent on the car service provisions (Main Brief, pp. 17-8) and found that these provisions were subject to the territorial limitations prescribed in Sec. 1(1) and (2) of the Act. In its brief on this appeal the Commission now resorts to the provisions of Sec. 15(3) as conferring its alleged jurisdiction to compel the railroads to deliver their cars for Seatrain's use on the route through Havana.

But it is obvious that the territorial limitations of Sec. 1(1) and (2) attach to the provisions of Sec. 15(3) no less than to the provisions of Sec. 1(4) and the car services provisions, Sec. 1(10), (11) and (14). Sec. 15(3) is contained in Part I of the Act and unlike Sec. 6(11) does not purport to confer any powers "in addition to the jurisdic-

tion given by the Act". The Commission now argues (pp. 24, *et seq.*) that since the power given the Commission under Sec. 15(3) is to compel establishment of through routes, applicable to the transportation of property by railroad carriers subject to Part I and carriers by water subject to Part III, it is entitled to read into Sec. 15(3) the definition of "interstate or foreign transportation" contained in Sec. 302(i), in Part III, with respect to carriers by water, and by so doing may extend the duty of the railroads which is provided solely in Part I. The fallacy of this argument is clearly exposed in the opinion of the District Court (R. 123-4) where the Court concludes "if cars are to be gotten from carriers by railroad for the use of carriers by water, it must be by virtue of the provisions of Part I" (R. 124).

We are concerned here solely with the duties of railroads and the jurisdiction of the Commission to compel the fulfillment of such duties; not with the Commission's jurisdiction over water carriers. Whatever jurisdiction over water carriers is conferred by Sec. 302(i) (2) of Part III where the transportation is partly by water and partly by railroad from a place in a State to a place in any other State, Congress was careful to repeat in that same section the territorial limitations of Sec. 1(1) and (2) with respect to the railroads' part of the transportation defined. It provided "such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States", Sec. 302(i)(2). Cars are included in the definition of transportation only as that term is used in Part I, that is, transportation by railroad, Sec. 1(3)(a).

Moreover, Sec. 15(3) does not purport to declare the Commission's jurisdiction over railroad cars. It merely empowers the Commission to determine "the terms and conditions under which such through routes shall be operated". The Commission's jurisdiction over railroad cars is provided in Sec. 1(14)(a). This has been more fully considered, *supra*, page 5 et seq.

The Commission offers a curious argument for the proposition that the territorial limitations of Sec. 1(1) and (2) do not apply to Sec. 15(3). In the first place, it cites (p. 28) the principle that specific terms covering a given subject matter will prevail over general language of the same or another statute. It is not clear what "specific terms" the Commission here invokes. If it means the provisions of Sec. 3(2)(i)(2) they are sufficiently dealt with above. It would appear that where the question is as to the validity of a car service order, the only place specific provisions can be found to resolve the question, is that part of the Act and the specific sections thereof which prescribe the duties of the owners to furnish car service to other carriers and the jurisdiction of the Commission to enforce such duties.

The Commission next urges (pp. 28-9) that Sec. 6(11), formerly 6(13), of the Act referring to transportation from a point in the United States "through the Panama Canal or otherwise" is also in Part I of the Act "and this Court did not hold it restricted by the general language of Sec. 1(1)(b)", (citing cases). Aside from the fact that the through route provisions of former Sec. 6(13) were repealed by the 1940 Amendment, it is sufficient answer to this contention that Sec. 6(11) provides, as did Sec. 6(13) that the jurisdiction there conferred is "in addition to the

jurisdiction given by the Act", etc. Sec. 15(3) contains no such provision.

It is difficult to see how Sec. 5(14), which the Commission cites (p. 29) "as applicable to carriers by water operating to or via foreign ports", aids its submission on this phase of its argument. That section makes it unlawful for certain carriers to own, lease, control, etc., any competing carrier by water operating through the Panama Canal or elsewhere. It is immaterial whether this section applies to the relations of railroads with carriers by water operating to or via foreign ports. The bar is against ownership or control, and has no relation to transportation as such.

The Commission (p. 27) refers to a letter of March 20, 1939 by Commissioner Eastman to the House Committee on Interstate and Foreign Commerce, which it says voices the Commission's objection to a provision in Part III, the water carrier provision of H.R. 2531, 76th Congress, 1st Session, and then quotes the provision in question.

Part III of the bill was not intended as a separate part such as was subsequently embodied in the 1940 Act; it merely contained amendments to the existing Act. As appears from the letter of Commissioner Eastman, the provision quoted in the Commission's brief was contained in "a new subparagraph (c) to section 1(1) of the Interstate Commerce Act." By the new section it was proposed to add to the common carriers to whom the Act applied those engaged in transportation on inland, canal or coastwise waterways of the United States, and to exclude common carriers engaged in the transportation of passengers or property upon the high seas, Great Lakes or any inter-

coastal commerce by way of the Panama Canal. This provision is quoted at page 27 by the Commission.

Following the quotation, the Commission says (p. 27) that Commissioner Eastman's "* * * criticism was that this provision might be construed as repealing the jurisdiction the Commission had over railroad-controlled water carriers (such as Seatrain) operating on the high seas." Commissioner Eastman's criticism had nothing to do with the jurisdiction of the Commission "over railroad-controlled water carriers (such as Seatrain)* operating on the high seas" in the sense that the Commission infers. His first criticism was that as some water carriers operated both on the New York barge canal and the Great Lakes, by the inclusion in the proposed provision of jurisdiction over transportation on canals, but not on the Great Lakes, "* * * the subparagraph may limit our jurisdiction more than was intended." Commissioner Eastman also suggested that the subparagraph might be construed to repeal the jurisdiction which they then had over railroad-controlled water carriers operating on the high seas under Sec. 5(21) of the Interstate Commerce Act, a section which merely gave the Commission authority to extend the time during which a railroad company could continue service by water by means of a competing water carrier operating other than through the Panama Canal. The extraterritorial jurisdiction claimed under Sec. 15(3) to compel railroads to send their cars outside the United States, is not *in pari materia* with the jurisdiction to control monopolistic acquisition of competing lines.

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* The Commission has held that Seatrain is not controlled by railroads (R. 39).

Finally, the Commission contends (pp. 31, *et seq.*) that the amendments made to the Panama Canal Act by the Transportation Act of 1940 were not meant to subtract any of its power; that Sec. 6(13)(b) as it stood before its repeal by the 1940 Act became superfluous because its substance with respect to the Commission's power to determine the terms and conditions under which the lines shall be operated is embodied in Sec. 15(3) of Part I and Sec. 307(d) of Part III.

The Commission (p. 32) and Seatrain (p. 49) refer to Commissioner Eastman's letter to the Conference Committee considering S.2009* and his statement that the Commission did not object to the repeal of Sec. 6(13)(b) because "other provisions of the bill adequately cover this matter". Commissioner Eastman's statement in his said letter was as follows:

> "House Bill. This bill leaves the Panama Canal Act provisions in Section 6(13) undisturbed, except that it repeals 'subparagraph (b)'. See Section 9 of the House bill. We have no criticism of this repeal, for that subparagraph deals with through routes and joint rates between rail and water lines, and other provisions of the bill adequately cover this matter."

This statement was not addressed to the interchange of cars or the territorial jurisdiction of the Commission over through routes between rail and water carriers. It merely recognized that under the new legislation jurisdiction was

* References in the said letter to the Senate bill are to print of of S.2009 dated May 29 as passed by the Senate which contained the definition of "interstate commerce" quoted at page 47 of our Main Brief; references to the House bill are to print of S.2009 dated July 26, showing the Senate text in linetype and the House text in italics.

also conferred *over independent water carriers, i. e.*, water carriers not under the control or management of a railroad carrier, with appropriate provisions in Part I and Part III for the establishment of through routes between water carriers and carriers by railroad.

In this connection the Commission states in footnote 14 at page 32 of its brief that one of the factors motivating Senator Clark's opposition to S.2009 which as amended became the Transportation Act of 1940, was his disagreement (citing 86 Cong. Rec. 11613, 11635) with the Commission's decision in Investigation of Seatrain Lines, Incorporated, 206 I.C.C. 328 (R. 35) "but the bill was passed without the incorporation of his suggestions". Senator Clark's sole objection to the Panama Canal Act provisions of the bill was to a provision removing the prohibition against acquisition and control by railroads of competing water carriers.

In his discussion Senator Clark noticed the finding in Investigation of Seatrain Lines, Inc., 206 I.C.C. 328 (R. 35) that subsequent to the passage of the Panama Canal Act, the Missouri-Pacific Railroad Co. and the Texas & Pacific Railway Co. had acquired stock interest in Seatrain which was such an interest as was contemplated by Sec. 5(19) of the I.C.A., and the fact that the Commission had issued an order permitting the continuance of such stock interest. He referred to Commissioner Mahaffie's dissent on this issue and said, 86 Cong. Rec. 11636:

> "Mr. President, one must be impressed by the strength of Commissioner Mahaffie's position to the effect that there is no warrant in the Panama Canal Act for the Interstate Commerce Commission to authorize a railroad company either to acquire control

> of water carriers or to continue control of water carriers in cases where the control was acquired subsequent to July 1, 1914. Such authority, however, is clearly for the first time granted by the section of Senate bill 2009 as rewritten by the conferees, and, on the statement of the chairman of the Senate committee rewritten at the insistence of the Interstate Commerce Commission itself, in an effort to invalidate an illegal ruling which had no basis in law, as Commissioner Mahaffie pointed out in his dissent."

It is thus apparent that Senator Clark's opposition to S.2009 was not based on any objection to the repeal of the through route provisions of the Panama Canal Act, and was not addressed to any of the through route or car service provisions of S.2009. He referred to Investigation of Seatrain Lines, Inc., *supra*, and the dissenting opinion therein, merely to point his opposition to provisions of the new legislation dealing with control by railroads of water carriers. He made no suggestion whatever as to through route or car service provisions to be incorporated in the new legislation.

The Commission at pages 33-4 cites former Sec. 25 of the I.C.A., which required railroads to issue through bills of lading for property being transported by rail and water to a destination in a foreign country, as proof that Congress has enacted extraterritorial legislation with respect to American vessels on the high seas. That section was repealed by the Transportation Act of 1940. It is submitted that this and the provisions of various shipping acts cited by the Commission (pp. 34-6) have no relevance to the issues of territorial jurisdiction at bar. The question here is as to a railroad's duty to permit its cars to be

taken outside the United States and the Commission's jurisdiction to enforce such a duty. We are not concerned with the Commission's jurisdiction over water carriers.

Seatrain attempts to sustain the Commission's jurisdiction to compel the railroads to deliver their cars for transportation through foreign waters and a foreign port by citing instances of through routes established between railroads and break-bulk carriers, where, of course, interchange of cars was not involved. Moreover, in none of the cases cited on pages 44 and 45 of its brief, was the question of territorial jurisdiction raised or discussed.

Seatrain argues at length as to the Commission's jurisdiction over water carriers. But we repeat, what is involved in the instant case is jurisdiction over railroad transportation and railroad property. That, as was said by the District Court, is "the gist of the question" (R. 124). Therefore, the cases and statutes cited at pages 52-5 of Seatrain's Brief with respect to jurisdiction over water carriers are irrelevant. At page 54 Seatrain repeats an argument made below that since its vessels are American-flag ships, nationality follows the vessels even into a foreign port, and the railroads' cars are on American territory even when the vessels are in the Harbor of Havana. But this Court, in *Cunard S.S. Co. v. Mellon* (1923) 262 U. S. 100, has discredited this doctrine, terming it a mere "figure of speech, a metaphor", and saying, at pages 123 and 124:

> "In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. • • •
>
> "A merchant ship of one country voluntarily entering the territorial limits of another subjects her-

> self to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion."

Seatrain's argument (pp. 56-7) that since the cars are to be furnished in the United States the order of October 13, 1941 is valid, is pure sophistry. As noted in our Main Brief (p. 49) the opinion of this Court in *St. Louis, etc. Ry. Co.* v. *Brownsville District* (1938) 304 U. S. 295, 298 shows that the delivery of cars there involved would be made in the United States. Nevertheless, it was there held that the railroad carrier was not bound to deliver cars in this country to another railroad carrier for transportation into Mexico.

It cannot be denied that the Commission's order, if valid, compels the railroads to send their cars into foreign waters and a foreign port. In Seatrain's operation, as its President testified (R. 583), its ships leave New York and clear for the foreign port, enter Havana and again clear from the foreign port for Belle Chasse. See page 41 of our Main Brief where this testimony is set forth in the foot-note. As was said by Mr. Justice Holmes in *American Banana Co.* v. *United Fruit Co.* (1909), 213 U. S. 347, at page 357, "all legislation is *prima facie* territorial". Seatrain has made no showing that the statute confers such extra-territorial jurisdiction upon the Commission, and has cited no case supporting such jurisdiction.

Answering "III" in Commission's Brief and "Point III", Subdivisions "A" and "B" in Seatrain's Brief.

The Commission and Seatrain assert (Comm., p. 37, Seatrain, pp. 57-9) that the allegations of confiscation in the complaint do not meet the prescribed requirements of particularity. We submit that it appears from the complaint, and particularly from paragraphs XIX, XXVIII, XXX and XXXI (R. 12-3, 16, 17-8), that the order "would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law." *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447. The facts relied on are specifically set forth, and, therefore, the constitutional protection is sufficiently invoked under the authority of the cases cited by the Commission and Seatrain. The petitioning railroads raised the question of their constitutional rights before the Commission (R. 677, 1039, 1311), although not required to do so in order to preserve their right to rai-e this issue in the present suit. *Baltimore & Ohio R.R. Co.* v. *United States* (1936), 298 U. S. 349; *San Joaquin Co.* v. *Stanislaus County* (1914), 233 U. S. 454, 459; *Manufacturers Ry. Co.* v. *U. S.* (1918), 246 U S. 457, 488.

The Commission further asserts (pp. 38-41) that the *per diem* rate to be paid by Seatrain, based on the finding in *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 378, "does cover the cost of car-ownership, not only during productive service, but also during idle periods". The quotation from the cited report shows that the rate fixed took into account the time during which cars were in unserviceable condition and when the supply of cars exceeded the demand; it

did not consider or allow for the unproductive days when the cars "are hauled empty, when they are being conditioned and placed for loading" (R. 63-4). Moreover, the finding made in the 1941 report, quoted at page 40 of the Commission's brief, is applicable only when payment is made from the time the cars are made available to the connecting carrier; the provision in the order that Seatrain can be asked to pay "only for such period as the cars are in its actual possession" suffices to establish that confiscation will result from the order. (See also Seatrain's brief, p. 59).

The argument of the Commission based on the "past treatment of other water carriers", and "the saving to the owner on car repair bills" (pp. 41-3), and the similar submission by Seatrain (pp. 59-60) are sufficiently met in our Main Brief (pp. 63-7).

Seatrain suggests that petitioners may not complain of not being permitted to charge Seatrain for the days when the cars are being held for Seatrain (pp. 61-2), because Seatrain's burden is assumed by someone else. (See also Commission's brief, pp. 43-6). We submit that a person deprived of his property is not afforded the constitutional protection to which he is entitled unless the person receiving the property is compelled to pay therefor; the fact that payment may be made by some other person voluntarily, or because of some secondary liability, does not meet the constitutional requirement. Moreover, the order of the Commission does not provide for payment by anybody, and payment to the owning railroad is not secured by any process of law.

With regard to the Commission's attempted analogy to "break-bulk traffic" (pp. 44-6), see our Main Brief (pp. 58, *et seq.*).

While it is wholly immaterial, Seatrain's statement on page 60, in paragraph "5" appearing on that page, that the petitioners "did not question the amount of the compensation to be received by them until nearly six years" after the institution of this proceeding, and that then, in 1938, Hoboken and the Lower Coast applied "for the entry of an order because of petitioners' failure to comply with the Commission's decision", requires some comment in the interest of accuracy.

The Commission's first report in these dockets was made on February 5, 1935, 206 I.C.C. 328, 331, 344, and dismissed the complaints therein. There was no occasion for the petitioners to object until such time as complainants sought an entry of an order in those dockets respecting delivery of cars to Seatrain. This they did promptly when complainants' motions therefor were filed (R. 668, 674-679).

Answering "IV" in Commission's Brief and "Point III", Subdivision "C" in Seatrain's Brief.

In our Main Brief (pp. 52-6) the invalidity of the order was asserted because it failed to contain any direction against Seatrain, and did not provide adequate protection for the return of the cars or compensation for their use. The Commission's asserted excuse for its failure to afford the necessary protection, to-wit: that the order was, as it now phrases it (p. 46) "to all intents a cease and desist order", was there considered (p. 54).

The Commission next insists that if petitioners are not paid the $1 per diem "they are not required to permit the delivery of their cars to Seatrain" (p. 47). Seatrain makes the same submission (p. 63). Under the per diem rules, which the petitioners are, by the order (R. 74), required to observe and enforce, payment is not to be made until long after the cars have been used. See our Main Brief, page 54. Does the Commission's present view of the effect of its order, mean that where cars have not been paid for in the past the petitioners are relieved from obeying the order? That is hardly possible, for the Commission well knew that no settlement for past due per diem had been made with the Pennsylvania, and there had been no payment to other railroads for eight years. Our Main Brief, page 53, note. The petitioners are afforded no security either for the return of their cars or for payment for their use by any effective condition.

In view of the fact that Seatrain's brief is an answer to our Main Brief, it is surprising to find a repetition (pp. 63-5) of the wholly irrelevant argument that it could not be compelled to pay petitioners for their cars because they would not accept direct payments from it. We directed attention in our Main Brief (p. 55, note) that this was not the fact, and that the Per Diem Rule on which the assertion was based "applies only to cars interchanged within Canada, Cuba or Mexico".

The Commission makes a submission similar to Seatrain's concluding with the statement "Thus the Association of which appellees are members, under the order of the Commission, has the power to bring about the direct settlement which all parties seek * * *" (pp. 47-8). This can only mean that the Commission now assumes that it

can fulfill its functions by delegating such power as it may have to another. The fact is that the Commission has not attempted any such delegation of power but, as shown by the concluding paragraph of its findings (R. 71), has specifically left these petitioners to recover as best they may. This can only mean that the Commission believes it has fulfilled its functions by delegating its power to another. What is in issue is whether petitioners are constitutionally entitled to adequate protection for the return of their cars and for payment for their use. This the order fails to afford, and therein it violates petitioners' constitutional rights.

Respectfully submitted,

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APPENDIX

Interstate Commerce Act—Section 15, Paragraph 3

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(As Amended, 1940. The Corresponding Matter Contained in the Hepburn Act Follows:)

Hepburn Act of 1906

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through rates shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting cariers is a water line.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., *et al.*,
Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., *et al.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR FORREST S. SMITH, TRUSTEE OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, NEW ORLEANS AND LOWER COAST RAILROAD COMPANY, AND SEATRAIN LINES, INC., APPELLANTS-APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 47

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., *et al.*,

Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*

No. 48

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., *et al.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR FORREST S. SMITH, TRUSTEE OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, NEW ORLEANS AND LOWER COAST RAILROAD COMPANY, AND SEATRAIN LINES, INC., APPELLANTS-APPELLEES

These are two appeals to review different phases of a decision and decree of a statutory three-judge court for the District of New Jersey, involving the validity of an order of the Interstate Commerce Commission. By this order the Commission required the Pennsylvania Railroad Com-

pany and certain other railroads, hereafter referred to as petitioners,* which had refused to do so, to permit the interchange of their cars with the vessels of Seatrain Lines, Inc., a water carrier, in the performance of through transportation of freight over through routes to which petitioners are parties between points in the United States.

The action was instituted by the petition of the petitioners, alleging that the Commission's order was invalid for various reasons and praying for a decree setting the order aside and enjoining its enforcement.

The District Court rejected certain of petitioners' contentions but upheld their argument in one respect. From this decision all parties have appealed. Petitioners are the appellants in No. 48. The United States, the Interstate Commerce Commission, the Trustee of Hoboken Manufacturers Railroad Company,† the New Orleans and Lower Coast Railroad Company,† and Seatrain Lines, Inc.† are the appellants in No. 47.

Opinions Below

The opinions of the specially constituted District Court (R. 109, 141) are reported in 55 F. Supp. 473.

The decisions and order of the Interstate Commerce Commission (R. 35-74), to review which the action was instituted, were rendered in Docket No. 25728, *Hoboken Manufacturers Railroad Company* v. *Abilene & Southern Railway Company, et al.*, and Docket No. 25878, *New Orleans and Lower Coast Railroad Company* v. *The Akron, Canton & Youngstown Railway Company, et al.* The foregoing proceedings were heard on a consolidated record and the Commission's decisions therein are reported in 206 I. C. C. 328, 237 I. C. C. 97, and 248 I. C. C. 109.

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* For convenience and brevity we will use this term, which has likewise been used in the brief of the Pennsylvania Railroad *et al.* to refer to the appellants in No. 48 and the appellees in No. 47.

† For brevity, these parties are hereinafter referred to as the Hoboken, the Lower Coast, and Seatrain, respectively.

Jurisdiction of This Court

The action in the court below was brought under the provisions of acts approved June 10, 1910 (38 Stat. L. 1149) and October 23, 1913 (38 Stat. L. 219), commonly referred to as the Commerce Court Act and the Urgent Deficiencies Appropriations Act, all as re-enacted in Title 28, U. S. C. A. Section 41 (28) and Sections 43-48, inclusive, having to do with suits brought to enjoin and set aside orders of the Interstate Commerce Commission. The direct appeals from the final decree of the court below were taken to this Court under the provisions of U. S. Code, Title 28, Sections 47a and 345.

Probable jurisdiction was noted by this Court on May 8, 1944 (R. 1378).

The Statutes Involved

The proceedings before the Interstate Commerce Commission were instituted by complaints filed by the Hoboken and the Lower Coast, in which it was alleged that certain rules, regulations and practices of the defendant rail carriers, by which they refused to permit cars owned by them to be delivered to Seatrain in the performance of through transportation over through routes in connection with Seatrain, were and would continue to be in violation of paragraphs 4 and 11 of Section 1, paragraphs 1 and 3 of Section 3 and Section 7 of the Interstate Commerce Act. Consideration of the authority of the Commission to make the orders in issue involves examination also of the provisions of Sections 1(1), (3)(a); 3(4); former Sections 6(13)(b); 15(1), (3), (8); 20(11), 305(b), (d), and 307(d). These are reproduced in the appendix hereto.

Statement of the Case

These Appellants-Appellees

The three parties on whose behalf this brief is filed were the complainants before the Commission whose complaints

initiated the proceedings in which the decisions and order here under review were made. The Hoboken and Lower Coast were the original complainants and Seatrain intervened in support of the complaints and adopted their allegations (R. 8, 20, 34, 38).

Seatrain is a common carrier by water. Prior to the requisition and charter of its vessels for war purposes, it was regularly engaged in operating vessels between the ports of New York and New Orleans (Belle Chasse), La. Seatrain's vessels and the manner in which it handles and transports freight are described in *I. C. C.* v. *Hoboken R. Co.*, 320 U. S. 368, 371. The vessels are specially constructed ocean-going ships, with large hatches and four decks. They are designed primarily to make possible the through transportation of freight by rail and water in freight cars, eliminating the labor, expense and delay incident to unloading cars at the ports and transferring the freight between cars and ships, avoiding the risk of injury to freight due to such handling and making possible the through movement of certain freight that could not otherwise move by water. The decks of the ships are equipped with railroad tracks and various appliances to permit the carriage of from 95 to 100 loaded freight cars. By means of cranes and other devices, the cars and their contents are lifted from the tracks of the railroad and then lowered through hatches into the hold of the vessel where they are secured in place. In unloading, the operations are reversed (R. 521-540).

Seatrain began operations between New York, N. Y. and New Orleans, La. in October of 1932 (R. 37). Prior to that time, it had been engaged in operations between New Orleans, La. and Havana, Cuba, only.

The terminal facilities of Seatrain at the port of New York are located on the Hoboken, those at New Orleans (Belle Chasse) are on the Lower Coast. The Hoboken and Lower Coast are terminal switching lines connecting with the various trunk line railroads serving the ports of New York and New Orleans, respectively.

The Events Leading up to the Complaints to the Commission and a Brief Summary of the Commission's Proceedings.

The transportation of freight in railroad freight cars by common carriers by water had been carried on long prior to the institution of operations by Seatrain between New York and New Orleans. Thus numerous so-called car ferry companies had operated and still are operating over the Great Lakes in conjunction with connecting rail carriers (R. 48). *Pennsylvania Co., Operation of Transportation Co.*, 34 I. C. C. 47; *Grand Trunk Ry. Co. of Canada, Operation of Car Ferry Co.*, 34 I. C. C. 49; *Buffalo R. & P. Ry. Co., Operation of Car Ferry Co.*, 34 I. C. C. 52; *Grand Trunk W. Ry. Co., Operation of Car Ferry Co.*, 34 I. C. C. 54 (R. 48). The railroads throughout the country have always, without objection and without any apparent concern, permitted their cars to be interchanged with such carriers by water (R. 48, 65). The Florida East Coast Car Ferry Company has operated for many years between Key West, Florida, and Havana, Cuba (R. 180). Seatrain or its predecessor company began operating in 1929 between New Orleans, La. and Havana, Cuba. At that time and until October, 1932 the railroads generally, including petitioners, permitted their cars to be delivered to Seatrain and its predecessor not only for transportation to Havana, Cuba, but also for delivery to the Cuban railroads for movement beyond Havana (R. 65, 214, 218, 219, 542-544). They also permitted their cars to be delivered to the Florida East Coast Car Ferry Company for transportation to Havana and interior points in Cuba (R. 210).

For many years, the railroads, through the Association of American Railroads and its predecessor, the American Railway Association, have maintained so-called car service rules governing the terms and conditions under which cars interchanged between them are used and paid for. Prior to 1932, these rules had never contained a requirement that

the consent of the car owner must be secured before the delivery of a car to any carrier in the performance of through transportation (R. 491-495). However, in 1932, just prior to the date when Seatrain was to begin operations between New York, N. Y. and New Orleans, the American Railway Association, at the suggestion of certain railroads, including the Pennsylvania, amended the car service rules and adopted a new Rule 4, providing:

> "Cars of railroad ownership must not be delivered to a steamship, ferry or barge line for water transportation without permission of the owners filed with the Car Service Division." (R. 492)

The new rule was aimed at Seatrain (R. 45). Thus, notice of the meeting called for the purpose of framing the rule referred to it as a meeting to formulate rules "to prohibit the interchange of railroad-owned cars to the Seatrain by the Hoboken Manufacturers or New Orleans and Lower Coast"; and out of some twelve water carriers referred to by the American Railway Association in connection with Rule 4, Seatrain was the only water carrier to which any railroad recorded a refusal to permit the delivery of its cars (R. 44). Immediately following the adoption of Car Service Rule 4 a substantial number of carriers recorded their refusals to permit their cars to be delivered to Seatrain (R. 502-7), but many of these refusals were subsequently withdrawn (R. 1258).

Promptly upon the adoption of this Car Service Rule 4, the Hoboken and the Lower Coast filed separate formal complaints with the Interstate Commerce Commission (Docket Numbers 25728, 25878) alleging that the new rule and the refusals of the railroads thereunder to permit their cars to be interchanged with Seatrain were unlawful (R. 8, 20, 38). Extended hearings were had. On October 13, 1941, the Commission issued its decision holding that it had ample jurisdiction to require the railroads to permit the interchange of their cars with Seatrain in the perform-

ance of transportation over through routes to which the railroads were parties with Seatrain and that their refusals violated the requirement of the Act that they should provide reasonable facilities for operating such through routes. However, it entered no order at that time because it held that the question whether through routes in connection with Seatrain existed or should be established was pending before it in a companion proceeding, Docket No. 25727, not yet decided. The circumstances of this latter proceeding must be briefly related.

Following the inauguration by Seatrain of its service between New York, N. Y. and New Orleans in 1932, the Pennsylvania and various other railroads not only refused to consent to the interchange of their cars with Seatrain but refused to recognize or establish arrangements of any kind for through routes and through transportation via Seatrain. Under these circumstances, Seatrain filed a complaint with the Commission, Docket No. 25727, in which it prayed that the Commission determine to what extent, if any, through routes already existed between Seatrain and the railroads named defendants in said complaint, and, in the event it should find that through routes did not exist, that it require the railroads to join with Seatrain in the establishment and maintenance of through routes for through transportation (R. 112, 113). After extended hearings, the Commission found that Seatrain's service provided shippers with a new and improved form of transportation which was required by the public convenience and necessity, that through routes between certain of the defendant railroads and Seatrain were already in existence between certain points and that where through routes were not in existence they should be established and maintained for through transportation by rail and water between points within about 500 miles of New York Harbor and points in the Southwest and a limited section of the South, 226 I. C. C. 7 (R. 57).

In its report in Docket No. 25727, the Commission also affirmed its previous conclusion in Docket Nos. 25728 and 25878, that it had jurisdiction to require the railroads to consent to the delivery of their cars to Seatrain in the performance of through transportation over the through routes found to exist and those which it had prescribed. It found further

> "that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be by the interchange of the loaded cars." (R. 57)

and ruled that if the railroads, parties to the through routes found to exist and prescribed,

> "refuse to so interchange, with Seatrain, traffic moving over such through routes, the matter may be brought to our attention either by a request for reopening Nos. 25728 and 25878, * * * or by a new complaint." (R. 57)

The petitioners still persisted in their refusals to permit their cars to be interchanged with Seatrain, and, therefore, in July, 1938, the Hoboken filed a motion for the reopening of Docket Nos. 25728 and 25878 and the entry of an order therein (R. 668). This motion was met by a request of the defendant railroads for further hearings to determine the measure of the compensation to be paid the railroads for the use of their cars by Seatrain (R. 674). Such further hearings were had and ultimately the Commission rendered a further report (R. 60-72) and entered the order which is the subject of this suit (R. 73).

By this report and order the Commission required petitioners to permit the interchange of their cars with Seatrain in the performance of through interstate transportation over through routes, on condition that they should receive as compensation for their cars the established per diem rate of $1.00 per car per day for each day their cars should be in

Seatrain's possession. This compensation was determined by the Commission to be reasonable in view of findings that it was the compensation paid generally by carriers for the use of cars owned by others, that it represented the average full cost of the ownership and maintenance of cars and that cars when on Seatrain's vessels were subject to much less wear and tear and maintenance expense than when switched in railroad yards or hauled in railroad trains (R. 61-72).

The Action in the District Court

The Petition

Petitioners thereupon brought suit in the District Court for the District of New Jersey to enjoin and set aside the Commission's order. By their petition they alleged that the order was invalid for various reasons:

1. Despite the fact that they had either voluntarily established or had acquiesced in the Commission's order requiring them to join in establishing and maintaining through routes for through interstate transportation in connection with Seatrain, petitioners alleged that because Seatrain was a water carrier the duty imposed by the statute "to provide reasonable facilities for operating such routes" did not embrace a duty to permit their own cars to be used for the through transportation.

2. Although they conceded the Commission's jurisdiction to prescribe the through routes and its authority over the through transportation, petitioners alleged that because Seatrain's ships in operating between New York and New Orleans necessarily passed outside of "the territorial waters" of the United States (whatever that term may mean) and usually, although not always, called at Havana, Cuba, the Commission was powerless to require them to permit their cars to

be delivered to Seatrain in the performance of the through transportation.*

3. They alleged that the compensation fixed by the Commission, which was the established per diem rate of $1.00 per day ordinarily paid by carriers generally for the use of cars owned by others, was not adequate and that the order was defective in certain other respects.*

The Decision of the District Court

The District Court held that the Commission had correctly ruled that since the petitioners were under a duty to establish and maintain through routes for through interstate transportation in connection with Seatrain, and since, as the Commission had found, the interchange of cars was the reasonable and efficient method of accomplishing such through transportation, the fact that Seatrain was a water carrier did not entitle petitioners to assert their ownership of the cars as a reason for refusing to permit such interchange (R. 120-21, 140).

The District Court also ruled that the Commission's determination that $1.00 per day would be reasonable com-

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* For a proper perspective it may be important to recall that

1. A large proportion of the more important railroads of the country have consented without restriction to the interchange of their cars with Seatrain at the established per diem rate (R. 1258).

2. Although petitioners now assert the fact that Seatrain's ships pass outside of territorial waters and usually call at Havana as a reason for refusing to permit their cars to be hauled by Seatrain in the transportation of through freight between New York and New Orleans, and also here object that $1.00 per day is not adequate compensation, nevertheless (a) prior to 1932 all of the petitioners permitted their cars to be interchanged with Seatrain's vessels for transportation to and from Havana, including transportation to and from interior points in Cuba (R. 45); (b) all of them now consent to the interchange of their cars with the Florida East Coast Car Ferry for transportation to and from Cuba (R. 1150-54); (c) eight of the petitioners still permit their cars to be interchanged with Seatrain's vessels for such Cuban transportation (R. 66, 81); and (d) all of this is permitted on the basis of the established per diem rate of $1.00 per day (R. 66, 81).

pensation for their cars while in Seatrain's possession was supported by ample and substantial evidence, and that its order would not be confiscatory (R. 147).

It held, however, that petitioners' duty to permit the interchange of their cars in the performance of through transportation over through routes was limited to transportation and routes entirely within the territorial limits of the United States, and that therefore the Commission could not require petitioners to permit their cars to be interchanged with Seatrain when Seatrain's vessels went outside the territorial waters of the United States or called at Havana (R. 128-29, 140). This phase of the decision is difficult to comprehend in view of the fact that the petitioners have not contested the Commission's jurisdiction to prescribe the through routes, and the court below ruled that the Commission had jurisdiction over the through transportation.

The Issues

The three principal issues for decision here are:

1. Whether because Seatrain is a water carrier the petitioners are under no duty, and the Commission is powerless to require them, to permit the interchange of their cars with Seatrain in the performance of through transportation over through routes to which they are parties, and whether, after a car has been furnished to a shipper and loaded for such through shipment, the owning carrier may assert its ownership as ground for insisting that the goods shall be unloaded at the port and the car shall not be delivered to Seatrain.*

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* It may be observed parenthetically that where a petitioner is the originating carrier it would clearly appear to be its duty to furnish to the shipper a car which may be used for the through transportation. Since most railroads of the country have now consented to the interchange of their cars with Seatrain, the originating carrier should ordinarily have no difficulty in supplying such a car and should be held, if it furnishes one of its own cars for loading, to have given its consent for the use of the car for the through transportation desired by the shipper.

2. Whether the fact that Seatrain's vessels pass outside the territorial waters of the United States and usually call at Havana en route between New York and New Orleans deprives the Commission of authority to require petitioners to permit the interchange of their cars in the performance of through transportation over through routes, the Commission's jurisdiction to prescribe the through routes not being challenged.

3. Whether the Commission's determination as to the compensation to be received by petitioners for their cars when in Seatrain's custody and as to the terms and conditions of the interchange is supported by substantial evidence.

Specification of Assigned Errors to be Urged (R. 150-151)

On behalf of appellants in No. 47, it will be urged that the District Court erred:

1. In not dismissing the petition herein.

2. In setting aside the Commission's order of October 13, 1941, involved in this case.

3. In holding that the Commission's power to require carriers by railroad to interchange or permit the interchange of their cars with common carriers by water and to supply cars which may go upon the lines of common carriers by water when necessary to effect transportation by rail and water routes for continuous shipment over through routes is limited "insofar as that transportation takes place within the United States or its territorial waters."

4. In holding that the legislative history of the Transportation Act of 1940 throws no direct light upon the question before the Court.

5. In holding that although "the Commission has jurisdiction over transportation such as that carried on by the

petitioners and Seatrain, from state to state in the United States, throughout the whole course of that transportation even if it passes through foreign waters and into foreign ports", nevertheless this fact "does not necessarily mean that the Commission can compel carriers by railroad to provide carriers by water with cars for routes passing through extraterritorial waters and into a foreign port."

6. In holding that the Panama Canal Act was emasculated by the Transportation Act of 1940.

7. In holding that the provisions of Section 303(a), 49 U. S. C. A. Section 903(a), mean that the provisions of Part I shall be applicable to transportation subject both to Parts III and I only to the extent that Part I makes them applicable.

8. In holding that the operation of Part I of the Interstate Commerce Act is restricted to transportation taking place within the United States, and that "It follows that the provisions of Section 1(4) and Section 1(10), (11), (13), and (14), the car service provisions, are applicable to transportation 'only insofar as such transportation takes place within the United States.' To conclude that the provisions of Part I apply throughout the whole of a course of transportation which, though it goes from place to place within the United States, in part moves outside of the United States and its territorial waters, would be casuistry."

9. In holding that "We can find no provision in the Interstate Commerce Act that imposes a duty upon carriers by railroad to exchange cars with carriers by water engaging as does Seatrain in transportation through extraterritorial waters and through a foreign port and we can find nothing in the Act which authorizes the Commission to impose such a duty on the petitioners."

10. In holding that "Insofar as the order of the Commission * * * serves to compel petitioners to interchange cars with Seatrain for transportation beyond the

United States and its territorial waters, in foreign waters or to a foreign port, it must be modified and limited."

11. In concluding and holding that "The orders of the Commission are beyond the statutory power of the Commission insofar as they require petitioners to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extraterritorial waters, or to a foreign port. Neither the Interstate Commerce Act nor any other statute authorizes the Commission to require carriers by railroad to permit such use of their cars."

12. In concluding that "The orders of the Commission are based upon a mistake of law in that in making them the Commission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars for the transportation referred to" in paragraph 11, *supra*.

13. In entering its final decree, dated December 8, 1943.

14. In failing to hold that under the Transportation Act of 1940, the Commission has full power to require carriers by railroad and carriers by water to establish through routes and facilities for the operation of through routes for through transportation between points in the United States whether or not the vessels of the water carrier pass outside the territorial waters of the United States or through a foreign port and that this authority includes authority to require railroads to provide cars which may be used for such through transportation and consent to their interchange with water carriers and to require water carriers to do likewise.

15. In failing to hold that the adoption by Congress of the Transportation Act, 1940, following and in the light of the decision of the Commission in both Docket No. 25728, 206 I. C. C. 328 (1935) and Docket No. 25727, 226 I. C. C. 7 (1938), that it had jurisdiction to require the defendant railroads to interchange or permit the interchange of their cars with Seatrain in the performance of through trans-

portation, constituted legislative confirmation of the Commission's authority in this regard.

Summary of Argument

1. (a) The Interstate Commerce Act imposes a duty upon carriers to permit the interchange of their cars in the performance of through transportation over through routes as a part of the duty which the Commission can enforce to provide reasonable facilities for the operation of such through routes. The history of the Act indicates a progressive tendency on the part of Congress to impose upon carriers the duty to coordinate their lines and provide means of through transportation. Especially for the handling of carload freight, the interchange of cars is necessary for the through movement of the commerce of the country and the duty to permit such interchange has been recognized by the Commission and the courts. *Missouri & Illinois Coal Co.* v. *I. C. R. Co.*, 22 I. C. C. 39; *St. Louis S. W. Ry.* v. *Arkansas*, 217 U. S. 136, 145; *Chicago, Rock Island & P. Ry. Co.* v. *United States*, 284 U. S. 80.

The terms "transportation" and "facilities" as used in the Act have been construed as including cars. *Hastings Commercial Club* v. *C. N. & St. P. Ry. Co.*, 69 I. C. C. 489; *Assigned Car Cases*, 274 U. S. 564. Cars are facilities for through transportation by rail and water when the interchange of cars is the reasonable and efficient method of performing the through transportation.

(b) Railroads are under a duty to establish through routes with water carriers as well as with other railroads and therefore there is a corresponding obligation to provide facilities for through transportation by rail and water over such through routes. Indeed, the authority of the Commission is greater where water transportation is concerned than in the case of transportation all-rail. *United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457. Part III of the Interstate Commerce Act further amplified the Commission's jurisdiction with regard to through transportation by rail and water and the facilities therefor.

(c) The Commission has found that through routes in connection with Seatrain are required by the public interest, that one of the principal advantages of such through routes is the ability to ship freight in railroad cars without handling at the ports, and that the reasonable and appropriate method of interchanging traffic moving over such through routes is by the interchange of loaded cars. Petitioners have not contested the order of the Commission requiring the establishment of through routes in connection with Seatrain. Therefore, they are under a duty, which the Commission can enforce, to provide reasonable facilities for the operation of such through routes, which means that if they see fit to furnish their own cars for loading they must permit such cars to be interchanged with Seatrain's vessels.

(d) The so-called car service provisions of Section 1 of the Act do not limit the duty of the carriers nor the authority of the Commission with respect to the furnishing of reasonable facilities, including cars, for the operation of through routes with water carriers. Instead, the car service provisions add additional requirements with respect to the use and handling of cars. However, even if the only power of the Commission with respect to cars were derived from the car service provisions, these provisions are violated by the refusal of petitioners to permit the interchange of their cars with Seatrain in the performance of through transportation.

2. The fact that Seatrain's vessels in operating between New York and New Orleans pass outside the territorial waters of the United States and usually call at Havana does not diminish the duty of petitioners or the authority of the Commission with respect to transportation between points in the United States, and the court below erred in reaching a contrary conclusion. There is no substantial merit in petitioners' objection, since eight of them permit their cars to be interchanged with Seatrain for the handling of traffic to and from Cuba and all of them permit their cars to go to Cuba via the Florida East Coast

Car Ferry. The decision of the court below that the Commission is without jurisdiction to order petitioners to permit the interchange of their cars in the operation of through routes is inconsistent with its view that the Commission has jurisdiction over the through transportation. To hold that the Commission is without jurisdiction over through transportation or the reasonable facilities therefor where the vessels of a water carrier pass outside the territorial limits of the United States or pass through foreign waters in performing transportation between points in the United States would emasculate the jurisdiction of the Commission over rail and water transportation and be contrary to the declared purpose of the legislation. The amendments made by the Transportation Act, 1940, confirm the Commission's authority in such cases. The Commission's order does not involve an invalid attempt to exercise authority extraterritorially since Seatrain's vessels are American flag vessels and subject to American laws. *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. (2d) 663; *United States* v. *Rodgers*, 150 U. S. 249; *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 129. Moreover, the Commission's order does not operate extraterritorially in so far as petitioners are concerned.

3. The Commission's decision, determining that the established per diem rate paid by all carriers for the use of cars of others will constitute reasonable compensation to the petitioners for their cars when interchanged with Seatrain is a determination of a matter peculiarly within the functions of the Commission, is supported by substantial evidence and will not result in confiscation. The Commission's order is not invalid for the other reasons alleged by petitioners.

Argument

For the convenience of the Court, there are set out in this one brief the contentions of the Hoboken, Lower Coast, and Seatrain both as appellants in No. 47 and as appellees in No. 48.

POINT I

The District Court correctly held that the fact that Seatrain is a water carrier does not render invalid the Commission's order requiring petitioners to permit the interchange of their cars with Seatrain's vessels in the performance of through transportation over through routes prescribed by the Commission but found by it to be in effect.

A. The duty to permit the interchange of cars in the performance of through transportation over through routes is a part of the duty imposed by the Interstate Commerce Act and enforceable by the Commission "to provide reasonable facilities for the operation of through routes."

It must be emphasized that the Commission's order here in issue requires each of the petitioners to permit its cars to be delivered to Seatrain only when such cars are being used for the accomplishment of through transportation over a through route to which such petitioner is a party.

A through route, as the term is used in the Interstate Commerce Act, implies an arrangement between two or more carriers, entered into voluntarily or by compulsion of an order of the Commission, whereby a shipper may have his freight transported from a point of origin on the lines of one carrier to a point of destination on the lines of another without the necessity of any action on his part to accomplish the transfer of his freight from one carrier to the other at the point of junction between them. *St. Louis, S. W. Ry. Co. v. United States*, 245 U. S. 136.

It is obvious that the business of the country could not be transacted without such through transportation. A concern in Harrisburg, Pa., for example, could not effectively sell its products in Dallas, Texas, if it could ship only to

New York Harbor and were compelled to have an agent there to accept the goods and turn them over to another carrier for the movement beyond. Consequently, the history of the Interstate Commerce Act has been marked by the imposition upon carriers of progressively increasing obligations to provide the means of through transportation regardless of the private interests or wishes of individual companies.

Although prior to the passage of the Act to Regulate Commerce, a carrier, be it railroad or water line, was under no legal obligation to undertake through transportation to points beyond its own line or to provide facilities for the accomplishment of such through transportation, and it could refuse to issue a bill of lading calling for delivery on the line of another carrier, *Atchison, Topeka & Santa Fe R. R. Co.* v. *Denver & New Orleans R. R.*, 110 U. S. 667, 680; *Central Stock Yards* v. *Louisville &c. Ry.*, 192 U. S. 568, 571, nevertheless, with the passage of the Interstate Commerce Act, this condition was changed. And by the subsequent amendments of the Act carriers have been more and more required to integrate their facilities and an ever-increasing authority has been reposed in the Commission to weld the various separate carriers into a common machine to provide the advantages of through transportation between the different parts of the country.

Thus, an originating carrier is now prohibited from attempting by contract to confine its obligation to transportation over its own line. It is required to issue to a shipper through bill of lading and is made liable for any loss, damage or injury to property received by it and for failure to deliver such property at a destination upon the line of another carrier, even if the loss shall occur while the goods are in the possession of the latter (Section 20(11)).

Section 1(4) of the Act specifically imposes upon carriers subject to its provisions the obligation to establish and maintain through routes for through transportation

upon reasonable request therefor and "to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to their operation."

By Section 3(4), carriers subject to Part I of the Act, which include petitioners, are required

> "according to their respective powers [to] afford all reasonable * * * facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of * * * property to and from connecting lines; * * *."

The term "connecting lines" is defined as including "any common carrier by water subject to Part III."

By Section 15(3), the Commission is empowered, and it is made its duty "whenever deemed by it to be necessary or desirable in the public interest", to

> "establish through routes * * * by carriers by railroad * * * and common carriers by water * * *, and the terms and conditions under which such through routes shall be operated."

Section 15(8) provides that where "through routes and through rates shall have been established * * * it shall thereupon be the duty of the initial carrier to * * * issue a through bill of lading" in accordance with the shipper's direction and that

> "it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier * * *."

Section 305(b) makes it the duty of common carriers by water

> "to establish reasonable through routes * * * with common carriers by railroad, * * * and to provide

reasonable facilities for operating such through routes, * * *."

And by Section 307(d) the Commission is again empowered to

"establish through routes * * * applicable to the transportation of * * * property by common carriers by water * * * and carriers by railroad * * * and the terms and conditions under which such through routes shall be operated."

Certainly these provisions indicate every intention on the part of Congress that all appropriate arrangements and facilities shall be provided for through transportation over the lines of several connecting carriers and that the Commission shall have broad powers to bring this about.

It is obvious that the accomplishment of such through transportation would be greatly impeded, if not completely defeated, if carriers, notwithstanding their obligation to issue through bills of lading and to establish and maintain through routes for through transportation, could refuse to allow the freight cars owned by them, when they constitute the necessary vehicles for the efficient performance of the through transportation, to go off their own lines.

It was long ago determined, as the result of practical experience, that the free interchange of freight cars was so necessary for the accomplishment of the through transportation required by the commerce of the country that all of the railroads should adopt a standard gauge which would make such interchange physically possible. However, there would be no object in a standard gauge if when a car reached a junction point the owning railroad might assert its ownership of the car as justifying its refusal to permit the car to be delivered to a connection for the purpose of completing the through transportation called for by the shipper. In the case of carload shipments especially, the through movement of the cars is one of the essentials of transportation upon which shippers have become accustomed to rely. Railroad tariffs ordinarily provide that

shippers shall load and consignees shall unload carload freight, relieving the railroads from the burden and expense of actually placing such freight in the cars. *Loading and Unloading Carload Freight*, 101 I. C. C. 394, 396. Consequently when a shipper asks for a car in which to make a carload shipment of machinery, grain, shoes, or some other commodity to a destination upon the line of some other and distant carrier, he expects that, barring accidents or contingencies occurring in the physical operation, his goods will go forward to destination in the car in which he loads them and without being handled and disturbed at junction points en route, with the risk of damage or loss which such handling inevitably involves. This is the essence of ordinary carload transportation under through carload rates maintained by the carriers, and it would be set at naught if the originating carrier, having furnished one of its own cars for loading, could, when the car reached the junction point with the next carrier on the route, refuse to permit the car to go off its rails, giving its ownership of the cars as the excuse, and could insist that the freight be unloaded and transferred to another car.

Hence we find in the decisions a consistent recognition that the duty to provide through transportation carries with it a duty to permit cars to be interchanged.

Shortly after the adoption of the Act, several cases came before the Federal courts in which the question arose whether a railroad was under an obligation to interchange cars. It was held that Section 3(2) (now Section 3(4)) so required. *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730; *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 746; *Chicago, Burlington, etc., Ry. Co.* v. *Burlington, Cedar Rapids & Northern Ry. Co.*, 34 Fed. 481. The decisions in these cases were cited with approval in *Peoria Ry.* v. *United States*, 263 U. S. 528, 535. In *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.*, 22 I. C. C. 39, the Commission held that a railroad violated the Act in prohibiting, by embargo, its cars from going off its rails.

In its opinion, the Commission said (p. 44):

"There can be little doubt as to the duty of the carriers under the present Act. The commerce of the country is regarded as national, not local, and the railroads are required to serve the routes which they have established, or which they may have been required to establish, in connection with other carriers, without respect to the fact that this may carry their equipment beyond their own lines. In the opening section of the Act, is to be found this mandate: '(here the Commission cited those provisions of the Act requiring the establishment of through routes and the furnishing of facilities for their operation, which provisions will now be found in Sec. 1(4)).' "

Continuing, the Commission remarked, at page 45:

"It would be difficult to draft language more direct than this, or language that would more clearly express the intent of Congress that our commerce shall flow freely, in established channels, without hindrance, embarrassment or delay. Supplementing this provision, the Act proceeds in this broad and inclusive language • • •." (citing what is now Section 1(4))

At pages 46 and 47, the Commission, referring to the provisions of what is now Section 3(4), said:

"Reading these provisions together, there can be no doubt as to the intent of Congress. Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other. The full burden of this great obligation is in the first instance cast upon the carriers themselves. In compliance with these recognized requirements of the law the carriers have undertaken to establish a body of rules and by cooperation in their enforcement insure the fulfillment of the law's demands. The duty of the initial carrier to furnish equipment for a shipment which moves on to other lines is universally

> recognized, and in cases where that is impracticable or deemed unwise the carriers assume to bear the burden of the transfer from the equipment of one line to that of the other. By agreement the carriers have fixed the rental value of a car for their own purposes at 30 or 35 cents a day. That rental, together with the rules governing the movement of foreign equipment (equipment not belonging to the line upon which it stands), is presumed to secure the return to the initial carrier of its own equipment."

In *St. Louis, S. W. Ry.* v. *Arkansas*, 217 U. S. 136, this Court, although reversing the decision of the lower court on other grounds, quoted with approval the following from the lower court's opinion (pp. 145-146):

> " 'The evidence indisputably establishes that it is a benefit to the shipping public to interchange cars and not to refuse to send cars off the line * * *. It is unquestionably good for the public that the railroads of the United States have a system of interchange of cars, instead of each road hauling to its termini only, and thereby force reloading and reshipment. The inconvenience and expense of such a system would at once condemn it as failing to meet public requirements. It is unquestionably the policy of both State and Federal legislation to facilitate, if not require, an interchange of cars. The most recent illustration of this policy is found in section 17, act April 19, 1907 (Acts 1907, p. 463). For one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers.' "

Thus we find, from the early days of the Interstate Commerce Act, recognition by the courts and the Commission that the Act imposes upon carriers subject to its provisions the duty, which the Commission must enforce, to permit their cars to be delivered to others, and that this duty and power are derived from and are incidents of the duty and authority with respect to through routes, reasonable facilities therefor, and reasonable facilities for interchange.

The correctness of this view was confirmed by this Court which in 1931 in *Chicago, Rock Island & P. Ry. Co.* v. *United States*, 284 U. S. 80, citing the Commission's decision in the *Missouri & Illinois* case, said (p. 91):

> "Nor is it disputed that under the law, in the operation of through routes, common carriers subject to the Interstate Commerce Act may be obliged to permit their car equipment to be carried beyond their own lines. See Missouri & Illinois Coal Co. *v.* Illinois Central R. Co., 22 I. C. C. 39."

In the dissenting opinion of Mr. Justice STONE, concurred in by Justices HOLMES and BRANDEIS, it was said (pp. 101-102):

> "In 1886, the adoption by the southern railroads of standard gauge track removed the last physical barrier to free interchange of equipment throughout the nation; and in 1911 a rule which the railroads had long before come to recognize as a necessity of commerce was declared to be an obligation of law, when the Interstate Commerce Commission, under the amended Interstate Commerce Act, decided that carriers could not refuse to permit their freight cars to pass onto rails of connecting carriers. *Missouri & Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39; See *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 217 U. S. 136, 145, 146, 148. The obligation has never since been doubted, and the power to regulate it is exclusively vested in the Commission. *Assigned Car Cases*, 274 U. S. 564; *United States* v. *New River Co.*, 265 U. S. 533."

It is clear from the decisions cited that it was considered that the obligation to furnish cars for through transportation and to permit the interchange of such cars in the accomplishment of such through transportation was imposed by the provision of Section 1(4) making it the duty of carriers "to provide reasonable facilities for operating such routes." It has been suggested by petitioners that cars are not "facilities" within the meaning of this

language. However, it is difficult to imagine what might be considered "facilities" for through transportation if cars are not embraced within the intent of this term. Indeed, it has been consistently held by the Commission and the courts that cars *are* "facilities" within the language quoted.

The term "transportation" is defined in Section 1(3) of Part I as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and *facilities* of shipment or carriage irrespective of ownership * * *." In *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, this Court stated that freight cars are "*facilities* of transportation" as defined in Section 1(3).

In *Missouri & Illinois Coal Co.* v. *I. C. R. Co.*, *supra*, the Commission, in reaching its conclusion as to the duty to interchange cars, cited Section 3(2) (now Section 3(4)), and referred to the duty imposed thereby to "furnish the necessary *facilities* for transportation, * * *."

In *Hastings Commercial Club* v. *C. M. & St. P. Ry. Co.*, 69 I. C. C. 489, 494, the Commission said:

> "*Cars* and trains were said to be *facilities* in *Little Rock & Ft. S. Ry. Co.* v. *Oppenheimer*, 64 Ark. 271 * * * a switch engine used only and entirely for handling freight at a terminal is clearly a terminal facility."

In *City of Nashville* v. *Louisville & N. R. R. Co.*, 33 I. C. C. 76, it was held (p. 85) that

> "the interchange of *cars* are thus expressly included among the *facilities* for the interchange of traffic which the second paragraph of Section 3 (now Sec. 3(4)) in turn requires carriers to afford to all connecting carriers equally * * *."

In *Assigned Cars for Bituminous Coal Mines*, 93 I. C. C. 701, it was held:

> "Private *cars* which are paid for by carriers for use and are used on the lines are clearly '*facilities* possessed,' * * *." (p. 730)

The language of the opinion in *Assigned Car Cases*, 274 U. S. 564, leaves no doubt that this Court regarded cars as facilities. There it was said (p. 575):

> "Likewise Congress may prescribe how carrier-owned *cars* shall be used. The regulation prescribed does not invade the private business affairs of the carrier. It merely limits the use of certain interstate transportation *facilities.*"

Further at page 580 the Court said:

> "It found also that the use of private cars tends more and more to produce inequalities in the use of *other facilities*, such as locomotives, tracks, and terminals; and that many, at least, of the so-called car shortages have been due to * * * a shortage of *such other facilities.*" (Italics ours.)

We submit therefore that the Interstate Commerce Act clearly evidences the intention of Congress that carriers shall be under a broad duty, enforceable by the Commission, to establish through routes for through transportation and to provide the facilities for such through transportation, and that, in the nature of things, such "facilities" must include cars which may be interchanged, when this is the reasonable, efficient and desirable method of accomplishing through transportation. We submit that these are duties which exist quite apart from the further and more specialized duties imposed by the so-called car service provisions of Section 1 which are discussed hereafter.

B. **The obligation to establish and maintain through routes and provide reasonable facilities, including cars, for the operation thereof exists and is enforceable with respect to through transportation via rail and water carriers.**

It follows from the previous point that if a duty is imposed by the statute upon railroads to establish and maintain through routes for through transportation in connection with their lines and the lines of water carriers, there is a correlative obligation to provide, jointly with the water

carriers, whatever facilities may be reasonable for the operation of such rail and water through routes. And it follows, further, that when it shall so happen, as in the case of Seatrain, that the interchange of cars constitutes the reasonable and economical method of accomplishing through transportation on such through routes, the same duty exists to permit such interchange and to furnish cars which can be so interchanged in the performance of through transportation as exists with regard to through transportation over all-rail routes.

Petitioners have not contested their obligation, pursuant to the Commission's order in Docket No. 25727, to establish and maintain through routes for through transportation via their lines and Seatrain. Neither have they taken exception to the Commission's findings that the advantages of these routes to the shipping public are in large part the result of the ability to have freight shipped by water in railroad cars without handling at the ports. Their argument here, therefore, comes to this: that although the statute imposes upon them an obligation which the Commission can enforce to establish and maintain through routes for through transportation in connection with Seatrain, which obligation is in no way nullified because Seatrain is a water carrier, nevertheless, in so far as cars owned by themselves are concerned, they are not under the same duty to provide reasonable facilities for the operation of such through routes as would exist where all-rail transportation is involved.

We submit, however, that the Commission has as full, and indeed more complete, authority with respect to through routes between railroads and water carriers and the facilities for and terms and conditions of their operations, as it has in relation to through routes between railroads only. This was plain as the statute stood when Hoboken and Lower Coast filed their complaints with the Commission. It is even more clear under the law today as it was amended by the Transportation Act of 1940.

Neither Section 1(3) and (4) nor Section 3(4), previously cited, making it the duty of carriers subject to the Act

to provide "transportation", defining transportation as including "cars, and other vehicles", and requiring carriers "to establish through routes * * * and to provide reasonable facilities for operating through routes" and to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines", by its language limits the obligations of carriers to through routes only in connection with railroads. They have been consistently construed as imposing equal obligations in connection with transportation by rail and water.

Flour City S. S. Co. v. *Lehigh Valley R. R. Co.*, 24 I. C. C. 179;

Chattanooga Packet Co. v. *I. C. R. R. Co.*, 33 I. C. C. 384;

Pacific Navigation Co. v. *Southern Pacific Co.*, 31 I. C. C. 472.

In the last cited case, the Commission said (p. 481):

> "By maintaining through routes and joint fares with the Pacific Coast Steamship Company and the San Francisco & Portland Steamship Company and refusing to establish through routes and joint fares with complainant, defendants are violating section 3. They are not affording equal facilities for the receiving, forwarding, and delivering of passengers to and from their lines and those connecting therewith."

Moreover, even before the Transportation Act of 1940, Congress gave the Commission greater authority where through transportation by rail and water was concerned than it possessed under the clauses previously quoted. By the Panama Canal Act, so-called, of 1912, Congress added sub-division 13 to Section 6 of the Interstate Commerce Act, providing in part as follows:

> "(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers,

and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, *in addition to the jurisdiction given by the Act to regulate commerce*, as amended June eighteenth, nineteen hundred and ten:

"(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this part.

"(b) *To establish through routes* and maximum joint rates between and *over such rail and water lines*, and to *determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced*." (Italics ours.)

The authority thus granted to the Commission by paragraph (b) to establish through routes between a railroad and a water carrier and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic involved, was certainly broad enough to enable the Commission to require a railroad to permit its cars to be used for the handling of the traffic. Such authority was no more drastic than that provided by para-

graph (a), which empowers the Commission to require a railroad to construct a track to the pier of a water carrier, *United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457. In that case, the Court, speaking through the present Chief Justice, said (p. 462):

> "The Panama Canal Act is by its terms supplemental to the Act to Regulate Commerce, and its obvious purpose was to extend to rail carriers connecting with water carriers in interstate commerce the requirements of § 1, par. 9 of the earlier acts, c. 3591, 34 Stat. 585, 586; c. 309, 36 Stat. 547, for furnishing switching and car service to lateral branch railroads and private sidetracks. By § 6, par. 13, so far as pertinent to the present inquiry, the commission is given authority to establish physical connection between the lines of the rail carrier and the dock of the water carrier, and to determine and prescribe the terms and conditions upon which the connecting tracks should be operated. It 'may either in the construction or the operation of such tracks determine what sums shall be paid to or by either carrier.'"

Had Congress not intended the foregoing language to carry with it the power to determine "*all* the terms and conditions" but to convey only authority to determine certain terms and conditions other than the use of cars, it could and should have made an appropriate exception by the language of the statute. While Seatrain's type of ships was not then in operation, there were many water carriers found by the Commission to be such which handled freight in cars and performed transportation of freight in through routes by the interchange of cars. *Pennsylvania Co., Operation of Transportation Co.*, 34 I. C. C. 47; *Grand Trunk Ry. Co. of Canada, Operation of Car Ferry Co.*, 34 I. C. C. 49; *Buffalo R. & P. Ry. Co., Operation of Car Ferry Co.*, 34 I. C. C. 52; *Grand Trunk W. Ry. Co., Operation of Car Ferry Co.*, 34 I. C. C. 54.

If there were any doubt as to the duty of carriers by railroad and water to establish through routes and provide

reasonable facilities for their operation, and of the Commission's authority to enforce this duty before the passage of the Transportation Act, 1940, adding Part III to the Interstate Commerce Act and bringing water carriers generally under the regulatory jurisdiction of the Commission, such doubt was clearly removed by that Act. First of all, Congress enacted a very emphatic declaration of policy, by which it declared:

> "National Transportation Policy
>
> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—*all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*" (Italics ours.)

Then it amplified paragraph (4) of Section 1 to eliminate any question that it imposed upon railroads the duty to provide for through transportation in connection with water carriers by the addition of the following clause:

> "and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through

routes with common carriers by water subject to part III, * * *."

Paragraph (4) was re-enacted to provide further:

"It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; * * *."

New Part III of the Act imposed correlative duties on water carriers. Section 305(b) makes it

"the duty of common carriers by water to establish reasonable through routes * * * with common carriers by railroad, * * * and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto."

If the duty is imposed by the Act on carriers, the Commission has the power to enforce it. And this, too, is made plain by the language of the statute as it now is. By paragraph (3) of Section 15, the Commission is empowered and directed to

"establish through routes * * * applicable to the transportation of * * * property * * * by carriers by railroad subject to this part and common carriers by water subject to part III, * * * and the terms and conditions under which such through routes shall be operated."

and by Section 307(d) the Commission is empowered and directed to

"establish through routes * * * applicable to the transportation of * * * property by common carriers by water * * * and carriers by railroad * * * and the terms and conditions under which such through routes shall be operated."

It follows that the fact that Seatrain is a water carrier does not diminish but, if anything, increases the duty of the petitioners, and the authority of the Commission to require them, to establish through routes and provide reasonable facilities for their operation. And if the interchange of cars constitutes the efficient and desirable method of performing such through transportation, then cars which may be so interchanged are as much the reasonable "facilities" to be provided as in the case of through all-rail transportation.

On page 24 of their brief, petitioners assert that although cars may be "facilities" where all-rail transportation is concerned, "freight cars have never been considered facilities of carriage on ocean-going ships." The record shows, however, that before Seatrain's time freight cars were used for the through transportation of freight by water carriers (R. 48). The American Railway Association itself, in promulgating so-called Car Service Rule 4, which provided the machinery whereby the petitioners gave effect to their refusals to permit the interchange of their cars with Seatrain, listed a substantial number of water carriers with whom interchange of cars was contemplated. It is true, of course, that the Seatrain ships were in one sense a new development and made possible the carriage of freight in cars in the holds of the vessels. But to argue that because cars had not previously been so handled, therefore they were not "facilities" for the operation of through routes, is the equivalent of saying that the word "facilities" embraces only such equipment as was in use at the time the statute was enacted. On such reasoning, a Diesel locomotive, a container car, or a new unloading device would not be "facilities" within the language of the Act.

Petitioners did not challenge the Commission's finding that the interchange of cars constitutes the reasonable and efficient method of accomplishing through transportation in connection with Seatrain. Certainly in the case of Seatrain cars are reasonable facilities for through transportation over through routes.

C. **The Commission has found that the establishment and maintenance of through routes for through transportation in connection with Seatrain are required by the public interest and that the interchange of cars with Seatrain constitutes the reasonable and efficient method of accomplishing the through transportation. These findings are not challenged and amply support the Commission's order.**

This case cannot properly be considered in a vacuum apart from the actual facts regarding Seatrain's services and their advantages as found by the Commission.

In Docket No. 25727, 226 I. C. C. 7, the Commission found that:

> "Even if it were held that through routes do not now exist in connection with Seatrain, the record shows that the establishment of such routes and of joint rates over same would be in the public interest and should be prescribed."

Again, in the same proceeding, it determined that

> "the establishment and maintenance of through routes (with Seatrain) are necessary in the public interest."

The Commission in Docket No. 25727 also found, as is perfectly obvious from the very nature of Seatrain's ships and facilities,

> "that the reasonable and appropriate method of interchanging traffic moving over such routes is and will be by the interchange of the loaded cars."

Some of the principal advantages of such routes result from the fact that Seatrain's vessels are equipped to handle freight in railroad cars, and that thereby shippers are

> "saved packing and handling expenses necessarily incurred if the movement is over break-bulk water routes; that certain classes of bulk freight which cannot be handled in vessels of the usual type and which cannot bear all-rail charges can be handled by Seatrain and

thus markets opened up which theretofore could not be reached, * * *." (226 I. C. C. 7, 20) (R. 85, 86)

To all of the foregoing findings the petitioners have taken no exception and pursuant thereto they have joined in establishing through routes and joint through rates for through transportation via Seatrain. Certainly these are equivalent to a finding that for such through transportation cars constitute "reasonable facilities".

How can it now be said that the Commission, having found that the interchange of cars is the reasonable method of accomplishing through transportation in connection with through routes via Seatrain, has no power to make such interchange compulsory? Such a conclusion would enable petitioners and others to defeat the declared purpose of the Act.

The arguments of our opponents rest, as we submit, upon a misconception of the legal and practical situation and of their obligations as carriers, parties to arrangements for through routes and through transportation. The correct view, as we conceive it, can perhaps be illustrated by a hypothetical example.

As we have said, the Pennsylvania Railroad, pursuant to the order of the Commission in Docket 25727, which it did not contest, entered into arrangements for through routes via Seatrain. Thus, presumably, it entered into such an arrangement with the Erie Railroad, the Hoboken Manufacturers Railroad, Seatrain, the New Orleans and Lower Coast Railroad, and the Missouri Pacific Railroad for the establishment and maintenance of a through route for through transportation from Harrisburg, Pa., to Dallas, Texas.

Let it be supposed that a shipper at Harrisburg desiring to ship over this route notifies the Pennsylvania Railroad that he has a carload of goods to be transported to a consignee in Dallas over this through route, and requests that a car be furnished for the loading of his goods for such through shipment. What are the obligations of

the several carriers in fulfillment of their duty to provide reasonable facilities for operating this through route?

It has been held that in a certain sense the obligation and undertaking of carriers which maintain through routes for through transportation is joint. *L. & N. R. R.* v. *Sloss-Sheffield*, 269 U. S. 217, 232-234. The nature of the obligation of each carrier in the through route and the facilities which it is reasonable for it to provide must, however, depend upon its particular situation.

Before the through movement of the goods can even begin, a car must be provided for the purpose. The obligation to furnish the car is on the originating carrier, the Pennsylvania.

Plainly, in view of the Commission's unchallenged findings, the Pennsylvania, knowing the shipper's desire, being itself party to the through route and the joint through rates, and issuing a through bill of lading for through transportation via Seatrain does not furnish a reasonable facility for the operation of the through route if it provides a car which may not be used for through transportation but may be hauled only as far as New York Harbor.

The Pennsylvania could, of course, furnish to the shipper in Harrisburg a car owned by some other railroad which had consented to the use of its cars for through transportation in connection with Seatrain. If it elects, however, to supply the shipper with one of its own cars, then we submit it does not fulfill its obligation if it attaches to that car the condition that on the basis of its ownership of the car it will prohibit the car, after it has reached Hoboken, from being delivered to Seatrain's vessel for the through carriage of the goods.

It is also necessary to consider the situation in the case of a shipment in the reverse direction. Suppose a man in Dallas desires to send a shipment to a consignee in Harrisburg. The Missouri Pacific has an empty Pennsylvania car on its line at Dallas. Under the car service rules it is obligated to return that car to the Pennsylvania. Can it be said that the Pennsylvania, as a party with the Missouri

Pacific to the through route from Dallas to Harrisburg via Seatrain, does its share in providing reasonable facilities for the operation of that route if it insists that its car may not be used for the through shipment but must either be returned empty or unloaded at New Orleans and that the Missouri Pacific must furnish one of its own cars for the through shipment? The answer is plainly in the negative.

D. The so-called "car service" provisions of the Act do not, because Seatrain is a water carrier, relieve petitioners of the duty to permit the interchange of cars owned by them with Seatrain in the performance of through transportation over through routes.

It remains to consider the argument which petitioners have made based upon their "history" of the Act, and upon the language of the so-called "car service" provisions, paragraphs (10)-(17) of Section 1, added thereto by the Esch Car Service Act of 1917.

Briefly, they contend, (a) that cars are not embraced within the term "facilities for the operation of through routes" which the carriers are obligated to provide; (b) that since paragraphs (10)-(17) refer to "car service", therefore the only power the Commission now has as to the furnishing and use of cars is derived solely from these provisions and, (c) that the language of these provisions excludes any idea that the Commission has authority to require the delivery of cars to a water carrier. We will answer these contentions briefly in order.

(a) As we have argued in Point A, the contention that cars are not embraced within the term "facilities" does violence to ordinary sense. It is in conflict with the obvious inference from the language of Section 1(3) providing that

> "The term 'transportation' * * * shall include * * * cars * * * and all instrumentalities and facilities of shipment or carriage, * * *."

And it is contrary to the decisions of the Commission and the courts in which cars have been held to be "facilities",

as that word is used in Sections 1(4), 3(4) and other provisions of the statute.

Petitioners contend (Brief, p. 32) that even in *Missouri & Illinois Coal Co. v. Illinois Central R. R. Co.*, 22 I. C. C. 39, the Commission did not decide that the provisions of the Act making it the duty of railroads to provide reasonable "facilities" for the operation of through routes obligated them to permit the interchange of their cars. But this Court did not so view the matter when, in *Chicago, Rock Island & P. Ry. Co. v. United States*, 284 U. S. 80, 91, it cited the *Missouri & Illinois* case as authority for the proposition:

> "that under the law, in the operation of through routes, common carriers subject to the Interstate Commerce Act may be obliged to permit their car equipment to be carried beyond their own lines."

When the *Missouri & Illinois* case was decided, the "car service" provisions had not yet been enacted and the duty to permit the interchange of facilities existed only because of the obligations imposed by Section 1(4) and 3(4) "to provide reasonable *facilities* for operating such (through) routes" and to "afford all reasonable, proper and equal *facilities* for the interchange of traffic."

In the previous point, we have also answered petitioners' argument that cars are not "facilities" where water transportation is concerned. Whether they are "reasonable facilities" obviously depends upon the nature of the water carrier in any particular case. The Commission has, in effect, found that they are "reasonable facilities" for through transportation via Seatrain, and since that decision is both patently correct and amply supported by evidence it is not subject to reversal here.

(b) The fact that "cars" are plainly embraced within the term "facilities" disposes of petitioners' argument that the only duty and authority with respect to cars are such as are provided for in the "car service" provisions.

Petitioners' argument to the contrary would require the conclusion that in enacting the car service provisions Con-

gress intended to diminish the duty of carriers with respect to cars and to curtail the authority which the Commission previously possessed to require the interchange of cars in the performance of through transportation as a part of its jurisdiction to require the provision of adequate facilities for the operation of through routes. It is inconceivable that Congress had such an intention. On the contrary, it seems plain that the Esch Car Service Act, which wrote the car service provisions into the Interstate Commerce Act, was designed to impose upon railroads duties in addition to those previously resting upon them and to increase rather than reduce the Commission's authority. For example, it appears from the *Car Supply Investigation*, 42 I. C. C. 657, the result of which led directly to the enactment of the car service provisions, that the Commission considered that it already had jurisdiction to require the *delivery* of cars but that further legislation was needed in order to make it the duty of the carriers to provide reasonable rules for the *return* of cars. Thus the Commission said (p. 672):

> "The power of the Commission to require a carrier to permit its cars to move from its line to the rails of a foreign line is thus clearly defined, and it is a necessary corollary that the observance of a reasonable rule for the return of such cars to the owning line may also be required."

It also used the following language, which applies directly to the case at bar (p. 674):

> "It would indeed be an anomaly if certain carriers could with impunity violate section 1 by failure to observe reasonable rules for the 'exchange, interchange, and return of cars,' and by so doing prevent other carriers from furnishing the transportation upon reasonable request which is required by the same section."

It will be noted, moreover, that the car service provisions relate to matters which have no direct connection to the operation of through routes. Therefore, the inference is plainly justified that Congress intended by the car ser-

vice provisions to impose duties upon the carriers and give authority to the Commission not in substitution or diminution of, but in addition to, those previously existing.

(c) We submit that the car service provisions themselves are not to be construed as leaving petitioners free from any duty to permit the interchange of their cars in the performance of through transportation over through routes with water carriers.

It is true that the car service provisions by their language are directed to railroads. By paragraph (10) the term "car service" is defined as including the "use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles • • • by any carrier by railroad". Paragraph (11) makes it the duty only "of every carrier by railroad" to furnish safe and adequate car service. By paragraph (13) the Commission is authorized to require only "carriers by railroad" to file with it "their rules and regulations with respect to car service". But this does not mean that the car service rules which railroads are thereby required to maintain and observe shall relate only to the interchange of cars with other railroads or that they are reasonable rules if they preclude the interchange of their cars with water carriers in the accomplishment of through transportation over through routes with such water carriers, where the interchange of cars constitutes the desirable and efficient method of performing the through transportation.

There is nothing in paragraph (10) defining "car service" which renders the car service provisions inapplicable and of no effect where a water carrier is concerned. The "interchange" referred to therein is, of course, defined as interchange *by* a "carrier by railroad," but the statute does not say that this means only interchange *with* another carrier by railroad. The word "use" means "use" by a railroad, but is a railroad not using a car when it furnishes the car to a shipper for through movement and later when it delivers that car loaded with freight to a connecting carrier, whether by rail or by water, in order to complete

a through transportation undertaking which the railroad has contracted to carry out? The terms "supply" and "distribution" plainly do not mean supply and distribution only to other railroads. They relate, for example, to supply and distribution to shippers. This is clear from paragraph (12), in which the word "distribution" is again used, obviously in the sense of distribution not to railroads but to shippers. *Assigned Car Cases*, 274 U. S. 564.

Moreover, we submit that a car service rule under which the Pennsylvania refuses to allow the Missouri Pacific in the hypothetical case described in the previous point to use an empty Pennsylvania car for the transportation of a through shipment from Dallas to Harrisburg via Seatrain would plainly be an unreasonable car service rule in violation of the car service provisions.

We submit, therefore, that petitioners' argument does not warrant the conclusion that because Congress enacted the car service provisions it thereby freed petitioners from all duty to furnish for through transportation in connection with a water carrier, cars which may be interchanged with that water carrier where such interchange constitutes the desirable and efficient method of performing the through transportation. Nor can it be validly argued that the enactment of these provisions gives petitioners the right, when they should see fit to furnish one of their own cars to a shipper for a through shipment over such a through rail and water route, to adopt and enforce a car service rule under which they may assert their ownership of the car as a reason for prohibiting its delivery to the water carrier and for compelling the unloading of the freight at the point of interchange with the water carrier. Neither can it be said that the car service provisions gave petitioners the further right to impose burdens upon other railroads, parties with them to through routes, by prohibiting such other railroads from using petitioners' cars for through shipments over such routes.

POINT II

The fact that Seatrain's vessels in operating between New York and New Orleans pass outside the territorial waters of the United States and usually call at Havana does not diminish the duty of petitioners or the authority of the Commission with respect to the interchange of cars for the performance of through transportation between points in the United States. The Court below erred in reaching a contrary conclusion.

A. There is no substantial factual basis for petitioners' objection to the Commission's order.

In considering this point, it is well to recall that when Seatrain (or its predecessor) was operating only between New Orleans and Cuba all of the petitioners permitted their cars to be interchanged with Seatrain's vessels for transportation to and from Cuba (R. 45), that eight of them still permit their cars to be used for through transportation to and from Cuba via Seatrain (R. 81), and that all of them permit their cars to be used for through transportation to and from Cuba via the Florida East Coast Car Ferry (R. R. 188, 501-506). In short, in asserting that they should not be required to permit the delivery of their cars to Seatrain because Seatrain's ships, in the performance of through interstate transportation between points in the United States, usually call at Havana, petitioners cannot be seriously concerned with any objection of practical substance.

This is confirmed by the further fact that the evidence affirmatively shows and the Commission found that cars containing through interstate freight remain in Seatrain's vessels when they call at Havana, that the cars are not in any way disturbed and that the Cuban government has not attempted to interfere with them in any way (R. 1150).

B. **The decision of the lower court and petitioners' argument are inconsistent with the admitted jurisdiction of the Commission to prescribe through routes and joint rates, and with the practical construction given to the statute by the Commission.**

Petitioners here did not, on the ground that Seatrain's vessels pass outside the three-mile or the ten-mile limit and ordinarily call at Havana, contest the Commission's authority to require them to join with Seatrain in establishing through routes for through transportation and in publishing joint through rates for such through transportation, nor did they challenge its order directing them to issue through bills of lading for such through transportation.

We submit that if the Commission has authority to require these things where the vessels of a water carrier go beyond territorial waters, it has equal authority to require the furnishing of reasonable facilities for the operation of the through routes so prescribed.

Moreover, on this view of the matter, the decision of the lower court and the contentions of petitioners are in conflict with the practical construction given to the Act by the Commission, which we submit is entitled to great weight. For in numerous cases the Commission has ordered the establishment of through routes and joint rates by railroads in connection with water carriers for transportation between points in the United States where the water carriers necessarily operate outside the territorial waters of this country. *Pacific Navigation Co. v. Southern Pacific Co.*, 31 I. C. C. 472; *Eastern Shore Development S. S. Co. v. B. & O. R. R.*, 32 I. C. C. 238; *Colonial Navigation Co. v. N. Y. N. H. & H. R. R.*, 50 I. C. C. 625; *Chicago, R. I. & P. Ry. v. United States*, 274 U. S. 29. And the Commission has also not hesitated to require the establishment of through routes and joint rates for transportation by railroads and water carriers between points in the United States where the water carriers in the nature of things have passed through

territorial waters of another country. Such is the case with all water carriers plying between upper Great Lakes ports and Erie ports, since, as the maps clearly indicate, the ship channels are to a large extent upon the Canadian side of the international boundary. *Flour City S. S. Co.* v. *L. V. R. R. Co.*, 24 I. C. C. 179. Ships operating between the Atlantic and the Pacific coasts not only pass beyond the three-mile or the ten-mile limit but often pass through territorial waters of other countries, and yet, as in the *Pacific Navigation Co.* case, *supra*, the Commission has ordered the establishment of through routes in connection with such carriers.

C. **To hold that the Commission is without jurisdiction to require the furnishing of reasonable facilities for the operation of through routes by rail and water where the water carrier goes beyond the territorial limits or passes through foreign waters would be contrary to the history and purpose of the legislation and to the provisions written into the Act in 1940.**

This Court will realize that, in the nature of things, the vessels of water carriers in the coastwise and intercoastal trades must go on the high seas beyond the limits of territorial waters, as tested by any of the standards which have usually been employed, and that the water carriers operating on the Great Lakes—for example, between Buffalo and Chicago or Duluth or between Oswego, New York, and Cleveland—pass through Canadian waters, since at various points the ship channels are on the Canadian side of the international boundary (R. 85). Hence, if the Commission were without power to require a carrier to provide reasonable facilities for the operation of through routes by rail and water between two points in the United States, where vessels pass outside of domestic territorial waters, or traverse waters under the sovereignty of another nation, the powers of the Commission over rail and water transportation would be largely non-existent.

In order to reach its conclusion that such really is the legal situation, the lower court was forced to argue that the Transportation Act, 1940, actually diminished the Commission's jurisdiction with regard to through transportation by rail and water. Such reasoning, however, is directly opposed to the plain purpose of Congress to broaden the regulatory authority of the Commission and to bring all transportation, both by land and water, under its jurisdiction. Indeed, the Transportation Act, 1940, far from reflecting any intention to reduce the Commission's authority, represented the latest action on the part of Congress in a long history of progressively increasing the integration of the different facilities of transportation and the Commission's jurisdiction over them. It reflected also the continuous watchfulness on the part of Congress that the railroads should not be able to use their great power to destroy competing transportation instrumentalities and particularly water carriers.

When the Panama Canal was opened to provide the means of water transportation between the opposite coasts of this country, Congress was on its guard lest the railroads, by themselves obtaining control of water carriers or refusing to establish arrangements with them for through transportation, should prevent the public from enjoying the great benefits offered by the Canal. Therefore, Congress enacted the Panama Canal Act of August 24, 1912 (37 Stat. L. 568, U. S. Code, Title 49, Section 51). This Act had two important provisions. First, it contained the clauses which were added to Section 5 of the Interstate Commerce Act prohibiting a railroad, without the approval of the Commission, from owning an interest in a water carrier with which the railroad did or might compete. By the second provision it added clauses to Section 6 of the Interstate Commerce Act designed to increase the jurisdiction of the Commission where through rail and water transportation should be involved.

Until that time the Commission had had jurisdiction of through transportation by water only when used with rail-

road transportation "under a common control, management, or arrangement for a continuous carriage or shipment" (Section 1(1)(2)). Section 1(2) confined the application of the Act to transportation "only in so far as such transportation takes place within the United States." However, by the Panama Canal Act, Congress provided that "in addition to the jurisdiction given by the Act to regulate commerce"

> "When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise * * * the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars."

It must be assumed that in referring to transportation "by rail and water through the Panama Canal or otherwise", Congress well understood that water carriers operating between the Atlantic and Gulf ports or between the Atlantic and Pacific coasts or on the Great Lakes, who might engage in transportation "from point to point in the United States by rail and water through the Panama Canal or otherwise", necessarily could not confine the movements of their vessels wholly "within the United States" and might well cause their vessels to pass through the territorial waters of nearby foreign countries. It is a fair inference, therefore, that Congress intended to insure that the Commission should have adequate jurisdiction of through transportation under these circumstances and that the clauses of this section should have application unconfined by the language of Section 1(2).

Were this not so the additional jurisdiction which Congress sought to confer upon the Commission might be wholly defeated by a carrier through the simple medium of causing its vessels to go outside the limits of the United States or pass along the coast of some foreign island.

By clause (a) of this provision of the Panama Canal Act, which became subdivision (13) (now subdivision (11))

of Section 6 of the Interstate Commerce Act, the Commission was authorized to establish physical connection between the lines of the rail carrier and the dock of the water carrier, and by clause (b) it was given authority "to establish through routes * * * between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated." This Court held that these provisions were intended to increase the jurisdiction of the Commission where water transportation is concerned, *United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457, 462.

If language is to be given its ordinary meaning, it seems plain that under these provisions, which were in effect when the present proceeding was instituted before the Commission, the Commission then had authority, notwithstanding the fact that Seatrain's vessels pass outside the limits of United States territorial waters, to establish through routes for rail and water transportation in connection with Seatrain, and as a part of its jurisdiction, "to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced". Clearly this gave it authority to require that the petitioners permit their cars to be interchanged with Seatrain in the performance of through transportation.

The reasoning of the court below and the argument of petitioners here rest chiefly upon the fact that by the Transportation Act, 1940, Congress eliminated subdivision (b) of Section 13, above quoted.

Certainly in view of the history of the Act, evidencing a tendency on the part of Congress constantly to increase rather than decrease the Commission's authority and to promote the development of an integrated transportation system, if Congress had actually meant to diminish the Commission's authority over rail and water transportation, the most clear and emphatic language would have been used and evidence of such a purpose would be found in the Congressional debates and in the reports of the Committees. Such evidence is totally lacking.

On the contrary, as a part of the 1940 Act, Congress adopted a declaration whereby it said that it was the declared national transportation policy

> "to promote safe, adequate, economical and efficient service * * * among the several carriers * * * to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

And Congress said that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

That Congress intended that the Commission should retain the powers conferred upon it by the Panama Canal Act is evident from the remarks of those closely associated with the passage of the Transportation Act, 1940. Thus, in a letter from the late Joseph B. Eastman, then Chairman of the Legislative Committee, Interstate Commerce Commission, to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, containing an analysis of the Transportation Act prior to its enactment by Congress, the following appears at page 23:*

> "*House bill.*—This bill leaves the Panama Canal Act provisions in section 6(13) undisturbed, except that it repeals 'subparagraph (b)'. See section 9 of the House bill. We have no criticism of this repeal, for that subparagraph deals with through routes and joint rates between rail and water lines, and *other provisions of the bill adequately cover this matter.*"

The reason for the repeal of sub-paragraph (b) of Section 6(13), as explained by Chairman Lea of the House Committee, in the Committee's Report No. 1217 on the

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* House Committee Print, 76th Congress, 3rd Session, dated January 29, 1940.

Transportation Act of 1939, which subsequently was entitled Transportation Act of 1940, was:

> "Section 9 repeals subparagraph (b) of paragraph (13) of section 6. That subparagraph as now in effect limits the Commission's jurisdiction with respect to the establishment of through routes and joint rates by rail and water by providing that the Commission may prescribe only the maximum joint rate that may be charged. The bill gives the Commission full authority over rates by water carriers including authority to prescribe both the minimum and the maximum joint rail and water rates. It was necessary to repeal the subparagraph in paragraph (13) of section 6 which limits the authority as aforesaid."

In the report of the Commission in these proceedings, Commissioner Eastman said (R. 62):

> "Defendants now urge that their argument has received additional support through the repeal of the former section 6(13)(b) by the Transportation Act of 1940. Insofar as the enactment of the latter measure is concerned, we regard it as confirming our jurisdiction in the present premises, as Congress reenacted section 1(4) with no material change in wording, presumably with full knowledge of the interpretation of that section followed in our first report in these proceedings."

It must be recalled that the 1940 Act was passed after the Commission had rendered its earlier decisions asserting its jurisdiction, and had the Congress intended that the Commission should not have the authority which it claimed, it would have so indicated by clear and precise language. It is plain that Section 6(13)(b) was eliminated, not for the purpose of diminishing the Commission's jurisdiction, but to prevent possible ambiguities and because the addition of Part III to the Act and the amendment made in Sections 1(4) and 3(4) gave the Commission broad powers

over through transportation by rail and water and the carriers participating therein.

It is reasonable to infer also that the clause of Section 1(2) upon which petitioners and the court below rely, whereby the application of Part I is limited to transportation "only in so far as such transportation takes place within the United States", was left in the statute for the reason that Part I is designed to have application primarily to railroads and the territorial jurisdiction of the Commission over the rights of way and fixed physical properties of railroads is obviously limited to the portions thereof within the territorial limits of the country. This accounts for the decisions cited on page 49 of petitioners' brief which involved rail transportation only and in which the Commission held that it did not have jurisdiction to require rail carriers located partly in the United States and partly in an adjacent foreign country to establish through routes.

But where water carriers are concerned the situation is different. From a physical standpoint it is obvious, as we have said that water carriers, in the nature of things, must go upon the high seas or may pass through foreign territorial waters when engaged in transportation between points in the United States.

This practical difference was recognized by Congress in enacting Part III, which in Section 302(i) defined interstate transportation for the purposes of that part as meaning transportation

> "partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include *transportation by water only insofar as it takes place from a place in the United States to another place in the United States.*" (Italics ours.)

By the 1940 Act Congress also amended Section 1(4) to provide specifically that carriers subject to Part I were under a duty to

> "establish reasonable through routes *with carriers by water subject to part III.*" (Italics ours.)

And it was made their duty also to

> "provide reasonable facilities for operating *such* routes and to make reasonable rules and regulations with respect to their operation * * *." (Italics ours.)

This latter language, taken in connection with the provision of Section 302(i), above quoted, can have no other meaning than that rail carriers, such as petitioners, are under a duty to establish and provide reasonable facilities for operating reasonable through routes with water carriers like Seatrain whose operations may take them outside the United States, but which are subject to Part III in so far as they perform transportation

> "from a place in the United States to another place in the United States."

This description fits perfectly the situation of petitioners and Seatrain. The decision of the court below does violence to the language and the plain intention of Congress.

D. The Commission's order does not involve an invalid attempt to exercise authority extraterritorially.

On page 50 of their brief, petitioners endeavor to convey the impression that the Commission's order is invalid because it has extraterritorial effect and would make petitioners' cars "subject to attachment or libel, and to seizure, not only by process of the United States Courts, but also by a foreign sovereignty."

It is submitted that the order involves no undue and invalid extraterritorial application and is not invalid for the reasons urged by petitioners.

As the Court well knows, there has been a great deal of regulatory legislation with respect to the activities of water carriers not only in the United States but when their vessels are in foreign ports. Thus, we have the rules for navigation at sea, U. S. C. A. Title 33, Section 61 ff. Then there are various statutes affecting the rights of crews and the obligations of masters of vessels with respect to seamen, which contain requirements and provide rights which take effect when American vessels are in foreign ports; U. S. C. A. Title 46, Sections 564-573. There are the provisions of the Shipping Act, 1916, prohibiting discrimination by water carriers in the foreign trade operating to and from the ports of this country which have been held to prohibit discrimination practiced by such carriers in a foreign country, *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. (2d) 663.

If such legislation is valid, it certainly cannot be seriously claimed that there is any objection, so far as sovereign authority is concerned, to legislation empowering the Commission to require the establishment of through routes between points in the United States in connection with an American water carrier operating to and from American ports resulting from the fact that the vessels of the water carrier may call at intermediate foreign ports or pass through foreign territorial waters. And the same must be true in so far as requiring reasonable facilities for the operation of such through routes and the performance of through transportation.

Seatrain's ships are American flag vessels. They operate to and from American ports. There is, therefore, ample means of enforcing any requirements in so far as Seatrain's performance of the through transportation is concerned and of protecting as against Seatrain the rights of petitioners in connection with such through transportation and the use of their facilities therefor.

The situation here is radically different from that in *St. Louis etc. Ry.* v. *Brownsville Dist.*, 304 U. S. 295, cited by petitioners on pages 44 and 49 of their brief. That case was a suit for mandamus to compel certain railroads

to furnish cars for the transportation of freight from the Mexican border to a point in Mexico. Congress had not attempted to give the Commission authority to order through routes from a point in the United States to a point in Mexico and the Court found that there was no joint rate applicable to the transportation involved. Moreover, Congress could not confer upon the Commission any enforceable jurisdiction over railroads entirely in Mexico. Therefore, the remark of the Court in that case that "Petitioners are not bound by any law, regulation or tariff to furnish cars for transportation in Mexico", is far from saying that regulation by Congress through the medium of the Commission of transportation between points in the United States is impossible under the circumstances here.

Were it necessary, an argument might be made based upon the principle that nationality follows the vessel, even into a foreign port; and that since Seatrain's vessels are American flag ships, petitioners' cars are on American territory even when the vessels are in the harbor of Havana. The principle is thus stated by H. Taylor, International Public Law, Section 268:

> "As Mr. Webster said in the case of *The Creole*, 'the rule of law and the comity and practice of nations allow a merchant vessel coming into any open port of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent the jurisdiction and authority of the laws of her own country. A ship, say the publicists, though at anchor in a foreign harbor, possesses its jurisdiction and its laws * * *'."

See also Moore on International Law, Vol. 2, page 292; Halleck on International Law (1908), 4th Ed. Vol. 1, pages 245-246; *Wildenhus's Case*, 120 U. S. 1, 12.

In the case of *United States* v. *Rodgers*, 150 U. S. 249, this Court, at pages 264 and 265, quoted with approval an expression of Daniel Webster, saying:

> "Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord

Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "*It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion.* * * * It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. * * * But, nevertheless, *the law of nations*, as I have stated it, *and the statutes of governments founded on that law*, as I have referred to them, *show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or whereso-ever else they may be waterborne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself.*' 6 Webster's Works, 306, 307." (Italics ours.)

This doctrine was affirmed in *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 129, where this Court said:

"In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. *Lord* v. *Steamship Co.*, 102 U. S. 541; *The Abby Dodge*, 223 U. S. 166, 176."

In the past, Cuba has exercised no authority over railroad cars in interstate service found on Seatrain vessels in Havana. In *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 14, the Commission found:

"that when the vessels call at Havana, cars containing interstate freight are placed under United States

> custom seals at the port of departure and remain so until arrival at the port of destination, and the freight contained in such cars is not made accessible to the Cuban authorities; that three sets of manifests are made out at the port of departure, one required by the Cuban authorities and another required by the United States customs relate to freight for Cuba, and the third, which shows only the cars moving in interstate commerce, is given the Cuban customs inspector as a matter of information; that *no Cuban official has ever attempted to take jurisdiction over the interstate freight;* * * *." (Italics ours.)

Plainly petitioners cannot assert that the Commission's order is invalid because of any fundamental lack of authority or because of conflicting sovereignty resulting from the route ordinarily followed by Seatrain's ships.

E. In so far as petitioners are concerned, the Commission's order operates within the United States.

Finally, it is submitted that even if the court below and the petitioners were correct in all of their arguments as to the interpretation, application, and effect of the provisions of the Act in so far as this point is concerned, and if the duty of petitioners as railroads were strictly limited to matters occurring within the territorial limits of the United States, still the Commission's order should not be held invalid. It is submitted that the argument of petitioners and the reasoning of the lower court rest upon a misconception of what is required of petitioners by the Commission's order and by the Act.

The term "transportation" is defined in Section 1(3) as including "cars * * * and all instrumentalities and facilities of shipment or carriage, irrespective of ownership." By Section 1(4) it is made the "duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor." When a shipper at Harrisburg requests the Pennsylvania to furnish transportation for his goods to Dallas, Texas, *via* Seatrain, it is the obligation of the Pennsylvania to

provide a car for loading. With a large proportion of the railroads of the country consenting to the interchange of their cars with Seatrain, the Pennsylvania cannot fairly assert that it is required to do the impossible if it is compelled to furnish a car which can be used for the through shipment. Hence when it furnishes one of its own cars instead of a car of a consenting railroad, it has not fulfilled its duty to provide reasonable facilities, if it attaches to that car a requirement that because of its ownership of the car the shipment must be unloaded at the waterfront. The particular point here is that everything which is required of the Pennsylvania—namely, the furnishing of a car which can be used for the through shipment—is required to be done by it within the United States, just as it is required in the United States to file tariffs naming joint through rates and to issue a bill of lading contract for the through shipment and just as it is required in the United States to perform its portion of the through haul.

For these reasons we submit that the Commission's order is not rendered invalid by the fact that Seatrain's vessels operate outside the territorial waters of this country and ordinarily call at Havana in carrying goods in interstate commerce, and that the decision of the court below to the contrary should be reversed.

POINT III

There is no merit in the petitioners' contention that the Commission's order is confiscatory or that it is invalid in other respects.

A. **As to the compensation to be paid to petitioners for their cars.**

What is reasonable compensation to be paid by one carrier to another for the use of cars owned by the latter, and the terms and conditions under which interchange of cars should be required, are matters peculiarly within the informed judgment of the Commission and, if its conclu-

sions are supported by substantial evidence, they should not be disturbed unless its order will result in the confiscation of petitioners' property. *Chicago, R. I. & P. Ry. Co.* v. *U. S.*, 284 U. S. 80, 91, 95.

There can be no doubt here both that there was substantial evidence to support the Commission's conclusions and that the Commission gave serious and detailed consideration thereto. The record includes many statistical exhibits and hundred of pages of oral testimony on the subject of compensation for cars. The evidence was reviewed by Commissioner Eastman, writing the report of the Commission, at pages 62 to 70 of the record. Every one of the contentions urged on this Court by petitioners (Brief, pp. 68-79) was weighed and discussed in the report in the light of the evidence.

In so far as confiscation is now claimed, it is submitted that the allegations of the petition do not raise an issue of confiscation with the particularity required in order to present to the Court an issue of violation of the Fifth Amendment.

In *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447-448, it was said:

> "Allegations asserting in general language that the findings, order and reduced rates are confiscatory and repugnant to the Fourteenth Amendment are not sufficient. In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 314; *Atlantic Coast Line* v. *Florida*, 203 U. S. 256."

This decision was cited by the Court in its opinion in *Beaumont, S. L. & W. Ry.* v. *U. S.*, 282 U. S. 74, 88-89, where it again said:

> "It is well established by the decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure complained of will necessarily deny to the utility the just compensation safeguarded to it by the Constitution."

The general allegations in paragraph XIX of the petition do not meet these standards and afford no foundation for a claim here that the Commission's order will deprive any of the petitioners of its property in violation of the Fifth Amendment.

Moreover, the following facts disclosed by the record may be noted as confirmation both that the Commission's determination was supported by substantial evidence and that its order is not confiscatory.

1. The compensation determined by the Commission as reasonable, *i. e.*, $1.00 per car per day to be paid to car owners for their cars while in Seatrain's possession, is the standard rate of compensation paid by one carrier to another whose cars are on its line and has been approved by the Commission as constituting, on the average, full compensation for the cost of car ownership and maintenance. *Rules for Car Hire Settlement*, 160 I. C. C. 369.

2. Prior to the inauguration by Seatrain of its service between New York and New Orleans, and at the time when Seatrain or its predecessor operated solely between New Orleans and Havana, all of the carriers of the country, including petitioners, consented to the delivery of their cars to Seatrain at the going per diem rate of $1.00 per day (R. 65).

3. Eight of the present petitioners, although joining in the contention here that $1.00 per day is not adequate compensation for their cars when used for the through transportation of interstate shipments, nevertheless permit their cars to be transported to Cuba by Seatrain on the

basis of payment to them of the established rate of $1.00 per day (R. 66, 81).

4. There is no carrier in the country which is called upon to pay more than $1.00 per day for standard box cars owned by another railroad (R. 66).

5. When this proceeding was instituted by the Hoboken and the Lower Coast, the defendant railroads, including petitioners, made no contention that the going per diem rate would be inadequate. They did not question the amount of the compensation to be received by them until nearly six years later when, on August 1, 1938, they filed their reply to the motions of the Hoboken and the Lower Coast for the entry of an order because of petitioners' failure to comply with the Commission's decision (R. 674, 679).

6. Of the average cost of car ownership and operation, upon which the per diem rate of $1.00 per car is predicated, a very large proportion consists of maintenance and repair expense made necessary by damage to cars received when being switched, handled in railroad yards or hauled in trains. These injuries to cars are avoided and the maintenance expense caused thereby is eliminated during the days when the cars are upon Seatrain's ships, where they do not move and are to a large extent protected from the weather. Petitioners themselves concede that 61.5 per cent of the average running repair expense per car per day is avoided when cars are not moving (R. 63).

7. The uncontradicted testimony of railroad operating men was to the effect that cars received from Seatrain ships are in much better condition and require less repairs than cars received from connecting rail carriers (R. 332-350, 1079-1099).

8. While petitioners argue that Seatrain should pay more because it does not itself own cars, the evidence shows and the Commission found: (a) that there are many railroads which do not own cars but that none of them is required to pay more than the established per diem rate

of $1.00 per day; (b) that the per diem rate is based upon the cost to the car owners and is not proportioned to the number of cars owned by the different railroads; (c) that Seatrain has offered, whenever car conditions of the country make it desirable, to acquire a fleet of cars which it would interchange with the railroads, and for which they would have to pay it compensation when the cars should be in their possession; (d) that the chairman of the Car Service Division of the Association of American Railroads, called as a witness on behalf of the petitioners, was unwilling to testify that it would be desirable that Seatrain should acquire a fleet of cars to add to the then existing car pool, thereby increasing the idle time of cars and the car expense for all concerned; and (e) that Seatrain has rented cars which it has furnished to the railroads in connection with through transportation via its line.

With such evidence before the Commission to support its findings it is submitted that this Court cannot properly conclude that the Commission's order was either arbitrary or confiscatory or that if petitioners receive the established per diem rate for their cars when in Seatrain's possession, they will be deprived of their property without just compensation.

B. **As to the period for which per diem is payable by Seatrain.**

One of the contentions strenuously urged upon the Commission by petitioners was that Seatrain should be required to pay the per diem expense on cars, not only while the cars are in its possession, but also while they are in the possession of the rail carriers at the ports awaiting delivery to Seatrain's vessels. Petitioners make the same contention here and urge that the court below erred in not setting aside the Commission's order because it failed to contain such a requirement (Brief, pp. 57-68).

The question is one whose answer does not affect the amount of compensation to be received by any of the peti-

tioners as the owner of cars and, therefore, involves no issue of confiscation. The question is rather who should pay the per diem to the owners on all cars, whether owned by petitioners or others, during the several days that they may be held at the port awaiting delivery to a Seatrain ship—whether this should be paid by the railroad holding the cars or by Seatrain. Moreover, most of the petitioners can have no practical interest in the question. Its answer does not affect the Pennsylvania since it is not the final railroad at New York delivering the car to the Hoboken. It receives its per diem in any event, whether it is paid by Seatrain or by the Hoboken or New York Central. Such railroads as the Boston & Maine and Northern Pacific, whose rails are far from both New York Harbor and New Orleans, are not affected. They, too, receive their per diem from someone. The only petitioners who may have any stake in the question are four, the Southern, Louisville & Nashville, Southern Pacific, and Texas & New Orleans, and whether they have any interest in the matter depends upon their arrangement with the Lower Coast.

Whether the per diem expense on cars held at New Orleans should be borne by Seatrain or by one of these four rail carriers serving that port depends upon whether under the rates or divisions of rates the rail carriers or Seatrain have assumed the undertaking to hold the cars and pay the per diem. This is obviously a question whose determination is peculiarly within the functions of the Commission. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

The Commission after careful consideration, has found that in the case of freight moving by rail and water, the railroad freight rates, and the divisions thereof as between the carriers concerned, are adjusted on the basis that the expense of holding the freight at the ports, including car detention, awaiting transfer to the on-carrying vessels of a water carrier, is to be assumed by the railroads serving the ports. The Commission concluded that there was no

reason for a different practice in so far as Seatrain was concerned.

Since there was substantial evidence to support this decision, it should not now be disturbed.

C. As to the form of the order.

Petitioners contend (Brief, pp. 52-56) that the Commission's order is invalid because it does not by its terms affirmatively direct Seatrain to pay per diem to petitioners for their cars.

The order was entered in a complaint proceeding in which petitioners were defendants and Seatrain was a complainant. The complaints alleged that petitioners' refusals to permit the interchange of their cars with Seatrain's vessels in the performance of through transportation over through routes were unlawful and a "cease and desist" order was sought directing petitioners and the other defendants to cease and desist from their unlawful conduct. This was, in effect, the nature of the Commission's order. There was no occasion for an order against Seatrain.

Moreover, petitioners are amply protected. The Commission's reports are made a part of its orders. The clear intention of all of them is that the petitioners are under no obligation to permit their cars to be transferred to Seatrain unless as car owners they receive the compensation determined by the Commission to be reasonable.

Furthermore, petitioners are really not in a position to attack the Commission's order on the ground here discussed because, by reason of their own action, it would be impossible for the Commission to make its order in the form for which they now contend.

Settlement for car hire between carriers is conducted under the form of a contract, called the Car Service and Per Diem Agreement, to which the several petitioners are signatories and which is administered by the Association of American Railroads (R. 450). When Seatrain's predecessor began operation between New Orleans and Havana, it applied to become a member of the Association and a

party to the Car Service and Per Diem Agreement (R. 214, 540). It was advised that it could not do so because it was a water carrier and the agreement was confined to railroads (R. 214). Thereupon an arrangement was worked out whereby the Lower Coast, as the last rail carrier, party to the per diem agreement, undertook the responsibility to all owning railroads for the payment of per diem on their cars when delivered to Seatrain, and Seatrain in turn entered into a contract with the Lower Coast to reimburse it for the per diem expense of cars while such cars were in Seatrain's possession (R. 214-226, 544). When Seatrain was arranging for the inauguration of its service between New York and New Orleans, the question of the method of settlement was again raised. The head of the Car Service Division of the Association of American Railroads advised that the situation was the same, that the Hoboken as the final rail carrier would be responsible for the payment of per diem to car owners under the Per Diem Agreement, and that, in accordance with the rules of the Association, Seatrain, as a non-subscriber, should enter into a contract to reimburse the Hoboken and make settlement with it rather than make payments directly to the railroads owning cars (R. 858-59). Seatrain has indicated on the record that it is ready and willing to become a member of the Association of American Railroads and a party to the Car Service and Per Diem Agreement, and to pay per diem directly to the owners of the car (R. 71), but this cannot be done unless the Association of American Railroads amends the agreement to make possible the admission thereto of water carriers. This, so far, has not occurred (R. 859).

Under the circumstances, it is plain that the Commission's order is not defective in failing to require Seatrain to make payment of per diem directly to petitioners and that the court below did not err in declining to set aside the Commission's order on this ground. On the contrary, the Commission's order is in strict conformity with the Per

Diem Rules maintained by petitioners and other members of the Association of American Railroads.

It may be said further that this conclusion finds further support in the decision of this Court in *Chicago, R. I. & P. Ry. Co.* v. *United States, supra*, 284 U. S. 80. That case involved an order of the Commission made in a proceeding to investigate the rules for car hire settlement between common carriers by railroad in the United States for the use and detention of freight cars while on the lines of carriers other than their owners (p. 87). The Commission made an order containing five numbered paragraphs. Paragraph 3 of the order read as follows:

> "(3) That short-line railroads which are less than 100 miles in length, and which return railroad-owned equipment to the road from which received, shall not be required to report per diem accruals to numerous car owners throughout the country, but shall be attached to their connecting carriers for purpose of car-hire settlement."

In other words the Commission decided that the short-line non-subscribers should, as does Seatrain, make reports and payments to their immediate connections and should not be required to pay the car owners directly. In upholding this part of the Commission's order, this Court said, at pages 95 and 96:

> "The Commission is a body of trained and experienced experts, and in respect of such matters a reasonable degree of latitude must be allowed for the exercise of its judgment. * * * Primarily, the question is an administrative one, and unless the limits of reasonable regulation be transcended, the courts may not interfere. The Commission concluded that the circumstances afforded warrant for requiring that class of railroads which generally owned the cars, which was best equipped to perform the clerical work, and which would receive the most in the way of compensating and offsetting benefits, to perform a larger proportion of the service of keeping and rendering the

counts. In doing so, we are of opinion that it did not transcend the limits of reasonable regulation, and that the claim of confiscation is not sustained."

Under the authority of this case it is clear that the Commission's order herein cannot be held invalid simply because it does not require Seatrain to make payment directly to the car owners.

Conclusion

For the reasons set forth herein, the decision of the court below should be reversed in so far as it held invalid, set aside or operated to nullify the Commission's order, but in all other respects it should be affirmed.

Respectfully submitted,

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December 28, 1944.

Appendix

The National Transportation Policy, as set forth in the Transportation Act of 1940, is as follows (54 Stat. 899):

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1(1)(a) and (b) provides in part:

> That the provisions of this part shall apply to common carriers engaged in—
>
> The transportation of passengers or property wholly by railroad, * * *;
>
> * * * * *
>
> —from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United

States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States. (49 U. S. C. 1(1)(a) and (b).)

Section 1(3)(a) provides:

The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier". The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof. (49 U. S. C. 1(3)(a).)

Section 1(4) provides:

It shall be the duty of every common carrier subject to this part to provide and furnish transporta-

tion upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers. (49 U. S. C. 1(4).)

Section 1(10) provides:

The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part. (49 U. S. C. 1(10).)

Section 1(11) provides:

It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. (49 U. S. C. 1(11).)

Section 1(13) provides:

The Commission is hereby authorized by general or special orders to require all carriers by railroad sub-

ject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto. (49 U. S. C. 1(13).)

Section 1(14)(a) provides:

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. (49 U. S. C. 1(14)(a).)

Section 3(4) provides:

All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. (49 U. S. C. 3(4).)

Section 6(13)(b) prior to the amendment effected by the Transportation Act, 1940, provides:

When property may be or is transported from point to point in the United States by rail and water through

the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

* * * * *

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced. (49 U. S. C. 6(13).)

Section 15(1) provides:

That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that

the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. (49 U. S. C. 15(1).)

Section 15(3) provides:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section. (49 U. S. C. 15(3).)

Section 15(8) provides:

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however*, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported. (49 U. S. C. 15(8).)

Section 20(11) provides:

That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such

property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; * * *. (49 U. S. C. 20(11).)

Part III of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 302(d) provides:

The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 902(d).)

Section 302(i)(2) provides:

(i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce", as used in this part, means transportation of persons or property—

* * * * *

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States;

* * * * *

(49 U. S. C. 902(i)(2).)

Section 303(a) provides:

> In the case of transportation which is subject both to this part and part I, the provisions of part I shall apply only to the extent that part I imposes, with respect to such transportation, requirements not imposed by the provisions of this part. (49 U. S. C. 903(a).)

Section 305(b) provides:

> It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers. (49 U. S. C. 905(b).)

Section 305(d) provides:

> All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to part I. (49 U. S. C. 905(d).)

Section 307(d) provides:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule cancelling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15. (49 U. S. C. 907(d).)

CPY774

SUPREME COURT OF THE UNITED STATES.

Nos. 47 and 48.—October Term, 1944.

The United States of America, Interstate Commerce Commission, Seatrain Lines, Inc., et al., Appellants, 47 *vs.* The Pennsylvania Railroad Company, et al.	Appeals from the District Court of the United States for the District of New Jersey.
The Pennsylvania Railroad Company, et al., Appellants, 48 *vs.* The United States of America, Interstate Commerce Commission, Seatrain Lines, Inc., et al.	

[January 29, 1945.]

Mr. Justice Black delivered the opinion of the Court.

Seatrain Lines, Inc., is a common carrier of goods by water. In 1929, its predecessor began to carry goods from Belle Chasse, Louisiana, to Havana, Cuba. Each of the vessels used was so constructed that it could carry a number of railroad cars, and special equipment was provided to hoist these cars from adjacent tracks on the docks and move them bodily into the vessels. It was thereby rendered unnecessary for goods carried to the ports in railriad cars to be unloaded from the cars and carried piecemeal into the vessels. This new method of transportation, so the Interstate Commerce Commission has found, was a great improvement over the old practice, less destructive to the goods, more economical and more efficient. 226 I. C. C. 7, 20-21. In 1932, Seatrain decided to initiate a new interstate service between Hoboken, N. J. and Belle Chasse, Louisiana, via Havana, Cuba, and thus entered into direct competition with the interstate transportation of freight by railroads. During the time Seatrain had limited its business to foreign transportation, i. e., Louisiana to Cuba, the non-competing railroads freely permitted it the use of their cars. Shortly after it began its interstate service, how-

ever, the following rule was promulgated by the American Railway Association:[1] "Cars of railway ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owner filed with the Car Service Division." Thereafter, some railroads continued to permit Seatrain to use their cars but others, including the parties to this proceeding, refused to do so. No railroads "refused to permit delivery of their cars to any of the other eleven water lines listed in a circular of the Association as coming within the intendment of the rule." 206 I. C. C. 328, 337.

A complaint was filed with the Interstate Commerce Commission. Appropriate hearings were conducted and a series of findings and opinions were entered. The findings were that the sole object of the Association of Railroads' rule was to prevent diversion of traffic from the railroads to Seatrain; that Seatrain, as an interstate water carrier, was subject to the Commission's jurisdiction; that its interstate operations were in the public interest and of advantage to the convenience and commerce of the public; that the Commission had jurisdiction to require through rail-water interstate routes, and, where such through routes were established, to require railroads to interchange cars with water carriers, 195 I. C. C. 215; 206 I. C. C. 328. An initial order of the Commission required the railroads to establish certain through joint rail-water routes with Seatrain. Such through interstate routes together with joint rates were established. 226 I. C. C. 7; 243 I. C. C. 193. The Commission then heard evidence and found that a payment of $1.00 per day would be a reasonable amount for Seatrain to pay the railroads for their cars while they were in Seatrain's possession. 237 I. C. C. 97; 248 I. C. C. 109. Based on its findings the Commission ordered the railroads to abstain from observing and enforcing rules and practices which prohibited the interchange of their freight cars for transportation by Seatrain in interstate commerce. The railroads promptly brought this action under 28 U. S. C. 41 (28), 47, to set aside the Commission's order. The District Court set aside the order insofar as it required railroads to interchange cars destined for carriage by Seatrain outside the territorial waters of the United States, but sustained it in all other respects. 55 F. Supp. 473. Both sides

[1] Later the American Railway Association, and other railroad organizations consolidated their activities under the name of the Association of American Railroads. The new Association adopted the same rule.

appealed directly to this Court as authorized by the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. 47, 47a, and Section 238 of the Judicial Code, 28 U. S. C. 345, par. (4).

First. It is contended that the railroads are under no duty to deliver their cars to Seatrain and that the Interstate Commerce Commission is without authority to require them to do so. It has long been held, and it is not denied here, that since the passage of the Interstate Commerce Act, railroads may be compelled to establish through routes[2] and to interchange their cars with each other,[3] both subject to reasonable terms. Nor is it denied that the railroads are under a legal duty, enforceable by proper Commission orders, to establish through routes with connecting water carriers.[4] The narrow contention is that the power granted the Commission to require establishment and operation of through rail-water routes does not empower it to require a railroad to interchange its cars with a water carrier. Since the Commission's order was entered after passage of the 1940 Transportation Act, 54 Stat. 898, the question must be decided under that Act. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78.

There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system. Cf.

[2] St. Louis S. W. Ry. Co. v. United States, 245 U. S. 136, 142-144.

[3] Missouri & Illinois Coal Company v. Illinois Central Railroad Co., 22 I. C. C. 39, 44; Chicago, R. I. & P. Ry. Co. v. United States, 284 U. S. 80, 91, 101-102; cf. St. Louis, S. W. Ry. v. Arkansas, 217 U. S. 136, 145-146.

[4] Such has long been the ruling of the Interstate Commerce Commission. Chattanooga Packet Co. v. I. C. C. R. R. Co., 33 I. C. C. 384, 391-392; Flour City S. S. Co. v. Lehigh Valley R. Co., 24 I. C. C. 179; Decatur Navigation Co. v. L. & N. R. R. Co., 31 I. C. C. 281, 288; Pac. Navigation Co. v. Southern Pac. Co., 31 I. C. C. 472, 479.

Chicago, R. I. & P. Ry. v. *United States*, 274 U. S. 29, 36; *I. C. C* v. *Railway Labor Executives Ass'n*, 315 U. S. 373, 376-377.

The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field, and correlatively broadened the Commission's powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a "national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each". The declared objective was that of "developing, coordinating and preserving a national transportation system by water, highway and rail, . . . adequate to meet the needs of the commerce of the United States . . ." Congress further admonished that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899.

This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports. The "inherent advantages of this service" would be lost to the public without railroad car interchange.

Furthermore, the Act calls for "fair and impartial regulation." The railroad Association's rule however is constructed on the premise that the railroads can at their discretion determine which water carrier may, and which may not, transport their cars. Seatrain alone, of all the water carriers, according to the Commission's findings, has been refused car interchange. This means that the Association's rule, if valid, enables the railroads to decline to deal with Seatrain as it does with other carriers. As early as 1914, the Commission had declared that the Interstate Commerce Act, as then in effect, prohibited railroad practices which lent themselves to such purpose. The Commission said at that time:

"If the rail carriers are permitted to choose the particular boat lines with which they will establish through routes and joint

rates, they will be able to dictate who shall operate on the water and who shall not, for a boat line which is accorded a monopoly of the through rail-and-water traffic will soon be able to drive its competitors out of business." *Pac. Navigation Co.* v. *Southern Pacific Co.*, 31 I. C. C. 472, 479.

We cannot agree with the contention that the Commission has less power now to protect water carriers than it had in 1914.[5] The 1940 Act was intended, together with the old law, to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers. In the light of its declared policy, and because of its provisions hereafter noted, we think railroads are under a duty to provide interchange of cars with water carriers to the end that interstate commerce may move without interruption or delay. *Cf. Flour City S. S. Co.* v. *L. V. R. Co.*, 24 I. C. C. 179, 184.

[5] This argument rests on a historical analysis of provisions in the original Act and later amendments which impose specific duties as to car interchanges. A detailed and clear narrative of the history appears in the opinion of the District Court. 55 F. Supp., *supra*, 479-483. In summary the argument is this. The original 1887 Act applying only to railroads, 24 Stat. 379, required in Section 3, an "interchange of traffic" but did not specifically provide for an interchange of cars. The Hepburn Amendment of 1906, 34 Stat. 584, subjected water carriers to the Act so far as they connected with railroads in interstate commerce, defined transportation to include "cars" and "facilities", and made it the duty of railroads to establish through routes. The Mann-Elkins Amendment of 1910, 36 Stat. 539, 545, required carriers to make reasonable rules and regulations to provide for "exchange, interchange, and return of cars" used on through routes. The Esch Car Service Act of 1917, 40 Stat. 101, again required interchange of cars, and specifically gave the Commission power to establish rules to enforce the requirement. The Transportation Act of 1920, 41 Stat. 456, 476, omitted the exact language of the car interchange requirement which had appeared in the 1910 Mann-Elkins Amendment, but substituted for it Sections 1(10)(11) (13) and (14) which contained more elaborate language imposing still more specific duties in this respect. These "car service" provisions were not changed by the 1940 Transportation Act. The Mann-Elkins and the Esch Car Service Amendments, however, had made the car interchange provisions applicable to every "carrier subject to the provisions of this Act." The 1920 Act made the car service provisions applicable to "carriers by railroad subject to this Act"; the 1940 Act made them applicable to a "carrier by railroad subject to this part." The argument is that these changes, made in the 1920 and carried into the 1940 Act, show a continuing purpose of Congress to deprive the Commission of the power to require interchange of cars with water carriers—to detract from its authority. But we have already had occasion to say that the 1920 Act "materially extends the jurisdiction of the Commission in respect of land-and-water transportation and the carriers engaged in it, whenever property may be or is transported by rail and water by a common carrier or carriers . . . ." Chicago, R. I. & P. Ry. Co. v. United States, 274 U. S. 29, 36. This conclusion as to the scope of the 1920 Act is fully justified by its history, 206 I. C. C. *supra*, 339-343. Consequently, the 1920 changes in the language of the car service requirements do not justify the narrow interpretation of the 1940 Act which is here urged.

Sec. 1(4) of Part I of the Act imposes a duty on railroads to establish reasonable through routes with other carriers, including water carriers, and to "provide reasonable facilities for operating such routes"[6] under "reasonable rules and regulations."

Sec. 3(4) makes it the duty of railroads to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their . . . lines and connecting lines, and for the . . . forwarding . . . of . . . property to and from connecting lines," and a "connecting line" is defined to include a water carrier.

Section 15(3) supplements these sections by providing that the Commission may hold hearings, and "shall" if it deems it "necessary or desirable in the public interest, . . . establish through routes . . . and the terms and conditions upon which such through routes shall be operated."

These sections provide sufficient authorization for the Commission's order. It was from its power to require through routes that the Commission originally derived its power to require interchange of railroad cars among connecting railroads.[7] Since a rail-water through route with Seatrain cannot function without an interchange of cars, the unquestioned power of the Commission to require establishment of such routes would be wholly fruitless, without the correlative power to abrogate the Association's rule which prohibits the interchange.

Second. It is contended, and the court below held, that if the Commission has power to require railroads to interchange cars with through route connecting water carriers, it is without power to do so if a route traverses, in part, foreign waters, as Seatrain's does. This contention basically rests on paragraphs (1) and (2) of Section 1 of the Interstate Commerce Act, as amended by Sec. 400 of the 1920 Act, 41 Stat. 474, left unchanged by Part I of the 1940 Act. The language relied upon in these paragraphs declares that the provisions of Part I, relating to railroads and their transportation, shall apply "only insofar as such transportation takes place within the United States." Limiting language to the same effect is contained in the water carrier regulatory provisions of Part III of the 1940 Act.[8]

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[6] As to cars being "facilities", see Sec. 1(3)(a) of the Act, and Assigned Car Cases, 274 U. S. 564, 575, 580; Tank Car Corp. v. Terminal Co., 308 U. S. 422, 428.

[7] See note 3.

[8] Sec. 302 (i) (2) of the Act provides that the transportation subject to regulation is that " . . . partly by water and partly by railroad or motor

This Court has stated that the 1920 Act, containing this limiting clause "applies to international commerce only insofar as the transportation takes place in the United States." *Lewis etc., Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 660. The question in that case was as to joint through railroad rates over a railroad route partly in the United States and partly in Mexico. The Court further said as to this situation that "The Act does not empower the Commission to prescribe or regulate such rates."[9] In *St. Louis, etc., Ry.* v. *Brownsville District*, 304 U. S. 295, this Court was called upon to consider whether, under the 1920 Act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that in the absence of a discrimination against shippers, places, or classes of traffic within the United States, American railroads were "not bound by any law, regulation or tariff to furnish cars for transportation in Mexico." These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad,[10] it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries.

But these interpretations of the 1920 Act concerning rail transportation outside the United States are of dubious relevance to the instant case. For Congress has, in Sec. 15(3) of the 1940 Act, unequivocally granted to the Commission the power to establish through joint rail-water routes, and Sec. 302(i)(2) makes this power applicable to such routes "from a place in the United States to another place in the United States."[11] Cf. *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634. The reason for this grant of authority to the Commission is apparent. It is well

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vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States . . . ."

[9] Notwithstanding this, however, the Court held that where such joint rates were voluntarily fixed and charged by an American railroad, the Commission could, under the power given it by the 1920 Act, pass upon the reasonableness of the joint international rate.

[10] See Knott v. Botany Mills, 179 U. S. 69; Cunard S. S. Co. v. Melon, 262 U. S. 100, 129.

[11] The Commission denied Seatrain's petition insofar as it asked an order requiring railroads to interchange their cars for the purpose of handling freight to Cuba. 206 I. C. C. *supra*, 337; 248 I. C. C. *supra*, 118-119.

known that a substantial part of intercoastal and lake transportation among the states, in which American companies engage, traverses waters outside of the territorial limits of the United States. Foreign countries have not the same interest in this purely domestic carriage of goods, as they have in controlling the movement of railroads in their territory.[12] Such transportation must be regulated by this country if it is to be effectively regulated. Congress recognized this fact when it made special provision in Section 15(3) for the Commission to regulate water transportation from one to another place in the United States, even though that transportation took place "partly outside" the United States. It is this particular provision, made especially applicable to interstate *rail-water* transportation, by which the Commission's authority over such movements must be measured, rather than by the limiting clause of Section 1, which is applicable to the Commission's power over *railroad* transportation. There is therefore nothing in the Act to deny the Commission the same power over interstate water-rail transportation which passes through foreign waters, as we have just held it enjoys where the transit is wholly within the territorial limits of the United States. We therefore hold that the order of the Commission requiring car interchanges was within its authority as to interstate movements which take place within or without the territorial waters of the United States.[13]

Third. The Commission found that $1.00 per car per day, to be paid to the car owners while Seatrain actually had cars in its

[12] Section 1(1)(a) of Part I of the Act which contains the general clause limiting the Act's application to railroad transportation within the United States, also declares its application to transportation "from any place in the United States *through a foreign country* to any other place in the United States." This latter clause, as the District Court recognized, 55 F. Supp. *supra*, 487, would have little meaning, if the limiting clause were given the interpretation for which the railroads here contend.

[13] We have not overlooked the argument that Congress intended to take away part of the Commission's power over car interchanges by repealing subdivision (b) of Sec. 6(13) of the Act to Regulate Commerce as amended, 37 Stat. 560, 568, which reads as follows: "To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

This repealed provision was substantially embodied in 15(3) of the 1940 Act. We think Commissioner Eastman, then Chairman of the Legislative Bureau, made an accurate statement, when in writing the Senate-House Conference Committee considering the 1940 Act, he stated that he did not object to the repeal of 13(b) since "Other provisions of the bill adequa ely cover this matter." Omnibus Transportation Legislation, House Committee Print, 76th Congress, 3d Session, p. 23.

possession, was a reasonable compensation. Although, in practice, cars brought to the ports must sometimes wait several days for Seatrain's sailing, the Commission did not require Seatrain to make per diem payments during this waiting period. It is contended that the Commission should require Seatrain to pay for the cars from the time they are made available to it; that the rate of compensation was too low; and that in both respects, the result is to require railroads to afford Seatrain the "free use" of their property, thereby imposing a burden upon the railroads which Congress neither did nor could have authorized. *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 84, 97.

The questions thus raised depend upon a determination of facts. The findings of the Commission, discussed at length in its opinions, illustrate the complex nature of the facts involved. 237 I. C. C. 97, 101-102; 248 I. C. C. 109. Those facts need not be repeated here. The Commission not only had the benefit of the testimony offered in these proceedings, but was possessed of wide experience with the general problem of car hire. See e. g. Rules for Car Hire Settlement, 150 I. C. C. 369. We have carefully examined the record and find substantial evidentiary support for the Commission's finding "that the current code of per diem rules governing the interchange of freight cars between the defendants above referred to and other rail carriers, including the current rate of $1.00 per day payable by Seatrain for such period as the cars are in its actual possession, would be reasonable for application to the interchange of cars between defendants and complainants for use by Seatrain." 248 I. C. C. at 119. This being true we sustain the Commission's order in this respect.[14]

We find no merit in any of the other contentions raised against the order of the Commission.

The judgment in No. 47 is reversed, and the judgment in No. 48 is affirmed.

It is so ordered.

Mr. Justice ROBERTS dissents.

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[14] It is to be noted that the Commission has not foreclosed future consideration of the car hire compensation problem, insofar as it may be involved in determining railroad rates or a proper division of through rail water rates between Seatrain and the railroads. 248 I. C. C. 117; cf. Chicago R. I. & P. Ry. Co., *supra*, 97, 109, note 11.